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THE
AMERICAN DECISIONS

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1869.

COMPILED AND ANNOTATED BY

A. C. FREEMAN,

COUNSELOR AT LAW, AND AUTHOR OF "TREATISE ON THE LAW OF JUDGMENTS,"
"CO-TENANCY AND PARTITION," "EXECUTIONS IN CIVIL CASES," ETC.

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AMERICAN DECISIONS.
VOL. LI.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

WHEELER v. EARLE.

[5 CUSHING, S1.]

CLAUSE IN LEASE RESERVING RIGHT OF RE-ENTRY if the lessee shall "neglect or fail to perform and observe any or either of the covenants" contained therein, applies to a breach of a negative covenant not to "occupy or in any manner suffer the buildings, etc., to be occupied * * for any unlawful purpose."

SUBTENANT'S OCCUPANCY FOR UNLAWFUL PURPOSE IS BREACH OF LESSEE'S COVENANT not to occupy or suffer the premises to be occupied for such purpose, and gives the original lessor a right of re-entry under a lease reserving such right for a breach of any of the lessee's covenants, for such covenant runs with the land.

WRIT of entry. The tenant claimed under a lease from Benjamin Wheeler, deceased. The demandants claimed as devisees of Wheeler, and by virtue of an entry upon the premises for a breach of a covenant in the tenant's lease. The terms of the covenant and of the clause in the lease reserving the right of re-entry for covenant broken are sufficiently stated in the opinion. Evidence was introduced tending to show that a subtenant of a part of the premises, under the tenant, had occupied the same for the unlawful purpose of selling liquor without a license. The court ruled that the evidence established such a use as constituted a breach of the lessee's covenant, that a breach thereof gave a right of re-entry, and that the tenant must be presumed to have known of the unlawful use by his subtenant. The tenant insisted upon proof of an unlawful use of the premises at the time of re-entry. Verdict for the demandants by consent, subject to the opinion of this court upon the sufficiency of the evidence on this point, and upon the correctness of the foregoing rulings.

C. G. Loring and E. D. Sohler, for the tenant.

E. Blake, for the demandants.

By Court, DREW, J. Does the clause in this lease, authorizing a re-entry by the lessor, to repossess himself of the premises, apply to the breach of the covenant, "that the lessee will not occupy, or in any manner suffer the buildings now on the premises, or which may hereafter be erected thereon, to be occupied, for dwelling-houses, or for any unlawful purposes whatsoever"?

This of course depends upon the construction to be given to the indenture. The language is very broad; the lessee stipulates, "if he shall neglect or fail to perform and observe any or either of the covenants herein contained, which on his part are to be performed," then the lessor may lawfully enter, etc. Although the conditions upon which the lessee took his lease may be such as materially to affect the value of his leasehold interest, and subject it to the contingency of an early termination, yet if such are its plain and obvious terms, the lessee must abide by the stipulations of the lease.

Several reported cases were cited by the counsel for the defendant, for the purpose of sustaining the position that the condition annexed to the lease of a right of re-entry does not embrace the covenant hereinbefore recited. The cases of *Doe v. Godwin*, 4 Mau. & Sel. 265; and *Doe v. Marchetti*, 1 Barn. & Adol. 715, 721, are clearly distinguishable from the present. The case of *Doe v. Stevens*, 3 Id. 299, is more analogous. That was the case of a lease reserving a right of entry by the lessor, "if the lessee shall do or cause to be done any act, matter, or thing, contrary to and in breach of the covenants of this lease," and it was held by the court that the condition as to re-entry did not apply to a breach of the covenant "to repair," the omission to repair not being an act done contrary to the provisions of the lease. This decision may be supported upon the principle of restricting forfeitures of leasehold interests to the precise letter of the condition; whether it be in accordance with its spirit may be more doubtful. It rests upon the principle that the right of re-entry in that case was confined "to acts and things done," and not to cases of omissions to do certain things, contrary to the stipulations of the covenant by the lessee. On the other hand, the case of *Doe v. Jepson*, Id. 402, seems very much to weaken the force of the decision in the case of *Doe v. Stevens*.

Upon looking at the terms of this lease, we perceive no ground

for holding that the stipulations, set forth as the foundation of the forfeiture, are not fairly within the condition of the re-entry clause. We are satisfied that it is no objection that the covenant is a negative stipulation. Such covenant may be equally effectual to work a forfeiture: *Doe v. Keeling*, 1 Man. & Sel. 95. It may have been very unwise to enter into such stipulations, making them a subject of forfeiture of the estate, but that consideration can not affect the legal construction of the indenture. The court are of opinion, that the use of the premises "for an unlawful purpose," would authorize the lessor to re-enter for a breach of the condition of the lease.

This restriction upon the manner of using the premises runs with the land, and is binding upon the estate in the hands of subtenants. They take only the title of the lessee, and with the like limitations and restrictions. Such use by a subtenant holding under the original lessee, for an unlawful purpose, would equally forfeit the estate. This principle seems very clear, and hence, in the treatises upon the relation of landlord and tenant, it is said that when an estate is held subject to forfeiture, for breaches of numerous covenants or stipulations, some of which may be likely to be violated, it is expedient always to take from a sublessee good security against all such violations of the various stipulations in the original lease, as may subject the original lessee to lose his whole estate. By creating subtenants, the original lessee puts them in possession of the premises, and being thus in under him, their acts, if in violation of the conditions of the lease, will cause a forfeiture.

In the view we have taken of this case, it is unnecessary to consider particularly, whether the ruling that the defendant was presumed in law to know that the buildings were used for unlawful purposes, if the fact was so, was entirely correct in the form stated. The legal consequence will be much the same, under the different forms in which I have stated the consequences of a violation of the lease by a subtenant of the lessee. But as the facts have never been passed upon by a jury, a new trial is ordered, and the case will go to a jury under instructions carrying out the legal principles above stated. The question of fact will be, whether the defendant by himself, or through his subtenants, has occupied the premises leased, or any part of them, "for an unlawful purpose," and also whether the lessor or those having his estate did make entry upon the premises, or upon any part thereof in the name of the whole, immediately after or while such default or misfeasance continued,

for the purpose of regaining the possession thereof. If such facts are found in favor of the plaintiffs, they will be entitled to a judgment in their favor.

New trial granted.

FORFEITURE OF LEASE BY BREACH OF COVENANTS OR CONDITIONS THEREIN: see *Jackson v. Brownell*, 3 Am. Dec. 326; *Spear v. Fuller*, 28 Id. 391; *Clark v. Jones*, 43 Id. 706, and notes. As to forfeiture of estates generally, by breach of conditions, subsequent in conveyances, see the note to *Cross v. Carson*, 44 Id. 743.

JORDAN v. FALL RIVER RAILROAD CO.

[5 Cushing, 69.]

RAILROAD COMPANY IS RESPONSIBLE FOR BAGGAGE DELIVERED TO AGENT OF ANOTHER LINE on whose road it is running, by one taking passage at a station, where such agent has been in the habit of receiving baggage for such company, and it has no agent of its own present at the station.

MONEY CARRIED IN PASSENGER'S TRUNK IS PART OF BAGGAGE for which a passenger carrier is responsible, if intended *bona fide* for traveling expenses and personal use and if reasonable in amount, but not where it is intended for any other purpose, as for trade, investment, transportation, or the like.

BAGGAGE OF PASSENGER INCLUDES ARTICLES NECESSARY or convenient for his personal use, and such as it is usual for travelers to take with them.

ACTION to recover the value of a trunk and its contents alleged to have been delivered to the defendants for carriage by the plaintiff as part of her baggage on taking passage in one of their cars. It appeared that the defendants' trains ran upon the track of the Old Colony Railroad Company, by an arrangement with the latter company, from Boston, where the plaintiff took passage to the beginning of the defendants' own road; that when the plaintiff came to the station to take passage, the train had not arrived, and the defendants' baggage-master was not present, and she delivered her trunk to one Fisher, the baggage-master of the Old Colony Railroad, who was in the habit of receiving baggage for the defendants in such cases, and delivering it to the defendants' agents. There was no evidence to show that the trunk in question ever came into the hands of the defendants' servants. Part of the contents of the trunk consisted of three hundred and twenty-five dollars in money. The defendants objected, that the delivery of the trunk to Fisher was not, in the circumstances of this case, a delivery to them, and that in any event, they were not liable for the loss of the money beyond what

was necessary for traveling expenses, but both objections were overruled. Verdict for the plaintiff, subject to the opinion of the court upon the correctness of these rulings.

G. Minot, for the defendants.

H. Wellington, for the plaintiff.

By Court, FLETCHER, J. The objection to the ruling of the presiding judge, that the trunk, under the circumstances, was properly delivered to Fisher, and that the defendants were responsible for it while in his keeping, the court think can not be maintained. It was the duty of the defendants to have an agent at the station to receive and take charge of the baggage of passengers, until it was put on board the cars; and it being the habit of Fisher to act as such agent when there was no other person present to perform that duty, as in this case, the trunk was properly delivered to him, and the defendants were responsible for it while it remained in his custody.

The only question of importance raised in the case is, whether or not the plaintiff can recover for the money contained in the trunk, as properly constituting a part of her baggage as a passenger. It was held, in the time of Lord Holt, and formerly by the supreme court of New York, that passenger carriers were not liable for baggage unless a particular and distinct price had been paid for its conveyance. But it is now well settled, and is a matter of great and general convenience and accommodation, in this age of universal and perpetual traveling, that passenger carriers are responsible for the baggage of a passenger, and that the reward for conveying the baggage is included in the passenger's fare. But, though it is settled that passenger carriers are responsible for baggage, yet there is still a very wide field for controversy remaining, in determining what is properly included in the term "baggage." From the nature of the case, it is impracticable to prescribe an exact rule, or to define with technical precision what may properly be included in the term "baggage," as used in connection with traveling in public conveyances.

Some persons, and, in this particular, the wisest, perhaps, take little or nothing with them in traveling, while others take many things and large quantities. It is quite impossible for the court to restrict, within certain and prescribed limits, the quantity or value or kind of articles, which may be embraced in the term "baggage" of the traveling world. The most that can be done is, to prescribe some general rules as to the character, description,

and purposes of articles which may be taken as baggage. It may be said, in general terms, that baggage includes such articles as are of necessity or convenience for personal use, and such as it is usual for persons traveling to take with them. It has been said that articles for instruction or amusement, as books, or a gun, or fishing tackle, fall within the term "baggage." In the case of *Brooke v. Pickwick*, 4 Bing. 218, the carrier was held responsible for a lady's trunk containing apparel and jewels. So in the case of *McGill v. Rowand*, 3 Pa. St. 451 [45 Am. Dec. 654], which was for apparel and jewelry. In *Jones v. Voorhees*, 10 Ohio, 145, 150, the carrier was held responsible for a watch which was lost in a trunk, as being an appendage of the traveler. But a carrier is not liable for merchandise as baggage. In *Pardee v. Drew*, 25 Wend. 459, the passenger carrier was held not responsible for a trunk of silk goods as baggage. So in *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586 [41 Am. Dec. 767], the carrier was held not liable for samples used for effecting sales of goods. So carriers are not liable for large sums of money as baggage taken for the purpose of transportation. In the case of *The Orange County Bank v. Brown*, 9 Wend. 85 [24 Am. Dec. 129], it was held that the owner of a steamboat used for carrying passengers was not liable for a trunk, containing a large sum of money, brought on board by a passenger as baggage, the object being the transportation of the money. In the case of *Weed v. Saratoga and Schenectady Railroad Co.*, 19 Wend. 534, it was held, that a railroad company were liable for money in a trunk, to a reasonable amount for traveling expenses, as baggage. In that case, the sum was two hundred and eighty-five dollars, in the trunk of a passenger from Saratoga to New York. In the case of *The Orange County Bank v. Brown*, *supra*, it was also supposed, though not expressly adjudged, that money for traveling expenses might be carried as baggage at the risk of the carrier. But in the case before cited from 6 Hill, 586, a doubt was expressed, whether any money could be considered as baggage.

Upon consideration of the whole subject, and referring to the cases, the court have come to the conclusion, that money *bona fide* taken for traveling expenses and personal use may properly be regarded as forming a part of a traveler's baggage. The time has been, in our country, when the character and credit of our local currency were such, that it was expedient and needful, for persons traveling through different states, to provide themselves with an amount of specie, which could not conveniently be car-

ried about the person to defray traveling expenses. But even if bills are taken for this purpose, it may be convenient and suitable that they should be to some amount placed in a traveling trunk, with other necessary articles for personal use. This would seem but a reasonable accommodation to the traveler. It has been objected that the carrier will not expect that there will be money with the baggage, and will not therefore be put upon his guard. But surely a carrier may very naturally understand and expect that a passenger will place his money for expenses, or some part of it, in his trunk, instead of carrying it all about his person; he certainly might as naturally expect this, as that there would be jewels or a watch in a traveling trunk, for which articles a carrier has been held responsible. The passenger is not bound to give notice of the contents of his trunk, unless particular inquiry be made by the carrier. But it must be fully understood that money can not be considered as baggage, except such as is *bona fide* taken for traveling expenses and personal use; and to such reasonable amount only as a prudent person would deem necessary and proper for such purpose. But money intended for trade or business or investment or for transportation or any other purpose than as above stated can not be regarded as baggage.

But in the present case, if the money in the trunk could not be considered as a part of the plaintiff's baggage, according to the rule now stated, so that the defendants would be actually responsible for it, as common carriers; yet as the trunk was in the custody of the defendants, they would, upon common and familiar principles, be answerable for gross negligence wholly irrespective of their liability as common carriers. This principle is well settled in the case of *Brooke v. Pickwick*, 4 Bing. 218, and *Batson v. Donovan*, 4 Barn. & Ald. 21, and other cases.

The verdict, which was for the whole sum of money in the trunk, without any inquiry as to the uses and purposes for which it was designed, must be set aside and a new trial granted; unless, by agreement of the parties, it can be settled in some other way, whether or not the plaintiff is entitled to recover any and what sum, in accordance with the principles above stated, and the verdict altered, if necessary, according to the agreement in the report.

LIABILITY OF CARRIER FOR BAGGAGE OF PASSENGERS: See *Peizotti v. McLaughlin*, 47 Am. Dec. 563; *Laing v. Colder*, 49 Id. 533, and cases cited in the notes thereto. The rule laid down in the principal case as to what constitutes baggage is approved in *Connolly v. Warren*, 106 Mass. 148.

MONEY OR MERCHANDISE CARRIED IN TRUNK, WHETHER CONSTITUTES PART OF BAGGAGE or not: See *Orange County Bank v. Brown*, 24 Am. Dec. 129; *Hawkins v. Hoffman*, 41 Id. 767; and the notes thereto. Money for traveling expenses, carried in a passenger's trunk, is a part of his baggage, but not money carried for purposes of speculation or otherwise: *McKee v. Owen*, 15 Mich. 127; *Berkshire Woollen Co. v. Proctor*, 7 Cush. 426; *Dunlap v. International St. Co.*, 98 Mass. 376. Costly jewelry, samples, or other merchandise, carried in valises or trunks, is no part of a traveler's baggage: *Michigan etc. R. R. Co. v. Carrow*, 73 Ill. 357; *Collins v. Boston etc. R. R. Co.*, 10 Cush. 507; *Stimson v. Connecticut etc. R. R. Co.*, 98 Mass. 84; nor a feather-bed carried by a passenger on a vessel not for use on the voyage: *Connelly v. Warren*, 106 Mass. 748, all citing the principal case.

LIABILITY OF PASSENGER CARRIERS GENERALLY: See *McElroy v. Nashua etc. R. R. Co.*, 50 Am. Dec. 794, and note.

TEBBETTS v. PICKERING.

[5 CUSHING, 83.]

OMISSION IN COUNT ON NOTE TO SET OUT MEMORANDUM thereon, which constitutes a defeasance or qualifies the stipulations of the note, is a variance, and the note will not support the count; but if the declaration contains the common money counts, and the memorandum is merely that the note is given as collateral security for another note, the variance is immaterial.

COUNT FOR MONEY HAD AND RECEIVED LIES ON SPECIAL CONTRACT if nothing remains to be done but to pay a stipulated sum of money. Hence, such a count is good on a note given as collateral security for a debt which remains unpaid, if the note is due.

OBJECTION THAT NO BILL OF PARTICULARS WAS FILED as required by the rules of practice, if not taken in the court below, can not be insisted upon afterwards.

BILL OF PARTICULARS IS UNNECESSARY TO LET IN NOTE AS EVIDENCE under the money counts in a declaration giving notice of the nature of the claim by containing a count on the note.

DISCHARGE IN INSOLVENCY AFTER PRIOR INSOLVENCY IS INVALID, under the Massachusetts statute, without the written assent of three fourths of the creditors, unless the estate pays fifty per cent. of the debts.

DISCHARGE IN INSOLVENCY DOES NOT AFFECT NOTE TO CITIZEN OF ANOTHER STATE who was such when the note was made and until the discharge.

ASSUMPSIT, the declaration containing a count on a note, and also the money counts. At the trial in the common pleas the note sued on was offered in evidence, but there was a memorandum thereon, not set out in the declaration, to the effect that the note was given as collateral security for certain other notes. A motion for a nonsuit on the ground of variance was overruled. The defendant offered in evidence a discharge in insolvency on his own application. It appeared that three fourths of the cred-

itors did not assent thereto in writing, and that the assets did not pay fifty per cent. of the debts, and it was proved that on a previous application for the benefit of the insolvent law the defendant had been refused a discharge because the assets did not pay fifty per cent. of the debts. It further appeared that the plaintiff was, at the making of the note, and ever since, a citizen of Maine. The defendant's discharge was, on these grounds, held no defense. Verdict for the plaintiff. Exceptions by the defendant.

E. G. Dudley, for the defendant.

F. B. Hayes, for the plaintiff.

By Court, DEWEY, J. It is unnecessary to decide whether the instrument offered in evidence supports the special count. If that was the only count upon which the plaintiff could recover, the inquiry would then properly arise, whether the memorandum appended to the note, and signed by the defendant, could in any sense be considered a defeasance of the note, or as containing anything to qualify the stipulations in the note itself. If so, then upon the authority of the case of *Whitaker v. Smith*, 4 Pick. 83, the evidence would not support the count on the note. But it is unnecessary to consider this point, as the writ contains the common money counts, and these are quite sufficient to embrace the plaintiff's case upon the evidence.

However special the contract, yet if there remains no other duty, than the mere payment of a stipulated sum of money, the count for money had and received will be sufficient: *Fellon v. Dickinson*, 10 Mass. 287; *State Bank v. Hurd*, 12 Id. 171; *Baker v. Corey*, 19 Pick. 496; *Bates v. Curtis*, 21 Id. 247; and more directly in point, being the case of a promissory note, given in consideration that the payee would assign a certain mortgage, the case of *Payson v. Whitcomb*, 15 Id. 212. There is no practical inconvenience resulting from this form of pleading, inasmuch as the rules of practice require reasonable notice to be given of the nature of the claim sought to be enforced, whenever the party needs such information, and moves for an order to that effect.

It is insisted, however, on the part of the defendant, that the plaintiff was required, by the rule of the court of common pleas, to file a bill of particulars, or be precluded from introducing this evidence under the general counts. To this objection, two answers may be given: 1. No such objection appears to have been taken in the court of common pleas, and therefore

is not properly open here; as that court had full power, if such objection had been taken, to have granted further time to the plaintiff for filing such bill of particulars, and thus avoided this objection; 2. The defendant had full notice of this claim of the plaintiff from the pleadings. The note itself now sought to be recovered was set forth as a cause of action in one of the counts. This superseded the necessity of filing a bill of particulars, setting forth the note as a demand, upon which the plaintiff would rely at the trial.

The further ground of defense, arising from the discharge granted by a master in chancery, is also unavailing to the defendant; because the case falls within the provisions of the act of 1844, chapter 178, section 5, which declares the discharge invalid, in the case therein specified; and because the plaintiff, at the time of the making of the promise, was, and ever since has been, a citizen of the state of Maine: *Savoie v. Marsh*, 10 Metc. 594 [43 Am. Dec. 451]; *Woodbridge v. Allen*, 12 Id. 470.

Exceptions overruled.

MEMORANDUM ON NOTE CONSTITUTES ESSENTIAL PART OF IT, WHEN: See *Barnard v. Cushing*, 38 Am. Dec. 362; *Fletcher v. Blodgett*, 42 Id. 487, and the notes thereto.

VARIANCE BETWEEN WRITING DECLARED ON AND THAT OFFERED IN EVIDENCE, WHEN MATERIAL AND WHEN NOT: See *Ross v. Overton*, 2 Am. Dec. 532; *Walsh v. Gilmor*, 6 Id. 502; *Bellas v. Hays*, 9 Id. 385; *Hastings v. Lovering*, 13 Id. 420; *Newell v. Mayberry*, 23 Id. 261; *Miller v. Brown*, Id. 693; *Adams v. Lisher*, 25 Id. 102; *Dibrell v. Miller*, 29 Id. 126; *Leidig v. Rawson*, Id. 354, and the notes thereto.

WHETHER ASSUMPSIT FOR MONEY HAD AND RECEIVED, or for goods sold and delivered, or for work and labor performed, etc., can be maintained where there is a special contract: See *Newman v. McGregor*, 24 Am. Dec. 193; *Cledeney v. Paulsel*, 25 Id. 435; *Fowler v. Austin*, 26 Id. 701; *Pool v. Tuttle*, Id. 552; *Cummings v. Nichols*, 38 Id. 501; *Matlocks v. Lyman*, 46 Id. 138. As to the right of the payee of a note to surrender it and recover on the original consideration, although the declaration contains a count on the note, see *Melledge v. Boston Iron Co.*, *post*, 59, and note.

OBJECTIONS NOT MADE IN COURT BELOW NOT CONSIDERED ON WRIT OF ERROR OR APPEAL: See various examples of the application of this rule, in *Beekman v. Frost*, 9 Am. Dec. 246; *Campbell v. Stakes*, 19 Id. 561; *Newsum v. Newsum*, Id. 739; *Birely v. Staley*, 25 Id. 303; *Sasscer v. Walker*, Id. 272; *Mitchell v. Anderson*, 26 Id. 158; *Barrett v. Wills*, Id. 315; *Nesbitt v. Dallam*, 28 Id. 236; *Apperson v. Cottrell*, 29 Id. 239; *Pennsylvania etc. Co. v. Dandridge*, Id. 543; *Driggs v. Dwight*, 31 Id. 283; *Reid v. Edwards*, Id. 720; *Jones v. Hardesty*, 32 Id. 180; *Hewett v. Buck*, 35 Id. 243; *Schlencker v. Risley*, 38 Id. 100; *Martin v. Webb*, 39 Id. 363; *Lewis v. Bank of Kentucky*, 40 Id. 469; *Clark v. State*, Id. 481; *Union Bank v. Lea*, 41 Id. 275; *Phillips v. Runnels*, 43 Id. 109; *State v. Morgan*, 47 Id. 329; *Rabe v. Fyler*, 48 Id. 763, and in cases cited in the notes thereto. In *Bond v. Bond*, 7 Allen, 6, it is laid down, citing the principal case, to be well settled, that on exceptions no objections

can be considered which do not appear to have been raised and passed on by the court below.

BILL OF PARTICULARS, NECESSITY, SUFFICIENCY, AND EFFECT OF: See *De Sobry v. De Laistre*, 3 Am. Dec. 535; *Babcock v. Thompson*, 15 Id. 235; *Roberts v. Beatty*, 21 Id. 410; *Sidwell v. Evans*, Id. 387; *Gilpin v. Howell*, 45 Id. 720.

DISCHARGE UNDER STATE INSOLVENT LAW, EFFECT OF, on debts due citizens of another state: See *Larrabee v. Talbott*, 48 Am. Dec. 637; *Brigham v. Henderson*, 48 Id. 610, and notes referring to other cases.

WOODBURY v. PERKINS.

[5 CUSHING, 86.]

DISCHARGE UNDER UNITED STATES BANKRUPT ACT IS NO BAR TO ACTION ON JUDGMENT against the bankrupt recovered after the filing of the petition in an action commenced before the filing.

DEBT on a judgment recovered in New Hampshire. The defense was a discharge under the United States bankrupt law, subsequent to the judgment, upon a petition filed before the judgment, but after the commencement of the action in which the judgment was rendered. The judge held it a good bar. Verdict for the defendant. Exceptions by the plaintiff.

L. Gale, for the plaintiff.

B. Rand, for the defendant.

By Court, *DEWEY, J.* The case of *Sampson v. Clark*, 2 Cush. 173, was a direct decision upon a similar question, arising under the insolvent law of Massachusetts. It was there held, that where a judgment is obtained against an insolvent debtor, after the first publication of the notice by the messenger of the issuing of a warrant, in an action pending at the time of instituting the proceedings in insolvency, such judgment is not provable as a claim against the insolvent's estate in the hands of the assignee, because it was not in existence at the time of the publication; and the original debt is not provable, because it was merged in the judgment. This decision was upon the statute of 1838, chapter 163, section 3, which allows all debts to be proved against the estate, which are "due and payable" from the debtor, at the time of the first publication of the notice of issuing the warrant in insolvency.

It becomes necessary now to inquire what are the provisions of the bankrupt act under which this discharge was obtained; and whether the case above referred to, in principle, applies to

the present case. The present is a question of the validity of a discharge; that related to the right of a creditor to file his claim; but both must be governed by the same rule; at least, it must be so in cases arising under the statute of 1838, chapter 163. By the provisions of the act of congress of 1841, chapter 9, section 4, it is enacted that "every bankrupt who shall *bona fide* surrender all his property," etc., "shall be entitled to a full discharge from all his debts, and such discharge shall be deemed a full and complete discharge of all debts, contracts, and other engagements of such bankrupt, which are provable under this act." The fifth section authorizes all creditors to prove their debts against the bankrupt.

In New York, this question seems to have been settled in the case of *Kellogg v. Schuyler*, 2 Denio, 73, where it was held, in reference to the bankrupt act, that a judgment is an extinguishment of the prior indebtedness; and where it is rendered after the time of presenting the petition, it is not affected by a discharge granted under such petition. In the case of *Thompson v. Hewitt*, 6 Hill, 254, where the defendant, during the pendency of a suit against him on a promissory note, presented a petition for a discharge under the bankrupt act, and afterwards gave a judgment for a part of it, by a compromise, the original debt was held to be merged and extinguished by the new judgment, and the judgment not to be affected by the discharge in bankruptcy.

We can perceive no great hardship that can result from taking this view of the question. The parties can neither of them be affected injuriously thereby, without their own assent, or by some laches on their part. The creditor who may have a suit pending against his debtor, at the time such debtor may become the subject of proceedings in bankruptcy, may at once discontinue his suit, and file his claim with the commissioner in bankruptcy, or insolvency, as the case may be, and will in such case be allowed to prove his claim, and receive a dividend. So, on the other hand, the debtor, if he would secure to himself the benefit of a discharge in bankruptcy, in reference to a debt for the recovery of which a suit at law is then pending, has only to interpose his objection to a judgment's being rendered in such suit, by suggesting the proceedings in bankruptcy, and asking a continuance of the action, until the proceedings in bankruptcy have so far progressed as to enable him to plead his discharge in bar of the suit.

But if both parties are content that the demand shall not be affected by the proceedings in bankruptcy; the creditor volun-

tarily yielding his right to file his claim for the purpose of taking a dividend from the avails of the assets of the bankrupt; and the debtor being also content to have the demand unaffected by the proceedings in bankruptcy; the result will be that a new debt is created, which is not affected by the discharge in bankruptcy. It is undoubtedly true, that to some extent and for some purposes, it is allowable to go behind a judgment, and inquire as to the original indebtedness, and this may have a decisive effect upon the rights of the parties. The case of *Betts v. Bagley*, 12 Pick. 572, cited by the counsel for the defendant, is an instance of such inquiry, and a case where effect was given to the original cause of action. The judgment in that case was rendered long before the application for a discharge or any proceedings in reference to the same. It was important to show the jurisdiction of the tribunals of New York, in reference to the case and the parties, and it appearing that the original debt was contracted in that state, this was held sufficient to subject the demand, which was a suit upon a judgment, to the insolvent laws of New York.

The English decisions, to some extent, are apparently conflicting with the view which we have taken of the present case. To what extent, it is somewhat difficult precisely to understand. In the case of *Robinson v. Vale*, 2 Barn. & Cress. 762, it was held, that the debt was provable, although in a judgment; but here the judgment was before the commission of bankruptcy issued. The case *Ex parte Birch*, reported in 4 Id. 880, and also in 7 Dow. & Ry. 436, 442, is a case more in point to show that a judgment, rendered after the commission of bankruptcy, is yet provable as a debt chargeable upon the assets of the bankrupt. The judgment was in fact rendered three days after the date of the commission, and the debt was held provable, but the grounds of the decision are not stated. It may have been decided upon the ground urged by one of the counsel, that a judgment there always relates to the first day of the term, which period would be found prior to the issuing of the commission; or it may have been founded upon the peculiar language of the statute of 46 Geo. III., c. 135, "after the act of bankruptcy," etc. The act of bankruptcy is the private act of the debtor, and may not at the time be known to the creditor, so that he can discontinue his action and waive taking a judgment; while our statute relates to all debts existing at the time of the publication by the messenger, which is a public event known to the creditor, so as to enable him seasonably to regulate his future course as to a suit then pending.

However that may be, we see no sufficient reason for not applying the same principle by anything settled in the law of *Sampson v. Clark*, 2 Cush. 173, before cited.

The petition in bankruptcy having been filed on the ninth of December, 1842, and the judgment, which is the foundation of the present claim, having been rendered subsequently, although the original action was commenced prior to the filing of the petition in bankruptcy, such judgment does not constitute a debt or demand, which could be proved and allowed by the commissioner in bankruptcy, and the discharge of the said Perkins, by virtue of said proceedings, does not apply to a judgment rendered after the filing of the petition in bankruptcy.

Such being the character of the demand sought to be enforced in the present action, the ruling of the court of common pleas was erroneous.

Exceptions sustained, and a new trial ordered in this court.

JUDGMENT RECOVERED AGAINST INSOLVENT AFTER PETITION in bankruptcy, but before decree or discharge, is not barred by the discharge: *Haggerty v. Amory*, 7 Allen, 460; *In re Gallison*, 5 Nat. Bank Reg. 354, citing the principal case. See to the same effect, *Fisher v. Foss*, 30 Me. 459; *Pike v. McDonald*, 32 Id. 418.

SIMPLE CONTRACT DEBT IS MERGED IN JUDGMENT therefor: See *Wann v. McNulty*, 43 Am. Dec. 53, and note. The principal case is cited and approved on this point in *Handrahan v. Cheshire Iron Works*, 4 Allen, 396; *Wolcott v. Hodge*, 15 Gray, 548, and *Bradford v. Rice*, 102 Mass. 473.

ROBINSON v. BAKER.

[5 CUSHING, 137.]

COMMON CARRIER HAS NO LIEN FOR FREIGHT ON GOODS RECEIVED FROM WRONG-DOER without the owner's consent, express or implied, as against such owner, although they were innocently received.

REPLEVIN for a quantity of flour, purchased by the plaintiff at Buffalo, in New York, and shipped on a boat of the Old Clinton line to Albany, to be delivered to the Western Railroad Company, to be shipped by them to the plaintiff at Boston. The agent of the Western Railroad Company declined to receive the flour, on being informed of its arrival, though it was not actually tendered to him, and said that the boat must take its turn after certain other boats waiting to deliver goods to that company; and the agent of the Old Clinton line then shipped it by the Albany and Canal line to New York, and the latter company shipped it thence by the defendant's boat to Boston, to be deliv-

ered to the plaintiff on payment of freight. The defendant, having carried it to Boston, refused to deliver it except upon payment of the freight, claiming a lien therefor, and the plaintiff brought this action. The evidence tended to show that the diversion of the course of the flour by the Old Clinton and Albany and Canal lines was without the plaintiff's consent; but it is unnecessary to state this evidence, or the instructions requested or given, except to say, that the judge ruled that if the defendant received the flour in good faith, and in the ordinary course of business, for shipment to the plaintiff, in ignorance of the contract of the plaintiff with the Old Clinton line, and of the fact that the flour was to have been shipped from Albany to Boston by the Western railroad, he was entitled to a lien for his freight thereon. The correctness of this instruction was the only question considered in the supreme court. The question was submitted to the jury as to whether or not the agent of the Western Railroad Company authorized the shipment by way of New York, and the jury found that he did not. Judgment was to be entered for the defendant, if the instructions were correct. Otherwise for the plaintiff.

C. B. Goodrich, for the plaintiff.

B. R. Curtis, for the defendant.

By Court, FLETCHER, J. (after stating the facts, the instructions requested, and the instructions given). As the ruling of the judge, that the defendant, as a carrier, had a lien for his freight, was placed upon grounds wholly independent of any rightful authority in the agents of the Old Clinton line and the Albany and Canal line, to divert the goods from the course in which the plaintiff had directed them to be sent, and to forward them by the defendant's vessel, and wholly independent of the plaintiff's consent, express or implied, the simple question raised in the case is, whether if a common carrier honestly and fairly on his part, without any knowledge or suspicion of any wrong, receives goods from a wrong-doer without the consent of the owner, express or implied, he may detain them against the true owner, until his freight or hire for carriage is paid; or to state the question in other words, whether if goods are stolen and delivered to a common carrier, who receives them honestly and fairly in entire ignorance of the theft, he can detain them against the true owner, until the carriage is paid.

It is certainly remarkable, that there is so little to be found in the books of the law, upon a question which would seem

likely to be constantly occurring in the ancient and extensive business of the carrier. In the case of *Yorke v. Grenaugh*, 2 Ld. Raym. 866, the decision was, that if a horse is put at the stable of an inn by a guest, the innkeeper has a lien on the animal for his keep, whether the animal is the property of the guest or of some third party from whom it has been fraudulently taken or stolen. In that case, Lord Chief Justice Holt cited the case of an Exeter common carrier, where one stole goods and delivered them to the Exeter carrier, to be carried to Exeter; the right owner, finding the goods in possession of the carrier, demanded them of him; upon which the carrier refused to deliver them unless he was first paid for the carriage. The owner brought trover, and it was held, that the carrier might justify detaining the goods against the right owner for the carriage; for when they were brought to him, he was obliged to receive them, and carry them; and therefore since the law compelled him to carry them, it will give him a remedy for the premium due for the carriage. Powell, J., denied the authority of the case of the Exeter carrier, but concurred in the decision as to the innkeeper. There is no other report of the case of the Exeter carrier to be found. Upon the authority of this statement of the case of the Exeter carrier, the law is laid down in some of the elementary treatises to be, that a carrier who receives goods from a wrong-doer or thief, may detain them against the true owner until the carriage is paid.

In the case of *King v. Richards*, 6 Whart. 418 [37 Am. Dec. 420], the court, in giving an opinion upon another and entirely different and distinct point, incidentally recognized the doctrine of the case of the Exeter carrier. But until within six or seven years, there was no direct adjudication upon this question except that referred to in *Yorke v. Grenaugh*, of the Exeter carrier. In 1843 there was a direct adjudication upon the question now under consideration, in the supreme court of Michigan, in the case of *Fitch v. Newberry*, 1 Doug. 1 [40 Am. Dec. 33]. The circumstances of that case were very similar to those in the present case. There the goods were diverted from the course authorized by the owner, and came to the hands of the carrier without the consent of the owner, express or implied; the carrier, however, was wholly ignorant of that, and supposed they were rightfully delivered to him; and he claimed the right to detain them until paid for the carriage. The owner refused to pay the freight, and brought an action of replevin for the goods. The decision was against the carrier. The general principle

settled was, that if a common carrier obtain possession of goods wrongfully or without the consent of the owner, express or implied, and on demand refuse to deliver them to the owner, such owner may bring replevin for the goods, or trover for their value. The case appears to have been very fully considered, and the decision is supported by strong reasoning and a very elaborate examination of authorities. A very obvious distinction was supposed to exist between the cases of carriers and innkeepers, though the distinction did not affect the determination of the case.

This decision is supported by the case of *Van Buskirk v. Purinton*, 2 Hall, 561. There property was sold on a condition, which the buyer failed to comply with, and shipped the goods on board the defendants' vessel. On the defendants' refusal to deliver the goods to the owner, he brought trover and was allowed to recover the value, although the defendants insisted on their right of lien for the freight.

Thus the case stands upon direct and express authorities. How does it stand upon general principles? In the case of *Saltus v. Everett*, 20 Wend. 267, 275 [32 Am. Dec. 541], it is said: "The universal and fundamental principle of our law of personal property is, that no man can be divested of his property without his consent, and consequently that even the honest purchaser under a defective title can not hold against the true proprietor." There is no case to be found, or any reason or analogy anywhere suggested, in the books, which would go to show that the real owner was concluded by a bill of lading not given by himself, but by some third person, erroneously or fraudulently. If the owner loses his property, or is robbed of it, or it is sold or pledged without his consent, by one who has only a temporary right to its use by hiring or otherwise, or a qualified possession of it for a specific purpose, as for transportation, or for work to be done upon it, the owner can follow and reclaim it in the possession of any person, however innocent.

Upon this settled and universal principle, that no man's property can be taken from him without his consent, express or implied, the books are full of cases, many of them hard and distressing cases, where honest and innocent persons have purchased goods of others apparently the owners, and often with strong evidence of ownership, but who yet were not the owners, and the purchasers have been obliged to surrender the goods to the true owners, though wholly without remedy for the money paid. There are other hard and distressing cases of advances made

honestly and fairly by auctioneers and commission merchants, upon a pledge of goods by persons apparently having the right to pledge, but who in fact had not any such right, and the pledgees have been subjected to the loss of them by the claim of the rightful owner.

These are hazards to which persons in business are continually exposed by the operation of this universal principle, that a man's property can not be taken from him without his consent. Why should the carrier be exempt from the operation of this universal principle? Why should not the principle of *caveat emptor* apply to him? The reason, and the only reason, given is, that he is obliged to receive goods to carry, and should therefore have a right to detain the goods for his pay. But he is not bound to receive goods from a wrong-doer. He is bound only to receive goods from one who may rightfully deliver them to him, and he can look to the title, as well as persons in other pursuits and situations in life. Nor is a carrier bound to receive goods, unless the freight or pay for the carriage, is first paid to him; and he may, in all cases, secure the payment of the carriage in advance. In the case of *King v. Richards*, 6 Whart. 418 [37 Am. Dec. 420], it was decided that a carrier may defend himself from a claim for goods by the person who delivered them to him, on the ground that the bailor was not the true owner, and therefore not entitled to the goods.

The common carrier is responsible for the wrong delivery of goods, though innocently done, upon a forged order. Why should not his obligation to receive goods exempt him from the necessity of determining the right of the person to whom he delivers the goods, as well as from the necessity of determining the right of the person from whom he receives goods? Upon the whole, the court are satisfied, that upon the adjudged cases, as well as on general principles, the ruling in this case can not be sustained, and that if a carrier receives goods, though innocently, from a wrong-doer, without the consent of the owner, express or implied, he can not detain them against the true owner, until the freight or carriage is paid.

CARRIER RECEIVING GOODS WITHOUT OWNER'S CONSENT HAS NO LIEN thereon for his freight, as against such owner: *Fitch v. Newberry*, 40 Am. Dec. 33, and note discussing this subject. The principal case is cited to the same point in *Clark v. Lowell etc. R. R. Co.*, 9 Gray, 232, and *Whitney v. Beckford*, 105 Mass. 271. Nor has such carrier any lien for freight paid by him to a prior carrier by whom the owner authorized the goods to be carried, because he had no authority to pay it: *Stevens v. Boston etc. R. R. Corp'n*,

6 Gray, 262, 266. But where goods are misssent by an agent of the owner acting within the scope of his authority, the carrier has a lien for his freight: *Whitney v. Beckford*, 105 Mass. 271. And he has such lien not only for his own freight, but also for freight to prior carriers: *Briggs v. Boston etc. R. R. Co.*, 6 Allen, 246, distinguishing the principal case, on the ground that the Old Colony Line was not constituted the forwarding agent of the owner.

MELLEDDGE v. BOSTON IRON COMPANY.

[5 CUSHING, 168.]

NEGOTIABLE NOTE GIVEN FOR PRE-EXISTING DEBT IS PRESUMED PAYMENT in Massachusetts, whether it be the note of the debtor or of a third person.

PRESUMPTION OF PAYMENT FROM GIVING NOTE for a pre-existing debt may be rebutted by evidence that such was not the intention of the parties.

PLAINTIFF COUNTING ON NOTE IS NOT PRECLUDED FROM SURRENDERING IT so as not to amount to payment, and from recovering on a count for goods sold constituting the consideration, if he can not recover on the note.

NOTE NOT IN CORPORATE NAME, and not disclosing any agency from the corporation to make it, is *prima facie* not the note of the corporation, but the presumption may be rebutted by evidence *aliunde*.

NOTE IN NAME ADOPTED AND SANCTIONED BY CORPORATION as indicative of its contracts, though not its corporate name, and given by its authorized agent for a corporate liability, is the note of the corporation, and these facts may be proved to rebut the presumption arising from the face of the note; as where a note is made in the name of a firm who are the general agents of the corporation.

CORPORATION MAY HAVE SEVERAL NAMES for the purpose of transacting its business.

MISNOMER OF CORPORATION IN CONTRACT does not prevent a recovery thereon against the corporation, if its identity with the corporation intended is pleaded and proved.

TRADING CORPORATION IS BOUND BY IMPLIED CONTRACT, constructive notice, implied assent, tacit acquiescence, ratification of contracts by acts or silence, etc., in the same way as a natural person.

COURT IS NOT BOUND TO GIVE OPINION ON LEGAL QUESTION ARISING ON PART OF EVIDENCE as stated in a prayer for instructions.

AUTHORITY OF AGENT OF CORPORATION MAY BE PROVED by corporate acts, and by the acts of the person professing to be agent acquiesced in or ratified by the corporation.

INSTRUCTION ASSUMING HYPOTHETICAL CASE of which there is no evidence is regarded as a mere illustration of a rule of law which can not mislead the jury.

DELIVERY OF GOODS BY VENDOR AT PLACE DESIGNATED by the vendee's agent, who made the purchase, is a good performance of the contract, though the vendor knows that they are to be used by a third person and not by the purchaser.

ASSUMPSIT for the price of a quantity of coals, the declaration containing a general count for goods sold and delivered and on

account annexed, two counts on certain notes alleged to have been made by the defendants, under the name of Horace Gray & Co., and also a count on a special agreement for the sale and delivery of coal; to which the defendants pleaded the pleas stated in the opinion. It appeared that the notes sued on were given in payment for coals delivered under the special agreement, and the questions were, whether the defendants were bound by the notes signed "Horace Gray & Co.," and if not, whether they could surrender them and recover for goods sold, etc. It appeared that Horace Gray & Co. were a copartnership, who for several years had conducted all the business of the Boston Iron Co., of which Horace Gray was the principal stockholder, though there was no vote proved appointing them agents, or defining their powers, with the exception of some votes giving them power to sign and indorse notes. Horace Gray & Co. were also agents of several other corporations in the iron trade, including the Massachusetts Iron Co., to whom some of the coals in question were delivered. It is unnecessary to give a summary of the evidence, as the only questions presented were as to the correctness of certain instructions granted and refused by the judge. These instructions are all stated in the opinion, except that given in answer to the defendants' sixth prayer. The prayer was for an instruction to the effect that if the plaintiff had notice that "Horace Gray & Co." and the "Boston Iron Co." were different concerns, this was notice that the name of "Horace Gray & Co." did not bind the defendants, and that if the plaintiff assumed that the two concerns were composed of the same persons, he did so at his own risk, and could not now surrender the notes as not payment. The court gave this instruction as applicable to the case supposed, but further instructed the jury that notice to the plaintiff that the two concerns were not the same, would not prevent his recovery in this action if the notes were in fact the notes of the defendants given under a name adopted and sanctioned by them, or were received by the plaintiff under a belief that they were so induced by the conduct of Horace Gray & Co., which belief was sanctioned by the defendants. Verdict for the plaintiff, which was to be set aside if the instructions were wrong.

B. R. Curtis, for the defendants.

C. G. Loring and F. B. Crowninshield, for the plaintiff.

By Court, SHAW, C. J. On the facts reported, the plaintiff insists in point of law: 1. That the signature "Horace Gray

and Company" to the notes is the proper name and signature of the defendants, adopted by them to authenticate their own contracts and obligations, and that they are bound by it, as a written contract of their own, received by the plaintiff as such, in satisfaction and discharge of the defendants' debt to him, for goods sold and delivered; or, 2. That if the signature "Horace Gray and Company" is not the proper signature of the defendants, adopted and sanctioned by them, so as to make the instruments in question their own promissory notes, the notes were received under a mutual mistake of facts or under a mistake of fact on the part of the plaintiff, occasioned by the acts and conduct of the defendants' agents, in consequence of which the plaintiff supposed that he had received the security of the defendants, in satisfaction of the debt due to him from them for goods sold and delivered, when in fact he had not received such security; that, therefore, the notes were but *prima facie* evidence of payment; and not having been paid or negotiated, but held by the plaintiff, and brought into court ready to be canceled, if not available as the notes of the defendants, that therefore the simple contract debt, for goods sold and delivered, at an agreed price, was not paid, and that the plaintiff was entitled accordingly to recover as for goods sold and delivered.

To this claim on the part of the plaintiff, the defendants filed the general issue, with a specification of defense, requiring the plaintiff to prove everything necessary to enable him to maintain his declaration, and setting up as a defense to all claims that might be so proved, payment, accord and satisfaction, and that credit was given by the plaintiff exclusively to the mercantile firm of Horace Gray & Co. At the trial, a great amount of evidence was introduced by the parties respectively, to maintain their several claims and grounds of defense.

The questions now to be considered relate to the instructions given by the judge before whom the case was tried, and to his refusal or modification of those which he was requested by the defendants to give, but which he declined giving in the terms or to the effect prayed for.

The presiding judge instructed the jury that the case presented two general inquiries, namely: 1. Whether there was an original indebtedness, on the part of the defendants, to the plaintiff, as alleged by him; and, 2. Whether such indebtedness, if it once existed, had been discharged to the extent of the notes declared on, which had been received by the plaintiff, with the signature of Horace Gray & Co.

In regard to the first inquiry, whether the defendants became indebted to the plaintiff for the coals alleged to have been delivered under the contract, the case was submitted to the jury with instructions, which we believe were not excepted to by the defendants.

Upon the other point, the jury were instructed that the taking of a negotiable promissory note for a pre-existing debt was *prima facie* a discharge of the original indebtedness; that the burden of proof was on the plaintiff to show some sufficient and legal reason for taking the case out of the general rule; that he must control the effect which the law otherwise gives to the acceptance of negotiable notes; and that in the present case, as the notes purported to be the notes of third persons, the plaintiff had the further burden to show some sufficient reason why the taking of them did not discharge all liability on the part of the defendants to the amount of such notes. The court are of opinion that these directions were sufficiently favorable to the defendants, and had the verdict been the other way, the plaintiff would have had more cause to complain of them.

It is true, that it has long been held as the law of Massachusetts that when the party bound to the payment of a simple contract debt gives his own promissory negotiable note for it, the law presumes such note to have been accepted in satisfaction and discharge of the pre-existing debt, because the party receiving it relinquishes no security, but has the same responsibility for payment which he had before, with more direct and unequivocal evidence of the debt, and a more simple remedy for recovering it, and with power also by indorsement to transfer the whole interest in it to another. There seems therefore to be no motive for retaining and keeping alive the original debt.

But the presumption that a negotiable note is taken in satisfaction of a pre-existing debt and not as collateral security, is a presumption of fact only, and may be rebutted and controlled by evidence that such was not the intention of the parties; so that when the promissory note given is not the obligation of all the parties who are liable for the simple contract debt, and *a fortiori* when the note is that of a third person, and if held to be in satisfaction, would wholly discharge the liability of the party previously liable, the presumption, if it exist at all, is of much less weight; and it is a question of fact, on the evidence, whether the promissory note, given on the one hand and accepted on the other, was in satisfaction and discharge of the original debt. Thus in the early case of *Maneely v. McGee*, 6

Mass. 143 [4 Am. Dec. 105], where the promissory note of one, who acted as agent and manager for the others, was taken for a debt due from four, it was held, upon rather slight evidence, that it was not intended, and therefore would not operate, as payment. So in the case of *French v. Price*, 24 Pick. 13, it was decided, that where several persons were liable for goods purchased by an agent, and the vendors knowing that others were liable, but without insisting on such liability, took the note of the agents alone, this was presumptive evidence of payment. But, said the court, it is competent for the plaintiff to rebut this presumption; and they add, if there was any deception or fraud in the giving of the notes, or if they were accepted under an ignorance of the facts, or a misapprehension of the rights of the parties, the vendors ought not to be bound by the acceptance, but may repudiate the notes and rely upon the original contract of sale. The principle rests on the ground, that if the vendors know that others are liable, whether they know who those others are or not, they voluntarily waive their responsibility by taking the notes of a part only of those who are liable. So where goods are purchased for a company, and a note given therefor by one professing to act as agent of the company, and supposed to be duly authorized to give the note of the company, when it appeared that the agent was not duly authorized, and the note was unavailing as the note of the company, although the holder might have treated it as the personal note of the agent, yet it was held that the holder was not bound to do so, but might treat the note as void, and recover against the company on the original contract for goods sold: *Emerson v. Providence Hat Manufacturing Company*, 12 Mass. 237 [7 Am. Dec. 66]. And a receipt of payment given on the bill for goods sold, a receipt being by law explainable by evidence *aliunde*, does not bar the vendor from recovering for goods sold, where the acceptance of the note is not intended to inure by way of payment and satisfaction: *Vancleef v. Therasson*, 3 Pick. 12. So, if goods are sold to be paid for by a note made by one person and indorsed by another, and a note of a corresponding description is offered and received, and the goods are thereupon delivered, and it appears afterwards that the indorsement is a forgery, such delivery of the note is no payment, and an action will lie for the goods: *Ellis v. Wild*, 6 Mass. 321.

With this view of the law as to the presumption of fact, arising from the acceptance of a negotiable promissory note for a pre-existing debt, whether it is the note of the same parties

originally liable, or of some of the same parties, or the note, genuine or otherwise, of a third person, we repeat the opinion, that we think the general ruling under which the evidence went to the jury was correct, and was sufficiently favorable for the defendants. Under this ruling, as it appears by the report, the plaintiff took the burden of proof, and attempted to show that the notes were in fact the notes of the defendants, and that they had adopted as their mode of signature to contracts of this nature the form here used; and, secondly, that the plaintiff, having a legal demand against the defendants for goods sold, received the notes in question under a misapprehension, in fact, in respect to the identity of the concern designated by the signature of Horace Gray & Co., with that designated as the Boston Iron Company, and acted under that belief; and that such belief was caused by the acts of the defendants and their agents, to whom was intrusted the superintendence and control of all their purchases and payments, and their business generally.

We are then brought to the consideration of the defendants' prayers for specific instructions, and the action of the judge upon them.

The first was, that the plaintiff, having counted upon these notes, and now seeking to recover on them, can not at the same time aver that he has so surrendered the notes, that they do not amount to payment. The judge declined, but instructed the jury, that the plaintiff was not precluded from now surrendering these notes, and recovering on the other counts, if he was not entitled to recover on the notes; if, in other respects, he was entitled to recover on the other counts for the goods sold. We do not perceive why a person may not declare on the original cause of action for goods sold, and also on a note given for the same cause, which the holder believes that the maker intends to resist, as void for any cause; they are two modes of claiming one and the same demand, to meet the evidence in the case. If he recovers on one of them, he will not on the other. In New York, where a note is not *prima facie* payment, but may be, if so agreed, the canceling of the note before bringing the action is not necessary to a recovery of the original debt; the rule is, that on the trial the court will not suffer the plaintiff to recover on the original consideration, unless he can prove that the note given for it is lost, or can then produce it to be canceled; but it is no objection to such a recovery that the note has been indorsed to another, if it has been retransferred to the payee, and he has it at the trial ready to be

canceled, if he recover on the original consideration. This is obviously required to secure the defendant from being twice charged: *Burdick v. Green*, 15 Johns. 247; *Hughes v. Wheeler*, 8 Cow. 77.

But the defendants, as we understand the argument, insist that these two claims are not only inconsistent with each other, but are repugnant to each other, so that the assertion of one is a denial of the other; and thus, if the plaintiff claims for the goods sold, the claim assumes that the notes given for them are not the notes of the defendants; but they are the notes of some party, and if not the notes of the defendants, they are the notes of Horace Gray & Co.; and the plaintiff, after recovering of the defendants for the goods, may recover of Horace Gray & Co. on the notes, who would have no defense against them. But we think this argument is not well founded. It may be true, that if the plaintiff, in the first instance, had chosen to treat the notes as the notes of Horace Gray & Co., the latter might have been barred by the doctrine of estoppel, from denying that they were bound by the notes; but the holder having elected to treat them as the notes of the defendants, made by the instrumentality of Horace Gray & Co., and having declared on them as such, and more especially having obtained judgment on them, or on the consideration for which they were given, the plaintiff would be estopped from proceeding against Horace Gray & Co.; and by a well-known technical rule, there would be estoppel against estoppel, which would let in the truth; or in other words, the plaintiff would be precluded by his own acts from making any such claim. Besides, looking at the subject in a more direct and practical view, if the plaintiff in this suit recovers on the notes, they will be merged in the judgment and effete; if he recovers on the count for goods sold, the notes will be canceled, and impounded here, and can never be used against Horace Gray & Co. Precisely the same course was adopted in the case of *Emerson v. Providence Hat Manufacturing Co.*, 12 Mass. 237 [7 Am. Dec. 66]. There, no doubt, the plaintiff might in the first instance have proceeded against Roberts, the agent, but having elected to proceed against the company, it was not suggested that he could afterwards proceed against the agent.

The second prayer for instructions was: That the defendants' corporate name not appearing on the notes, and the notes on their face not disclosing any agency, Horace Gray & Co., and not the corporation, were bound by these notes. This instruc-

tion was given, as the defendants insist, with such qualifications and restrictions, as take away the whole legal effect and operation of it. This is true, and it leads to the other principal question in the present case. It is undoubtedly true, that the notes were not signed in the defendants' regular corporate name, by which they were incorporated; that the notes on the face of them did not disclose any agency; and that they were signed by Horace Gray & Co., who had a separate firm and house of trade of that name. If it were an absolute and unqualified rule of law, that upon these facts Horace Gray & Co., and not the corporation, were bound, and the judge was bound so to instruct, of course that would put an end to the question, whether these notes could be the notes of the defendants. The court did give the instructions prayed for, but with this qualification, that the ruling was not to be understood as preventing the plaintiff from maintaining his action, if the jury were satisfied: 1. That these notes were in fact the notes of the Boston Iron Company executed under a name adopted and sanctioned by them as indicative of their contracts; or, 2. That the plaintiff received these notes upon a legal demand against the defendants, under a misapprehension of the facts as to the matter that Horace Gray & Co. and the Boston Iron Company were not the same; the plaintiff acting under the belief that they were, and such belief being induced by the acts of the defendants, or their legal agents.

The effect of the instruction thus given, we think, was, that the facts mentioned in the prayer for instructions, to wit, the corporate name not appearing on the notes, and the notes not disclosing any agency, but signed "Horace Gray & Co.," constituted *prima facie* evidence, that those were the notes of Horace Gray & Co., and not of the Boston Iron Company; and standing alone would warrant and require the direction, that Horace Gray & Co. and not the Boston Iron Company were bound by them; but that this evidence might be rebutted, and controlled by proof *aliunde* that they were in fact the notes of the Boston Iron Company, because executed under a name adopted and sanctioned by them as indicative of their contracts, and it may be added, given in satisfaction of their debt.

The court are of opinion that this direction was correct. If, by any possible proof, the presumption arising from the face of the note, from the form of the execution, from the corporate name of the company not being used, and the use of the name of a mercantile firm, could be rebutted, then the evidence was

prima facie, and not conclusive. It seems to be now well settled in this commonwealth, since the great multiplication of corporations, extending to almost all the concerns of business, that trading corporations, whose dealings embrace all transactions, from the largest to the minutest, and affect almost every individual in the community, are affected, like private persons, with obligations arising from implications of law, and from equitable duties which imply obligations; with constructive notice, implied assent, tacit acquiescence, ratifications from acts and from silence, and from their acting upon contracts made by those professing to be their agents; and, generally, by those legal and equitable considerations which affect the rights of natural persons. We are not dealing here with the weight, force, or effect of the evidence, but only whether any evidence *aliunde* could control the presumption arising from the notes; and we think there was evidence competent to go to the jury, from which they might infer that the defendants had so adopted a name, other than their corporate name, for the special purpose of giving notes, as to be bound by it, when used by a general agent, in liquidation of their own debts.

This results from a series of decisions both in England and in this country, but particularly in America, quite too numerous to be reviewed here. I will allude to a few. In the supreme court of the United States, in the case of *Bank of Columbia v. Patterson*, 7 Cranch, 299, it was held that a corporation might be bound both by express and implied provisions, and that by acting on the contracts made by their agents, they adopted and ratified them. In the case of *United States Bank v. Dandridge*, 12 Wheat. 64, the subject was considered at great length, and it was held that a corporation is bound by the same presumptions which would affect a natural person; that the authority of agents may be proved from their acts, and that corporations may be affected by parol proof and presumptions of fact, in the same manner as natural persons. The case is an instructive one, and though the chief justice dissented, it has generally been acquiesced in as sound law. In Massachusetts, in the case of *Canal Bridge v. Gordon*, 1 Pick. 297 [11 Am. Dec. 170], it was held that a corporation could be bound without vote or deed by implication from corporate acts. This proceeded on the broad ground, that corporations can be bound by implication as well as individuals. In *Minot v. Curtis*, 7 Mass. 441, 444, the court say: "We know not why corporations may not be known by several names, as well as individuals." As that case arose on

pleading, the court further say, that if this point had been open to the jury as a question of fact, the defendants would have been bound to prove the identity of the parish thus acting under different names. This of course could be done by any proof tending to establish such identity. The case of *Medway Cotton Mfg. Co. v. Adams*, 10 Mass. 360, is in point with the present, except that there the corporation was plaintiff, whereas here it is defendant. The averment was, that the defendants, by their promissory notes, etc., promised the said Medway Cotton Manufacturing Company by the name of Richardson, Metcalf & Co. That came before the court on demurrer, and the declaration was held good. The opinion of the court was given by Sewall, J., who states the principle on which it was founded. He says, it was a question of identity, which was sufficiently there stated by way of averment, to be good on demurrer, but had it been traversed or tried, would, as he states, depend on an inquiry of facts, which might or might not be proved, and might be provable by evidence extraneous to the note. The same point was subsequently decided in the case of *Commercial Bank v. French*, 21 Pick. 486 [32 Am. Dec. 280].

Without going more at large into authorities that a corporation may have several names, I will cite the third edition of Ang. & Ames on Corp. 206, 4th ed., sec. 234, which lays down the rule that the misnomer of a corporation in a grant, obligation, or other written contract, does not prevent a recovery thereon by or against the corporation in its true name, provided its identity with that intended by the parties to the instrument is averred in pleading and apparent in proof; and the authors cite many cases in support of the rule thus stated. The court are therefore satisfied that it was competent for the plaintiff, if he could, to show by evidence, that the notes were in fact the notes of the defendants, given in a name adopted by them to authenticate their contracts; and therefore that the modification prescribed to the rule asked for by the defendants, and given, was correct, and adapted to the case then in proof. In this connection, several authorities were cited to the point, that when a creditor, knowing that one acts as agent for a principal in making purchases, takes the note of the agent, without that of the principal, he waives the responsibility of the principal and gives credit to the agent. This principle, though to be taken with some qualifications, is no doubt correct, but not applicable to the present case.

The ground of the plaintiff is, not after taking the note of

the agent to resort back to the principal, but to show that the note taken was, in fact and in legal effect, the note of the defendants. It was urged, in this connection, that the court should have given an opinion on the questions of law stated in this prayer for instructions, and upon the facts there stated, but as we understand it, these facts were only a part of the evidence; there was much other evidence which was competent, such as the fact that the company had no meetings except a formal annual meeting; that there was no vote appointing Horace Gray & Co. agents, or appointing any agent, or prescribing the powers of agents; that a large amount of business was done by and in the name of the Boston Iron Company, in the way of purchases, sales, and other dealings, which was done wholly by Horace Gray & Co.; that these were open and notorious, from which constructive notice to the company might be presumed; from all which a jury might infer the authority which is the subject of inquiry. If so, the judge could not be called upon to express an opinion on a question of law, arising from a part of the evidence; the only question is, whether the judge was correct in submitting the evidence to the jury; and he was, so, if there was competent evidence proper for their consideration, and from which they might infer the fact sought to be proved: *Shaw v. Woodcock*, 7 Barn. & Cress. 73.

Under this same objection, also, the question was discussed, whether a corporation can adopt the name of a mercantile firm, and bind themselves by notes given in its name. It may not be a wise arrangement, but we are not prepared to say they can not do it. Suppose the case which actually occurred, as appears in the case of *Goddard v. Pratt*, 16 Pick. 412, that a manufacturing corporation pass a vote or by-law, providing that all their mercantile business shall be done and contracts made in the name of a partnership whose stock they have taken, and to whose business they have succeeded. This may be wise in such a case, in order to keep up an established, extensive, and valuable correspondence, and retain the run of custom and good-will of an old-established firm. That case was the reverse of the present, and the struggle there was to charge the firm, who defended on the ground that their firm name designated the obligations of the company, and not their own; and the case turned on the question, whether the plaintiff, when he dealt with them, knew of the dissolution of the old firm; if he did not, then by a well-known rule of the law of partnership, the firm was bound to him, not having given notice of their dissolution. Had the

point in that case been, whether the corporation were bound, we can have no doubt that they would have been held bound by their vote for notes made in the name designated.

It was further relied on by the defendants, that it was not the intention of Horace Gray & Co. to give the note of the Boston Iron Company, even if they had authority so to do; but further, that there was no evidence that they had such authority. In regard to the first, it depended wholly upon the weight or sufficiency of the evidence, which, for reasons already given, we do not go into. As to the authority, it requires some further consideration. Undoubtedly, to charge a party by the act of an agent, and corporations can be charged in no other way, it is incumbent on the plaintiff to prove the authority of the agent. But how is such authority to be proved? No doubt, the vote of the corporation entered on their records or minutes is the regular and proper evidence; but suppose they pass no votes, or keep no records, or refuse to produce them, and yet *de facto* transact a large amount of business. If the authority of agents could be proved in no other way than by the production of such a vote, those who deal with them would have but a precarious security for their rights. But we think that it is established by the cases cited, and by many others which could be produced, that having proved the constitution of a corporation by the act of incorporation, and the acting under it by the persons incorporated and their associates, the powers of agents as well as any other fact necessary to charge them may be proved by corporate acts, and by the acts of persons professing to be their agents and servants, and the tacit acquiescence of the corporation. This was decided in the cases of *Narragansett Bank v. Atlantic Silk Company* and *Westcott v. Same*, 3 Metc. 282. In these cases, the defendants had refused, on notice, to produce their records. But so far as third persons are concerned, the production of books, which contain no entry on the subject, is the same as if they had refused on notice to produce their books. Corporations, like natural persons, may be bound by such acts, as proving either a previous authority or a subsequent ratification. When a corporation consists of a small number of persons, like a partnership, they may transact all their business by conversation, without formal votes; and it would be a violation of the plainest principles of justice, to hold those who deal with them to prove all their acts by written votes, which they do not keep or do not produce. And inasmuch as the powers of agents may be proved by extraneous evidence, the extent and

limitation of their powers may be proved in the same manner. And when general and very large powers are exercised by an agent or firm apparently intrusted with the entire business of the corporation, and no vote appears on the production of their records, prescribing or limiting their powers, the corporation are as well bound by the declarations and statements of such agents, upon the subject of the dealings of the corporation, and whilst acting therein, as by their acts and contracts. Such declarations and statements of agents, made in connection with their dealings, are *res gestæ*.

The next objection is to the qualification annexed by the judge to the sixth instruction prayed for and given. The objection is that it assumed a hypothetical case, of which there was no evidence. Whether there was any evidence we can not judge; but if there was none, it was a mere illustration and explanation of a rule of law, which could not mislead the jury: *Dole v. Thurlow*, 12 Metc. 157.

The next question turns upon the eighth request for instructions. The prayer is as follows: The judge is requested to instruct the jury, "that the acts of Horace Gray & Co., and the knowledge of Horace Gray & Co., are not the acts and knowledge of the defendants, except in those matters which were within the scope of their authority as agents; and that if they, without authority from the defendants, held out to the public that the names of Horace Gray & Co. would bind the defendants, the defendants were not bound by the knowledge of Horace Gray & Co. that they had so held themselves out; and it was necessary to bring home knowledge to the defendants in some other way than by showing knowledge by Horace Gray & Co." This instruction was given, and the position there taken, and the principles of law therein stated, declared to be correct, but accompanied with the further instruction, that if Horace Gray and Horace Gray & Co. were the general and only agents of the defendants vested with full powers to act in their behalf in all matters of purchase and sale, and in giving notes, and in all the business of the defendants; and the concerns of the Boston Iron Company, in the way of business, were wholly transacted by them, and no others, and that such had been the case for a series of years, and this had knowingly been permitted by the defendants; then it was competent for the jury to find that the defendants had notice of these acts of using the signature of Horace Gray & Co. for the Boston Iron Company, as promisors of notes, and to infer that they had sanctioned them. Whether

these acts were so frequent, and of such a character, as to satisfy the jury that Horace Gray & Co. did so conduct, etc., was wholly left to the jury, under the various instructions given in the case.

The court are of opinion, that this instruction, as given to the jury by the presiding judge, with this qualification and commentary on the evidence, was correct.

The request for instructions assumed a state of facts, which did not constitute the whole case. If the request was founded on the ground that the agents had no authority to use any other name than the corporate name of the defendants, in giving notes and that it could not be within the scope of their authority to do so without express authority, or without a vote, or the production of written authority; then, for reasons already given, we think it was not correct in point of law, and ought not to have been given. But if such authority, like all other authority, could be proved by evidence *aliunde*, then the only question was, what was their authority, what were its extent and limits, and whether the acts and declarations in question were within its scope; and then it seems to us, that it was proper, and that the judge was bound, to add the qualifications stated, and to submit the question to the jury.

Some objection was made that the judge declined to give the seventh instruction requested, that if the plaintiff, at the time of the delivery of the last two cargoes of coals to the Massachusetts Iron Company, knew that they were to be used by them, and in point of fact Horace Gray & Co., as agents of the Boston Iron Company, had no authority to deliver coals of the Boston Iron Company to the Massachusetts Iron Company, the plaintiff could not charge the defendants for those deliveries. This assumes the whole question in controversy, that these agents had no authority to sell. But it does not turn upon that; the effect of the instruction was, that if the goods were delivered at places designated by the defendants' agents, being the same agents by whom they were purchased, this was a good performance of the contract, without regard to the question whether they were to be used by the defendants or not. This, we think, was correct.

Judgment must therefore be entered on the verdict for the plaintiff.

NOTE DEEMED PAYMENT, WHEN AND WHEN NOT: See *Arnold v. Delano*, 50 Am. Dec. 754, and cases cited in the note thereto. In *Wyman v. Fabens*, 111 Mass. 81, the principal case is cited and distinguished as one of a class of

decisions where several being liable on the same contract, the note of one or of an agent is taken for some temporary use or convenience and the original contract is not affected.

PRESUMPTION OF PAYMENT BY ACCEPTANCE OF NOTE may be rebutted: *Manesly v. McGee*, 4 Am. Dec. 105; *Varner v. Nobleborough*, 11 Id. 48; *Perrin v. Keene*, 36 Id. 759. That the giving of a note for a pre-existing debt is only *prima facie* evidence of payment in those states where the Massachusetts doctrine prevails, is well settled: *Hutchins v. Olcott*, 24 Id. 634; *Lazell v. Lazell*, 36 Id. 352; *Perrin v. Keene*, Id. 759. In other states, as will be seen upon an examination of the cases referred to in the note to *Arnold v. Delano*, 50 Am. Dec. 754, a note is not even *prima facie* evidence of payment, unless it is so agreed between the parties. Hence, under either rule, if it be shown not to have been so intended, it is no payment.

RIGHT OF PAYEE OF NOTE TO RECOVER ON ORIGINAL CONSIDERATION, where the note is unavailable, and necessity of producing the note to be canceled: See *Holmes v. De Camp*, 3 Am. Dec. 293; *Glenn v. Smith*, 20 Id. 452; *Wyman v. Rae*, 37 Id. 70. As to the right to recover against a corporation upon the original liability where a note of an agent has been taken which does not bind the corporation, see *Emerson v. Providence Hat Mfg. Co.*, 7 Id. 66. See, generally, as to the right of recovery on the money counts where there is a special contract, *Tebbetts v. Pickering*, ante, 48, and citations in the note thereto.

NOTE BY AGENT OF CORPORATION IN HIS OWN NAME BINDS CORPORATION, when: *Despatch Line v. Bellamy Mfg. Co.*, 37 Am. Dec. 203. See also *Commercial Bank v. Newport Mfg. Co.*, 35 Id. 171; *Merchants' Bank v. Central Bank*, 44 Id. 665. And see *Barker v. Mechanic Fire Ins. Co.*, 20 Id. 664, holding a note by the president of a corporation in his own name not to be binding on the corporation. That a note payable to the "cashier" of a bank may be indorsed by the bank and proved by parol to be its property, is held, citing the principal case, in *Walker v. Popper*, 2 Utah, 98. See, on that point, *Rose v. Laffan*, 42 Am. Dec. 376 and note.

CORPORATION OR PARTNERSHIP MAY ADOPT NAME of its agent, or other name, for business purposes, so that acts done in that name will bind it as effectually as its regular name, but clear and cogent proof that the act is in fact the act of the corporation or firm: *Brown v. Parker*, 7 Allen, 338; *Williams v. Robbins*, 16 Gray, 82. Parol evidence that the name "Pompton Iron Works" in a bill is the adopted name of a certain firm, is admissible: *Fuller v. Hopper*, 3 Gray, 341, all citing the principal case. See also *Bank of Rock-eter v. Monteath*, 43 Am. Dec. 681, and note.

MISNOMER OF CORPORATION IN CONTRACT, EFFECT OF: See *Berks etc. Turnpike Road v. Myers*, 9 Am. Dec. 402; *Hagerstown Turnpike Road v. Creeger*, Id. 495; *Culpeper Mfg. Soc. v. Digges*, 18 Id. 708, and notes.

CORPORATION MAY BE BOUND BY IMPLIED CONTRACT: See *Hayden v. Middlesex Turnpike*, 6 Am. Dec. 143; *Canal Bridge v. Gordon*, 11 Id. 170; *Mott v. Hicks*, 13 Id. 561, note.

AUTHORITY OF AGENT TO BIND CORPORATION MAY BE IMPLIED from corporate acts, from circumstances, from subsequent assent or ratification, etc.: *Ridgway v. Farmers' Bank*, 14 Am. Dec. 681; *Frankfort etc. Co. v. Churchill*, 17 Id. 159; *Pennsylvania etc. Co. v. Dandridge*, 29 Id. 543; *Everett v. United States*, 30 Id. 584; *Despatch Line v. Bellamy Mfg. Co.*, 37 Id. 203; *American Ins. Co. v. Oakley*, 38 Id. 561; *Planters' Bank v. Sharp*, 43 Id. 470; *Merchants' Bank v. Central Bank*, 44 Id. 665; *Bank of the State v. Comegys*

46 Id. 278; *Mayall v. Boston etc. R. R.*, 49 Id. 149, and cases cited in the notes thereto. The principal case is cited as an authority to the same effect, in *Sherman v. Fitch*, 98 Mass. 64; *Sceery v. Springfield*, 112 Id. 514. Evidence that one has acted as president of a corporation without proof of a vote of the directors, is sufficient evidence of authority to indorse note as such president: *Topping v. Bickford*, 4 Allen, 122, also citing *Melledge v. Boston Iron Co.*

INSTRUCTION ON PARTIAL STATEMENT OF EVIDENCE in prayer, whether court bound to give: See *Whiteford v. Burckmyer*, 39 Am. Dec. 640, and the note thereto. See also *Stockton v. Frey*, 45 Id. 138, and note.

INSTRUCTION ASSUMING FACTS OF WHICH THERE IS NO PROOF should be denied: *Whiteford v. Burckmyer*, 39 Am. Dec. 640. See also *Harvey v. Thomas*, 36 Id. 141, and note. And generally, instructions which are irrelevant and inapplicable to the case should not be given, as they tend to mislead the jury: *Stout v. McAdams*, 33 Id. 141. The court is not authorized to give instructions on abstract principles of law: *Zachary v. Pace*, 47 Id. 744. But that erroneous abstract instructions which could not mislead the jury are no ground of reversal, see *Arthur v. Broadnax*, 37 Id. 707; *Porter v. Woods*, 39 Id. 153; *Armstrong v. Tait*, 42 Id. 656; *Zachary v. Pace*, 47 Id. 744, and notes.

DELIVERY OF GOODS AT TIME AND PLACE APPOINTED is a good performance of a contract therefor: *Case v. Green*, 30 Am. Dec. 311.

CASES
IN THE
SUPREME COURT
OF
MICHIGAN.

PEOPLE v. RICHARDS.

[1 MICHIGAN, 216.]

INDICTMENT FOR CONSPIRACY TO CHEAT AN INDIVIDUAL will lie.

CRIME OF CONSPIRACY DOES NOT DEPEND UPON KIND OF PROPERTY which it was the object of the conspiracy to obtain; and an indictment for conspiracy to cheat an individual out of lands lies.

CONSPIRACY MAY BE INDICTABLE although the act to be done, if done by an individual, or the means made use of, would not be indictable; the doctrine that an indictment only lies for conspiracy to commit a crime or to do a lawful act by criminal means denied.

CONSPIRACY TO COMMIT MISDEMEANOR IS NOT MERGED in the misdemeanor, *semble*.

INDICTMENT DOES NOT CHARGE CONSPIRACY TO CHEAT BY FALSE PRETENSES where the acts charged as done were, that one F. was about to prosecute the defrauded person for an attempt to commit a rape upon his daughter, and that by the testimony of the daughter he would be convicted and sent to the state prison, and must leave the state; the charges are not of existing facts, but of things which a third person has threatened to do—upon which no indictment for false pretenses can be predicated.

AGREEMENT OR COMBINATION MUST BE SET OUT IN INDICTMENT FOR CONSPIRACY; the crime does not consist in the mere combination, but where to this is added an illegal object, then it becomes criminal; and where neither the conspiracy nor the object to be attained is unlawful, but the means by which it is to be executed are criminal, then it is necessary to set out the means intended to be used, as a component part of the offense.

OFFENSE OF CONSPIRACY DEPENDS UPON THE UNLAWFUL AGREEMENT, and not on the act which follows it; the acts are but evidence of the agreement.

INDICTMENT FOR CONSPIRACY USUALLY SETS OUT OVERT ACTS, such as may have been done by any one or more of the conspirators in order to effect the common purpose of the conspiracy, but this is not essentially necessary.

GENERAL CHARGE OF CONSPIRACY IN INDICTMENT, stating the object and intent, is sufficient.

WHERE CONFEDERACY TO DO UNLAWFUL ACT IS INDICTABLE, although no means have been agreed upon, an indictment for such an offense, where the means were agreed upon, need not state them, as they form no part of the offense, and it is complete without them.

PERSONS ARE INDICTABLE FOR CONSPIRACY, where they agree to cheat a third person out of his lands and goods, and in pursuance of the agreement falsely pretend that one F. is about to prosecute him for an attempt to commit a rape upon his daughter, and that by the testimony of the daughter he will be convicted and sent to the state prison, and must leave the state.

INDICTMENT for conspiracy, containing three counts; the first two counts charged, substantially, that Richards and Pelton conspired to cheat one Laton Hoxie of his lands, tenements, goods, etc.; that in pursuance of this agreement, they falsely pretended that one Farmer was about to prosecute Hoxie for an attempt to commit a rape upon his infant daughter, and that by the testimony of the daughter he would be convicted and sent to the state prison; that Richards and Pelton knew that Farmer would not prosecute the pretended charge, but Hoxie, being a man of weak intellect, was persuaded to convey to them his lands, tenements, goods, etc., without consideration. The third count charged the defendants generally with unlawfully conspiring to cheat Hoxie out of his lands, tenements, goods, etc. The defendants were tried and found guilty. The questions reserved were as to the sufficiency of the indictment.

Howell, for the people.

Backus, *contra*.

By Court, WING, J. The counsel for the defendants insists that cases of indictable conspiracies at common law are classed under two heads; either there must be a charge of a conspiracy to commit a criminal act, or to commit an act not criminal by criminal means. That in the one case the offense is to be determined by the nature of the object, in the other by the nature of the means.

This question was elaborately argued by Senators Spencer and Stebbins, the first giving the judgment of the majority, and the latter of the minority of the court of errors in New York, in the case of *Lambert v. The People*, 9 Cow. 578. The charge set forth in the indictment in that case was in substance that the defendants conspired, by wrongful and unjust means, to cheat the Sun Fire Insurance Company and other persons of their goods and

chattels; and that in the execution of said conspiracy and in pursuance thereof, and by certain indirect and undue means, did cheat and defraud the said company of their goods, chattels, and effects—describing them—and thereby impoverished and injured the company, etc.

The supreme court sustained the indictment, but their judgment was reversed by the court of errors. There were many points made and decided in that case, some of which are raised in this case. Upon a careful examination of the arguments of the court and the senators, we are constrained to adopt the views of the supreme court and the minority of the senate, as being sustained by the common-law decisions.

In Arch. Cr. Pl. 507, the author says a conspiracy is an agreement between two or more persons: 1. Falsely to charge another with a crime punishable by law—either from a malicious or vindictive motive or feeling towards the party, or for the purpose of extorting money from him; 2. Wrongfully to injure or prejudice a third person or any body of men in any other manner; 3. To commit an offense punishable by law; 4. To do an act with an intent to pervert the course of justice, etc. 3 Chitty's Cr. L. 1139; 1 Hawk. P. C., b. 1, c. 72, sec. 2, support the same doctrine. In the second class we have an authority for an indictment for a conspiracy to cheat an individual: See 7 Am. Jurist, 445. It is said, however, that an indictment will not lie for a conspiracy to commit any mere civil trespass: Arch. Cr. Pl. 507.

Mr. Chitty, at the page cited above, says, "there are perhaps few things left so doubtful in the criminal law as the point at which a combination of several persons in a common object becomes illegal; certain it is, that there are many cases in which the act itself would not be cognizable by law if done by a single person, which becomes the subject of indictment when affected by several with a joint design." He further remarks, "it might be inferred from the decisions that, to constitute a conspiracy, it is not necessary that the act intended should be in itself illegal, or ever immoral—that it should affect the public at large, or that it should be accomplished by false pretenses; and, though it is agreed that the gist of the offense is the union of persons, it is impossible to conceive a combination, as such, to be illegal. We can rest, therefore, only on the individual cases decided, which depend in general upon particular circumstances, and which are not to be extended."

The counsel for defendants in this case cites the last sentence

of the last quotation, which is taken from the remarks of Lord Ellenborough in the case of *The King v. Turner*, 13 East, 231, to show that even if an indictment for a conspiracy to commit a fraud upon an individual will lie, yet it can not lie where the object of the conspiracy is to defraud him of his lands; and the indictment being bad as to land, is bad as to all. In the case cited, the indictment was for a conspiracy to commit a civil trespass, by going on to another person's land to kill hares. It was held the indictment would not lie, and Lord Ellenborough's remark was made in reference to such a case. The judge can not be supposed to have intended to say that an indictment for a conspiracy to cheat an individual would only lie in cases where the facts were the same as those in which indictments had been sustained. He only objects to the extension of the doctrine to cases where the principles laid down in former cases were not involved.

By reference to the cases, I am unable to perceive that they depend upon the kind of property to obtain which was the object of the conspiracy. In this, as in many of the cases, the intended fraud or cheat gives character to the transaction, and not the nature of the property. It is true, that fraud in relation to real estate resolves itself into some other distinct offense when consummated; but the same may be said of all kinds of property. We do not pretend to lay down a rule which shall govern in this class of cases—we only say, that from an examination of the cases cited by elementary writers, we are of the opinion that this case falls within the general principles deducible from those cases.

It is insisted that the first two counts are bad, because they charge an executed conspiracy to cheat by false pretenses, which is a higher crime than a conspiracy at common law.

The objection is founded upon another, made in this cause, that an indictment will only lie for a conspiracy to commit a crime, or to do a lawful act by criminal means; but the English authorities and the decisions in Maryland and other states establish, as we think, and as we have said, a contrary doctrine: and if a conspiracy may be indictable, although the act to be done, if done by an individual, or the means made use of, would not be indictable, it would follow from the position of the defendant's counsel, that a conspiracy which is a misdemeanor may be merged in acts which of themselves do not amount to a misdemeanor, or acts which in themselves amount only to a misdemeanor, an offense of the same grade with the conspiracy; and

the consequence might also be that a conspiracy might be indictable if not executed, which, if executed, would not be indictable.

It was said in an early case in Massachusetts, *Commonwealth v. Kingsbury*, 5 Mass. 106, that where the misdemeanor or felony is actually executed, the conspiracy is merged and can not be punished. But the case was one of a conspiracy to commit a distinct felony. It is no doubt the law, that if the felony is proved, the conspiracy must at once merge. To apply such a rule to misdemeanors is scarcely in accordance with legal analogy, and it is supported by no other authority. That it never obtained in England to such an extent as to involve the absorption of a conspiracy to commit a misdemeanor in the misdemeanor itself, is evident from the elementary treatises, in which no such doctrine is even broached, and the books of precedents, in which forms constantly occur for conspiracies to commit misdemeanors to which the overt act is attached: See *State v. Murray*, 15 Me. 100; *Commonwealth v. Gillespie*, 7 Serg. & R. 469 [10 Am. Dec. 475]. This subject was fully discussed in New York, in the case of *The People v. Mather*, 4 Wend. 265 [21 Am. Dec. 122]. Justice Marcy says, in delivering the opinion of the court: "It is supposed that a conspiracy to commit a crime is merged in the crime when the conspiracy is executed. This may be so when the crime is of a higher grade than the conspiracy, and the object of the conspiracy is fully accomplished; but a conspiracy is only a misdemeanor, and when its object is only to commit a misdemeanor, it can not be merged. Where two crimes are of equal grade there can be no legal, technical merger."

But we are disposed to go no further than is necessary to decide this case, and if our views as expressed above are not correct, still the question made by the defendants' counsel may be disposed of on another ground.

Does it appear by the indictment in this case, as in the case of *Commonwealth v. Kingsbury*, 5 Mass. 106, that an offense of a higher grade than a conspiracy has been committed? Would the acts set forth as having been done in pursuance of the conspiracy, if true, make defendants guilty of a cheat, or of obtaining goods or property of any kind by false pretenses, or of having obtained the signature to any written instrument? I think not. Neither of the counts charge, as is supposed by defendants' counsel, a conspiracy to cheat by false pretenses. The means by which the conspiracy was to be accomplished, formed no

part of the conspiracy. They are set forth in the indictment as acts done in pursuance or in furtherance of the conspiracy. The acts charged as done, were, that one Thomas Farmer was about to prosecute—to charge Hoxie with an attempt to commit a rape upon Farmer's daughter; that by the testimony of the daughter he would be convicted and sent to the state prison, and he must leave the state. This is the substance of the pretenses. In the class of cases stated, the tokens must be false, and the pretenses must be of some existing fact, and must be made for the purpose of inducing the prosecutor to part with his property, and it must appear that the object was effected by such means as are stated; but this does not appear in this case. The pretense that a person would do an act which he did not mean to do, as a pretense that he would pay for goods on delivery, is not a false pretense within the act, but merely a promise for future conduct: Arch. Cr. Pl. 246; 4 City Hall Recorder, 156; Rosc. Cr. Ev., 2d ed., 422; *Rex v. Codrington*, 1 Car & P. 661; *Young v. Rex*, 3 T. R. 98.

Our statute is taken from the English statutes, and the decisions upon the latter are applicable to cases arising under the former. If I am correct in this view of the subject, it will obviate the necessity of further discussing the doctrine of merger. The charges are not of existing facts: but of things which a third person has threatened to do—upon which no indictment can be predicated. The forms in 3 Chit. Cr. L. 1185, 1186, are examples of indictments for executed conspiracies.

Again, it is objected that the indictment charges that the defendants induced and persuaded Hoxie to make his deed, but does not set forth the means. This objection is also in part predicated upon the erroneous assumption that the object to be accomplished must be a crime, or the means must be criminal. The objection may also be based upon the general rule, that in all indictments the offense must be so set forth as to enable the court to judge whether an offense requiring the defendant to plead is stated upon the record. The agreement or combination must be set out. The crime does not consist in the mere combination: but where to this is added an illegal object, then it becomes criminal; and when neither the conspiracy nor the object to be attained is unlawful, but the means by which it is to be executed are criminal, then it is necessary to set out the means intended to be used, as a component part of the offense.

In every case that can be adduced of a conspiracy, the offense depends upon the unlawful agreement, and not on the act which

follows it; the latter is but the evidence of the former: 2 Russ. Cr. L. 568; *Commonwealth v. Tibbets*, 2 Mass. 537; *Rex v. Spragg*, 2 Burr. 993; *Rex v. Rispal*, 3 Id. 1321. In 3 Chit. Cr. L. 1141, it is said, that to render the offense complete, there is no occasion that any act should be done in pursuance of the unlawful agreement entered into between the parties, still less can it be necessary to show that any party was actually defrauded; for the conspiracy is the essence of the charge, and, if that be proved, the defendant will be convicted.

It is usual to set out the overt acts, such as may have been done by any one or more of the conspirators in order to effect the common purpose of the conspiracy, but this is not essentially necessary: *Rex v. Gill*, 2 Barn. & Ald. 204; *Rex v. Spragg*, 2 Burr. 993; *Rex v. Rispal*, 3 Id. 1321; Stark. Cr. Pl. 170, 171; *People v. Mather*, 4 Wend. 264 [21 Am. Dec. 122].

What we have said disposes of another point made by defendants' counsel, viz.: That the third count of the indictment is bad, as being too general. The forms given in 3 Chit. Cr. L. 1185, embrace the general count contained in this indictment. It states the object and the intent: 3 Chit. Cr. L. 1143.

Thus we understand the common law to be upon all these points. In the case of *Lambert v. The People*, it was strongly urged by Senator Spencer, that unless the means by which the fraud was effected were set out in the indictment, the defendant would have no means of knowing for what he was to be tried, until the moment when the public prosecutor opens his testimony on the trial; that it opens the way to general and indefinite charges; that such an indictment ought not to be sustained in a country which regards every citizen as composing a part of its sovereignty. But the reply of Senator Stebbins is unanswerable. Referring to Chitty and Russell, he says these authorities are quite sufficient to establish the proposition that the offense consists in the act of combining unlawfully; that where the object is unlawful the offense is complete, whether the means of execution were agreed upon or not; that it is not requisite those means should form any part of the agreement, unless the agreement is thereby rendered unlawful. If, then, a confederacy to do an unlawful act, although no means be agreed upon, is indictable, it follows, that in an indictment for such an offense, where the means were agreed upon, it would be unnecessary to state them, because they form no part of the offense; it is complete without them. In the one case the means could not be set out; in the other it would as certainly be unnecessary.

The question whether the common law should be altered by statutory provision, restricting indictments for conspiracy to defraud an individual, to cases where the object is to commit an offense, or where the means are criminal, as has been done in New York, must be determined elsewhere.

Certified accordingly.

CONSPIRACY, DEFINITION AND NATURE OF.—GENERAL PRINCIPLES RELATING TO.—Conspiracy, according to the modern law, is an agreement or combination between two or more persons to do an unlawful act, or to do a lawful act by unlawful or criminal means: *Regina v. Vincent*, 9 C. & P. 109; *Regina v. Bunn*, 12 Cox C. C. 316; *Smith v. People*, 25 Ill. 17; *Heaps v. Dunham*, 95 Id. 533; *State v. Potter*, 28 Iowa, 556; *State v. Buchanan*, 5 Harr. & J. 317; S. C., 9 Am. Dec. 534; *State v. Bartlett*, 30 Me. 134; *State v. Hewitt*, 31 Id. 398; *State v. Mayberry*, 48 Id. 218; *Commonwealth v. Hunt*, 4 Met. 111; S. C., 38 Am. Dec. 346; *State v. Burnham*, 15 N. H. 396; *Commonwealth v. Ridgway*, 2 Ashm. 247; *Alderman v. People*, 4 Mich. 414; *Hinchman v. Richie*, Bright. 143; *Commonwealth v. Bliss*, 12 Phil. 580; *Commonwealth v. Haines*, 11 Rep., N. S., 413; 2 Stephen's Hist. Crim. L. of England, 227; 2 Bishop's Crim. L., sec. 175, 7th ed.; 2 Archbold's Crim. Pr. & Pl. 1829, n. (Pomeroy's notes); Bouvier's L. Dict., "Conspiracy;" Abbott's L. Dict., "Conspiracy." At the ancient common law, the word had a very much narrower meaning. Indeed, "in very early times, the word had a completely different meaning from that which we attach to it:" 2 Stephen's Hist. Crim. L. of England, 227. But this meaning has been gradually enlarged until it has reached its present extended signification. For a history of the meaning of the crime the reader is referred to the above writers, also to 3 Chit. Crim. L. 1138; 3 Russell on Crimes, 9th ed., 116; Roscoe's Crim. Ev., 7th ed., 409. In conspiracy the gist of the offense is the unlawful combination or agreement: *The Queen v. Button*, 11 Q. B. 929; *Rez v. Rival*, 3 Burr. 1320; S. C., 1 W. Black. 368; *The King v. Gill*, 2 Barn. & Ald. 204; *Regina v. Best*, 1 Salk. 174; *United States v. Miller*, 3 Hughes, 553; *United States v. Donau*, 11 Blatch. 168; *State v. Adams*, 1 Houst. Cr. Cas. 361; *State v. Rowley*, 12 Conn. 112; *State v. Bradley*, 48 Id. 549; *State v. Sterling*, 34 Iowa, 444; *Commonwealth v. Tibbets*, 2 Mass. 536; *Commonwealth v. Warren*, 6 Id. 74; *Commonwealth v. Davis*, 9 Id. 415; *Commonwealth v. Hunt*, 4 Met. 111; S. C., 38 Am. Dec. 346; *Commonwealth v. Shedd*, 7 Cush. 514; *Commonwealth v. Wallace*, 16 Gray, 223; *Alderman v. People*, 4 Mich. 414; *State v. Pule*, 12 Minn. 164; *State v. Burnham*, 15 N. H. 396; *State v. Christianbury*, Bush. L. 48; *Commonwealth v. Ridgway*, 2 Ashm. 247; *Collins v. Commonwealth*, 3 Serg. & R. 220; *Commonwealth v. McKisson*, 8 Id. 220; *Commonwealth v. Corlies*, 8 Phil. 450; *Twitchell v. Commonwealth*, 9 Pa. St. 211; *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Id. 173; *State v. Noyes*, 25 Vt. 415. When the unlawful agreement is established, the offense is complete. The object need not be attained, nor need anything be done in pursuance of the agreement. No overt act need be proved; it is an offense complete and consummate in itself: *The Poulterer's Case*, 9 Co. 55; *Rez v. Kinnerley*, 1 Stra. 193; *Regina v. Best*, 2 Id. Raym. 1167; S. C., 1 Salk. 174; *United States v. Donau*, 11 Blatch. 168; *State v. Carwood*, 2 Stew. 360; *Landringham v. State*, 49 Ind. 186; *State v. Buchanan*, 5 Har. & J. 317; S. C., 9 Am. Dec. 534; *Alderman v. People*, 4 Mich. 414; *State v. Pule*, 12 Minn. 164; *Isaacs v. State*, 48 Miss. 234; *State v. Straw*, 42 N. H. 392; *State v. Rickey*, 9 N. J. L. 293; *People v. Mather*, 4 Wend. 229; S. C.,

21 Am. Dec. 122; *State v. Younger*, 1 Dev. L. 357; S. C., 17 Am. Dec. 571; *State v. Christianbury*, Busb. L. 48; *Hinchman v. Richie*, Bright. 143; *Respublica v. Ross*, 2 Yeates, 1; *Commonwealth v. Corlies*, 8 Phil. 450; *Collins v. Commonwealth*, 3 Serg. & R. 220; *Commonwealth v. McKisson*, 8 Id. 420; *Commonwealth v. Bliss*, 12 Phil. 580; *Heine v. Commonwealth*, 91 Pa. St. 345; *Johnson v. State*, 3 Tex. App. 590; *State v. Noyes*, 25 Vt. 415. "The offense of conspiracy is committed when to the intention to conspire is added the actual agreement:" *United States v. Donau*, 11 Blatch. 168; nor need the means be settled and resolved on at the time of the conspiracy: *The King v. Gill*, 2 Barn. & Ald. 204; much less need the conspirators succeed: *State v. Norton*, 3 Zab. 33. If overt acts were charged in the indictment and sustained by proof, such acts would be merely matter of aggravation: *State v. Noyes*, 25 Vt. 415; *Collins v. Commonwealth*, 3 Serg. & R. 220; or evidence of the crime: *Commonwealth v. Corlies*, 8 Phil. 450. But in New Jersey, although it was acknowledged that such were the common-law doctrines, still under the statute some act must be done in execution of the design agreed upon to complete the offense: *State v. Norton*, 3 Zab. 33.

A conspiracy must be shown, and evidence that each one acted illegally or maliciously will not support an action for a conspiracy, without proof that the defendants conspired together: *Newell v. Jenkins*, 26 Pa. St. 159 (compare *Re v. Cope*, 1 Stra. 144); and there must be a direct intention that injury shall result from the conspiracy, or the object must be to benefit the conspirators to the prejudice of the public or the oppression of the individual: *Commonwealth v. Ridgway*, 2 Ashm. 247. The agreement may be express or implied, and it is not essential that any but the leading conspirator know the exact part which each is to perform: *United States v. Rindskopf*, 6 Biss. 259. And if it be proved that the defendants pursued by their acts the same object, often by the same means, one performing one part and another another part of the same object, the jury will be justified in the conclusion that they were engaged in a conspiracy to effect that object: *The Mussel Slough Case*, 5 Fed. Rep. 680. The conspirators might not be even acquainted with each other: *People v. Mather*, 4 Wend. 229; S. C., 21 Am. Dec. 122. And when a number of persons meet together for different purposes, and afterwards join to execute one common purpose to the injury of the property of another, it is a conspiracy, and it is not necessary to prove any previous plan amongst them against the person injured: *Lowery v. State*, 30 Tex. 402. Nor would it be a defense to say that the whole scheme was concocted before he became an associate: *Den d. Stewart v. Johnson*, 3 Harr. (N. J.) 87.

Many acts which, if done by an individual, are not indictable, are punishable criminally when done in pursuance of a conspiracy between two or more persons: *State v. Rowley*, 12 Conn. 101; and the act of an individual may be lawful, and yet, if he combines with others to do the same act, with the intention to prejudice the public to his own benefit, if prejudice and oppression are the necessary consequences, he may commit an indictable offense: *Commonwealth v. Tack*, 1 Brews. 511. Wharton, in his work on Criminal Law, does not approve of extending the law on this point. In section 2288 of the seventh edition of his work, he says: "Undoubtedly it has been held that there are cases in which persons may be indicted for an offense committed in concert, when they would not be severally indictable for such offense if committed individually. These decisions can not now be shaken, except by the courts who pronounced them; but any further extension of conspiracy in this direction should be resolutely opposed. A distressing uncertainty will oppress the law if the mere fact of concert in doing an indif-

ferent act will be held to any greater extent than at present to make such act criminal. We all know what offenses are indictable, and if we do not, the knowledge is readily obtained. Such offenses, when not defined by statute, are limited by definitions which long processes of judicial interpretation have hardened into shapes which are distinct, solid, public, and permanent. It is otherwise, however, when we come to speak of acts which are *quasi* criminal or immoral. These there has never been any judicial attempt to define or legislative attempt to codify. No man can know in advance whether any particular enterprise in which he may engage falls under either of these heads. The chief object of penal jurisprudence is to prevent crime by attaching penalties to specific offenses. Here, however, there are no specific offenses to which penalties can be attached. * * * Nor can we continue to accept the reasons by which this indefinite extension of conspiracy has been justified. It used to be said that the combination of two or more persons to do an act invests it with a criminality which it does not otherwise possess. Undoubtedly this is so with riot, which depends on tumult, which again depends on plurality of agents; but riot is positively defined by the law, and all who engage in a riot have means to know what it is, and know that it is punishable. But can this be predicated of combinations which the law does not in advance pronounce to be unlawful? One of two alternatives we must here accept. We must, with the old English judges, look upon all voluntary combinations as suspicious, and objects of judicial suppression, or we must declare that only such combinations are penally cognizable, as are declared beforehand to be unlawful."

Conspiracy is, in its nature, a joint offense, and it can not be committed by one alone; but the proof must show that two or more persons were engaged in the offense: *Pollard v. Evans*, Show. 380; *United States v. Miller*, 3 Hughes, 553; *Evans v. People*, 90 Ill. 334; *State v. Christianbury*, Busb. L. 48; *Commonwealth v. Manson*, 2 Ashm. 31; *Commonwealth v. Irwin*, 8 Phil 380. Consequently an action for conspiracy will not lie against a husband and wife alone, because they are but one person: *Kirtley v. Deck*, 2 Munf. 15; although if a man and woman marry in the name of another for the purpose of raising a specious title to the estate of the person whose name is assumed, it is a conspiracy: *The King v. Robinson*, 1 Leach C. C. 37; and if two persons alone are indicted, both must be convicted, and an acquittal of one would be an acquittal of the other: *State v. Tom, a Slave*, 2 Dev. L. 569; *Jones v. Baker*, 7 Cow. 445; and the effect would be the same if a *nolle prosequi* was entered as to one. In such a case a verdict of guilty against the other could not be sustained: *State v. Jackson*, 7 S. C. 283; S. C., 24 Am. Rep. 476. But a judgment may be given against one before a conviction of the other: *Rex v. Kinnersley*, 1 Stra. 193; and one of them can not, on a writ of error, object to a discontinuance of process against the other: *Wright v. The Queen*, 14 Q. B. 148. A conviction of two persons is not, however, always necessary. Thus if three persons were engaged in a conspiracy, and one of them died before trial and another was acquitted, the survivor may be tried and convicted: *People v. Olcott*, 2 Johns. Cas. 301. And on an indictment alleging that two persons named in it conspired together, together with divers others whose names were unknown, one of the persons indicted may be convicted and the other acquitted, if the jury are satisfied from the evidence that any other persons conspired with him to commit the offense: *State v. Adams*, 1 Houst. Cr. Cas. 361; and on an indictment of three persons, tried separately, if one of them is convicted before the others are tried, the possibility of the others being found not guilty is not a sufficient reason for holding the judgment irregular: *Regina v. Ahearne*, 7 D. & R. 6.

CONSPIRACIES TO CHEAT AND DEFRAUD.—"A diversity of opinion seems to have arisen upon the question, whether, if two or more persons agree to cheat or defraud another of lands or goods, without agreeing upon the particular means to be employed, the conspiracy is then indictable; or whether they must go further and determine the means, when it will be indictable or not, according to the nature of the means. The question indeed, as usually presented in the reports, wears the aspect of one concerning the mere form of the allegation in the indictment; but an accurate examination shows the difference to extend further:" 2 Bishop on Cr. Law, 7th ed., sec. 199. In England it is a settled rule that the indictment need not set forth the means to be used: *Id.*, sec. 200; 2 Wharton on Cr. Law, 7th ed., sec. 2298. In America the rule seems to be different, and it has been held that as cheating and defrauding a person of his property are not necessarily a crime at common law, an indictment charging a conspiracy to cheat and defraud must contain averments setting out the unlawful means by which the object was to be accomplished; this rule has been laid down in Maine: *State v. Williams*, 48 Me. 218; *State v. Roberts*, 34 Id. 320; Massachusetts: *Commonwealth v. Shedd*, 7 Cush. 514; *Commonwealth v. Eastman*, 1 Id. 189; *Commonwealth v. Wallace*, 16 Gray, 223; Michigan: *Alderman v. People*, 4 Mich. 414; New York: *Lambert v. People*, 9 Cow. 578; and *March v. People*, 7 Barb. 391, where it was held that although there may have been an intention to defraud, yet if the means could not possibly have that effect, the offense is not complete; the contrary rule prevails in Pennsylvania: *Commonwealth v. McKisson*, 8 Serg. & R. 420. This subject is discussed in the works of the authors above cited, and treated at length by Bishop in the second volume of his work on Criminal Procedure, sections 204-222, to which the reader is referred. We will proceed to consider those cases in which the question was as to whether the offense proved was itself a conspiracy.

To charge persons with conspiracy to cheat and defraud a third person, there must be a collusion and participation in the scheme or its execution. Mere silent observation and acquiescence are not sufficient. Unless the persons charged, by some deed or word, become parties to the plot to cheat, they neither influence the acts of the person defrauded, nor contribute to his losses, and therefore are not liable to this action: *Brannock v. Bouldin*, 4 Fred. L. 61. An indictment lies for a conspiracy to defraud an individual of his property: *Lambert v. People*, 7 Cow. 167; and also in many cases where, through the false representations of others, a party has been defrauded: *State v. Mayberry*, 48 Me. 218. Thus partners may be convicted of conspiracy to cheat and defraud by a false representation as to the solvency or trade of another, although the representation was oral, and one for which one would not *per se* be liable civilly: *Regina v. Timothy*, 1 Fost. & F. 39; see also *Commonwealth v. Warren*, 6 Mass. 74; and the same, of course, would be true where partners recommended an insolvent person as worthy of credit, whereby the plaintiffs were induced to trust him with goods, which the defendants immediately attached with other goods of the insolvent's, thus causing the plaintiffs to lose their goods: *Patten v. Gurney*, 17 Mass. 182. So where A. and B. conspire to make a representation, knowing it to be false, that horses were the property of a private person, and not of a horse-dealer, thereby inducing a purchase, they are guilty of conspiracy: *Queen v. Kenrick*, 5 Q. B. 49; S. C., D. & M. 208. And so are parties conspiring to buy a horse for much less than its real value, by falsely representing to the seller that the horse is unsound, and that one of them had sold the horse for the smaller price: *Regina v. Carlisle*, Dears. C. C. 337; but no action

can be maintained against persons for falsely representing that a horse is sound unless there is evidence of a concert between the parties to effect a fraud: *Rez v. Pywell*, 1 Stark. 402; and persons inducing the prosecutor to buy certain plated ware at auction, by means of false representations as to its quality, are not liable to indictment, as an agreement between persons to dispose of goods in this way is not conspiracy: *Regina v. Levine*, 10 Cox C. C. 374. Chambers, Common Sergeant, in this case, said: "It is most important not to bring within the criminal law the ordinary enhancing of value and quality by the seller of the goods. There is always a conflict of knowledge and skill between a buyer and seller, the one wishing to buy as advantageously and the other to sell as advantageously as he possibly can, and it would be very dangerous to extend the criminal law to such cases. At present, the line is fixed, and there must be a false representation of an existing fact, operating upon the mind of a buyer, and deceiving him in such a manner that he can not protect himself against it." But a mock auction, with sham bidders, who pretend to be real bidders, for the purpose of selling goods at prices grossly above their worth, is an offense at the common law, and those aiding or abetting such a proceeding may be indicted for conspiracy with intent to defraud: *Rez v. Lewis*, 11 Cox C. C. 404; so also brokers are indictable if they agree before a sale at auction that only one of them shall bid for each article sold, and that all articles thus bought by any of them shall be sold again amongst themselves at a fair price, and the difference between the auction price and the fair price be divided among them: *Levi v. Levi*, 25 Eng. L. & Eq. 377; and so also are those who conspire to separately induce a third person to purchase each other's goods for them at an advanced price, in his own name, without intending to pay for them, thereby intending to charge him with their goods at the advanced price: *State v. Rowley*, 12 Conn. 101; but the fact that the plaintiffs and other buyers of farm produce at a certain village were combined in secret partnership is no ground for the recovery of damages by one who has sold them such produce, from time to time, in ignorance of the partnership, where it appears there was, nevertheless, a healthy competition, and that the defendants were paid a fair market price: *Fairbank v. Newton*, 50 Wis. 628.

A combination to secrete or dispose of the property of a debtor for the purpose of defrauding his creditors is indictable: *Commonwealth v. Goldsmith*, 12 Phil. 632; so would it be if such a combination was for the purpose of avoiding an expected adjudication of bankruptcy, even though the adjudication was not made: *Heyman v. The Queen*, L. R., 8 Q. B. 102; S. C., 12 Cox C. C. 383; or if in pursuance of such a combination, the personality of the debtor was attached and concealed: *Hall v. Eaton*, 25 Vt. 458. In *Heine v. Commonwealth*, 91 Pa. St. 145, H. and others were indicted and convicted for conspiring to defraud creditors; H. being the owner of a store, and assigning the goods in it to a clerk for that purpose. And a general creditor who procures the assignment of a deed of trust which his debtor has given of his exempt personality, and substitutes a trustee who refuses to receive payment, sells the property, and produces a balance which the creditor garnishes, is with his accomplice guilty, if they acted in concert under an agreement to accomplish the result: *Ellzey v. State*, 57 Miss. 827. As conspiracies to obtain goods by false pretenses or to cheat and defraud are indictable: *Johnson v. People*, 22 Ill. 314; *Rhoads v. Commonwealth*, 15 Pa. St. 272, and cases cited *ante*, of course those entering a combination by which one person was to obtain the goods of another on credit, and then abscond, are guilty: *Commonwealth v. Ward*, 1 Mass. 473; *Place v. Minster*, 65 N. Y. 89; but the fact that

a merchant buys goods on credit, and then assigns them to an assignee without consideration, who removes them out of the state, does not make the parties guilty of conspiracy, where the goods were removed with a *bona fide* intent to sell them for the benefit of creditors: *Whitman v. Spencer*, 2 R. L. 124. Persons combining to cheat one of hats by bargaining with him a certain quantity of wine pretended to be good wine of the kingdom of Portugal, called New Lisbon, are indictable: *Queen v. Macarty*, 6 Mod. 301; S. C., 2 East Cr. L. 823; and so are parties conspiring to defraud a party to a contract of exchange, and using a forged deed to effectuate their object: *State v. Bradley*, 48 Conn. 535. Conspiracies between a partner and a third person to cheat the copartner are indictable: *State v. Cole*, 39 N. J. L. 324; *Queen v. Warburton*, L. R., 1 Cr. Cas. Rea. 274; but a complaint for conspiracy by a partner and a third person, by which the third person brought an action against the partner conspiring, who confessed judgment, and thus broke up the business, should be dismissed if the partner owed a debt for the full amount to his co-conspirator, although it was not yet due: *Neudecker v. Kohlberg*, 14 Am. L. Rev. 812.

Employees combining to cheat and defraud the employer are guilty. This rule would apply where the employees of a bank conspire to defraud it: *State v. Buchanan*, 5 Har. & J. 317; S. C., 9 Am. Dec. 534; or where an employee conspired with a third person for that purpose: *Commonwealth v. Foering*, 4 Pa. Law J. R. 29; or where the employees of a dyer used the dyeing materials on articles not intrusted to them for dyeing, and not belonging to themselves or their families, to their employer's loss: *Regina v. Button*, 11 Q. B. 929. An indictment will not lie for a conspiracy to commit a civil injury of any description that is not in itself an indictable offense. Thus, it is not an indictable offense for several persons to conspire to obtain money from a bank by drawing their checks on the bank when they have no funds there: *State v. Rickey*, 9 N. J. L. 293; nor against several persons who induce a testator to revoke a will in favor of a third party by means of false representations, as the revocation merely deprives the devisee of an expected gratuity, without interfering with any of his rights: *Hutchins v. Hutchins*, 7 Hill, 104 (see further, *State v. De Witt*, 2 Hill (S. C.), 282; S. C., 27 Am. Dec. 371, as to the effect of destroying a will to defraud devisees); nor for the sale and transfer of a railroad excursion ticket, unless there was a previous concert between them to obtain the ticket for the purpose of its being fraudulently used: *Regina v. Absolon*, 1 Fost. & F. 498; nor for a conspiracy between two persons to defraud a third in an unlawful enterprise: *State v. Crowley*, 41 Wis. 271; S. C., 22 Am. Rep. 719. On the other hand, an indictment will lie if a man and woman marry in the name of another person for the purpose of raising a specious title to the estate of the person whose name is assumed: *The King v. Robinson*, 1 Leach C. C. 37; or for the destruction or erasure of the indorsement on a promissory note, with intent to defraud: *State v. Norton*, 3 Zab. 33; or for a conspiracy to obtain the prosecutor's acceptance, although he did not intend to take it up, and the bill was never in his hands, except for his acceptance: *Queen v. Gompertz*, 9 Q. B. 824; or for combination to cheat, by offering to sell forged foreign bank notes of a denomination the circulation of which is prohibited by statute: *Twitchell v. Commonwealth*, 9 Pa. St. 211; or for a fraudulent conspiracy to obtain a knowledge of certain things known to so few in a certain business that the knowledge made the business very profitable: *Jones v. Baker*, 7 Cow. 445; or for conspiring to ruin a card-maker's trade, by bribing his apprentices to put grease in his paste, thus spoiling the cards: *Rex v. Cope*, 1 Stra. 144.

Conspiracies to cheat one at gaming are held indictable; as where one con-

spiring to cheat F. S. out of his money, gets him to lay a sum of money on a foot-race and prevails with the party to run booty: *The Queen v. Orbell*, 6 Mod. 42; or a combination to cheat another by making him drunk and defrauding him at cards: *State v. Younger*, 1 Dev. L. 357; S. C., 17 Am. Dec. 571. In *Regina v. Hudson*, Bell C. C. 263; S. C., 8 Cox C. C. 383, the same principle was held. In that case the three prisoners were in a public house with the prosecutor; one of them, in concert with the other two, placed a pen-case on the table and left the room; whilst out, the other two took out the pen and substituted a pin in its place; on the return of the first one, the other two induced the prosecutor to bet him there was no pen in the case; he did so, and on opening the case another pen dropped out. "Though it be an expedient in that conspiracy," said Pollock, C. B., "to induce the man who is cheated to think that he is cheating some one else, that does not prevent those who use that device from being amenable to punishment."

The foregoing cases were all combinations to cheat individuals. There are a number of cases in which the public generally have been affected by the offense. A general charge of conspiracy to cheat a municipal corporation imports an indictable offense, on account of the character of the corporation: *State v. Young*, 37 N. J. L. 184; and where the directors of a joint-stock bank, knowing it to be in a state of insolvency, issued a balance-sheet showing a profit, and thereupon declaring a dividend of six per cent., and issuing an advertisement asking the public to take shares, upon the faith of their representation that the bank was in a flourishing condition, they are guilty of conspiracy: *Regina v. Brown*, 7 Cox C. C. 447; and similar conduct was held conspiracy in *Regina v. Esdaile*, 1 Fost. & F. 213. But in *United States v. Britton*, Am. L. Reg., Aug. 1883, p. 545; S. C., 2 Sup. Ct. Rep. 531, it was held, that directors of a national bank declaring a dividend, with knowledge of the fact that the bank had made no net profits to pay it, was not conspiracy, as the declaring of a dividend by an association is not a willful misappropriation of its funds by the individual directors; it being an act done by them as officers, and not as directors. As to the effect of issuing a false prospectus, and when it is not conspiracy, see the interesting case of *Regina v. Gurney*, 11 Cox C. C. 414. A conspiracy to defraud an incorporated bank of issue, so that the securities for the circulation held by the public are impaired, is an offense of so public a nature as to be indictable at common law: *State v. Norton*, 3 Zab. 33; so is a conspiracy to manufacture base and spurious indigo, with a fraudulent intent to sell the same as good and genuine indigo, although no sale is made in pursuance of such conspiracy: *Commonwealth v. Judd*, 2 Mass. 329; S. C.; 3 Am. Dec. 54. See also head "Combination to Raise Price of Commodities or of Government Funds," *post*

CONSPIRACIES TO EXTORT MONEY.—It is well settled that these conspiracies are indictable; as where the conspirators falsely exhibited a certain indictment against a party for the purpose of extorting money, or offered to suppress a certain indictment if he would give them money for doing so: *The King v. Hollingberry*, 6 D. & R. 345; S. C., 4 Barn. & Cress. 329; or extort a deed by means of a peace warrant; in such a case, the offense of conspiracy may be made out, although the affidavit to obtain the peace warrant was true; *State v. Shooter*, 8 Rich. 72; or get money out of a man by conspiring to charge him with a false fact, whether the fact charged was criminal or not: *The King v. Rispol*, 1 W. Black. 368; S. C., 3 Burr. 1320; as bastardy: *Johnson v. State*, 28 N. J. L. 113; although the rule would be different if the charge was made *bona fide*: *Heaps v. Dunham*, 95 Ill. 583; or obtain money from a master mechanic which he is under no obligation to pay, by inducing his workmen to leave him, and by deterring others from entering into his employ, or by

threatening to do this, so that he is induced to pay the money demanded, under a reasonable apprehension that he can not carry on his business without yielding to the demand: *Carew v. Rutherford*, 106 Mass. 1; S. C., 8 Am. Rep. 287. And defendants are also guilty of conspiracy where A., having been bail for D., went, accompanied by B. and C., to the lodgings of D., telling her that B. and C. were officers, who would take her to jail if she did not give him security for his debt, although B. and C. were not officers, and had no authority to take D.; and D. gave A. a number of articles, and signed a paper stating that the articles were deposited with O. for security, and that he might sell them if he was not paid in forty-two days: *Bloomfield v. Blake et al.*, 6 Car. & P. 75.

CONSPIRACY TO ARREST OR MALICIOUSLY PROSECUTE, OR TO CHARGE ONE WITH BASTARDY, LUNACY, OR A CRIME.—The officer, prosecutor, and all other persons concerned may be indicted for a conspiracy to procure criminal process to cause the false imprisonment of a man for improper purposes: *Slower v. People*, 25 Ill. 70. A police sergeant has no right to arrest a person for an alleged breach of the Sunday law of 1794 without a warrant; and a police magistrate has no right to commit a person for such alleged breach on his refusing to pay an illegal fine therefor; and for doing so a magistrate and sergeant were held to answer on a charge of conspiracy in *Commonwealth v. Collins*, 12 Rep., N. S., 284. And conspiracy will lie also for a malicious prosecution at the common law: *Sydenham v. Keilaway*, Cro. Jac. 7; *Stewart v. Cooley*, 23 Minn. 347; S. C., 23 Am. Rep. 690; but in an action against a prosecutor, a magistrate, and a constable, for conspiring together to arrest and imprison a person without probable cause, evidence that each one acted illegally or maliciously will not support the action without proof that the defendants conspired together to do such acts: *Newall v. Jenkins*, 26 Pa. St. 159.

Conspiracy to vex and harass a person by having him subjected to an inquisition of lunacy without any probable cause is actionable: *Davenport v. Lynch*, 6 Jones L. 545; but an action for conspiracy for confining the plaintiff in a lunatic asylum can not be sustained if the defendants conscientiously believe that the plaintiff was deranged and required for his recovery medical treatment under restraint; although the existence of such conspiracy be proved, yet neither the signing of a certificate of lunacy by a physician, nor the receiving and keeping of the plaintiff in the asylum by the officers thereof, nor the serving as a juror on the inquest by which the plaintiff was found a lunatic, but which was afterwards set aside, will render either the physicians, officers of the asylum, or members of the inquest co-conspirators, unless they had knowledge of the existence of the conspiracy, and their several acts were corruptly done in furtherance thereof: *Hinchman v. Richie*, Bright. 143.

It is also an indictable conspiracy to bring one into disrepute by falsely charging him with being the father of a bastard: *The Queen v. Best*, 6 Mod. 137; S. C., 2 Ld. Raym. 1167; *Leviaton v. Lentall*, 1 Sid. 68; or for charging one with keeping a bastard child: *The King v. Armstrong*, 1 Vent. 304; or with being the father of a child likely to be born a bastard: *Regina v. Best*, 2 Ld. Raym. 1167; S. C., 1 Salk. 174; *Johnson v. State*, 26 N. J. L. 313; but persons procuring the arrest of a man upon a charge of bastardy can not be charged with conspiracy, if in prosecuting the suit in behalf of the woman interested they honestly believed from her statements that the charge was true and were thereby induced to act in the matter: *Heaps v. Dunham*, 95 Ill. 583.

There are a number of cases in the books of persons being charged with

conspiracy for combining to charge one with a criminal offense. Such a conspiracy is indictable, and the New Jersey statute, requiring an overt act, does not require the full execution of the conspiracy: *State v. Hickling*, 41 N. J. L. 208; S. C., 32 Am. Rep. 198. Persons have been indicted for charging one with theft: *State v. Cauwood*, 2 Stew. 360; *The Poulterer's Case*, 9 Co. 55, and for charging one with concealing stolen goods, without procuring any legal process: *Commonwealth v. Tibbetts*, 2 Mass. 536; or with fornication, a spiritual offense: *Regina v. Best*, 2 Ld. Raym. 1167; or with a capital offense: *Rex v. Spragg*, 2 Burr. 993; and so also persons buying a pretended right to an estate, and then entering into a combination with others to charge the owner with a capital offense in order that his estate might be forfeited, are guilty: *Sir Anthony Ashley's Case*, 12 Co. 90; but the most flagrant case is that of *The King v. Macdaniel*, 1 Leach C. C. 44, where persons conspired to accuse one of highway robbery, and procured his conviction and execution in order to obtain the reward allowed for convicting a highway robber.

CONSPIRACIES TO COMMIT CRIMES OR MISDEMEANORS, OR TO INDUCE OTHERS TO COMMIT THEM.—Conspiracies to commit crimes are indictable. Thus a design by two persons by different means to murder a child of which a woman is pregnant is sufficiently proximate to be the subject of a conspiracy *Regina v. Banks*, 12 Cox C. C. 393. And conspirators have been held for combining to tar and feather a man: *State v. Pulte*, 12 Minn. 164; or to commit an assault and battery: *Commonwealth v. Putnam*, 29 Pa. St. 296; *State v. Ripley*, 31 Me. 386; or to rob and steal: *State v. Sterling*, 34 Iowa, 443; *Horton v. State*, 66 Ga. 690. And a conspiracy to murder, unaccompanied by an intent to rebel or make an insurrection, is within the meaning as well as the words of the act of 1802 (Rev. C. 618), to prevent conspiracy and insurrection among slaves: *State v. Tom, a Slave*, 2 Dev. L. 569. And a combination to utter forged notes of a foreign bank is indictable: *Clary v. Commissioners*, 4 Pa. St. 210; as is a conspiracy to defraud the public by means of false pretenses and false writings in the form and similitude of bank notes: *Collins v. Commonwealth*, 3 Serg. & R. 220; and an agreement to fabricate shares in addition to the limited number of which a joint-stock company, according to its rules, consists, in order to sell them as good shares, notwithstanding any imperfection in the original formation of the company: *Rex v. Mott*, 2 Car. & P. 521; so, also, a conspiracy to make counterfeit coin is not an infamous crime within the meaning of article 5 of the amendments to the constitution of the United States, and may be prosecuted by indictment: *United States v. Burgess*, 9 Fed. Rep. 896.

Instances have occurred of persons being indicted for inducing another to commit an offense against the law. *People v. Saunders*, 25 Mich. 119, is an illustration of this, and there conspirators were held for inducing others to violate the law by a sale of liquor, in order that the conspirators might make profit out of their fears of prosecution. So a conspiracy entered into to induce and procure other persons to do an act prohibited under a penalty by statute is an indictable offense, whether the object was accomplished or not: *Hazen v. Commonwealth*, 23 Pa. St. 355. And it would be a conspiracy for two or more persons to act in concert [in unlawful measures to enforce the Sunday law, as by inducing a tavern-keeper, by artifice or persuasion, to furnish beer on Sunday: *Commonwealth v. Leeds*, 9 Phil. 569; and merchants who suspect one of theft, and employ a detective to consort with the suspected party, and to enter into an agreement with him to rob the store, and furnish the detective with the key to facilitate the scheme, are liable: *Johnson v. State*, 3 Tex. App. 590; but see *Knowles v. Peck*, 42 Conn. 386; S. C., 19 Am. Rep. 542, a case analogous to this in principle.

CONSPIRACIES TO SEDUCE, PROCURE PROSTITUTION, ETC.—These acts have been the subject of conspiracy frequently. Conspiracies to seduce a female are indictable: *Smith v. People*, 25 Ill. 17; *Anderson v. Commonwealth*, 5 Rand. 627; as is a conspiracy by false pretenses to procure an infant female to have illicit carnal connection with a man: *Regina v. Mears*, 2 Den. C. C. 79; or to induce an unmarried girl, seventeen years old, to become a common prostitute: *Regina v. Howell*, 4 Fost. & F. 160; or a conspiracy by a master, an attorney, and a gentleman, to assign over a female apprentice, by her own consent, for purposes of prostitution: *Rez v. Delavel*, 3 Burr. 1434. But a mere agreement between a man and a woman to commit adultery or fornication is not conspiracy: *Miles v. State*, 53 Ala. 390; *Shannon v. Commonwealth*, 14 Pa. St. 226.

CONSPIRACY TO INDUCE INFANT TO MARRY AGAINST FATHER'S OR GUARDIAN'S CONSENT.—A confederacy to assist a female infant to escape from her father's control with a view to marry her against his will is indictable: *Mifflin v. Commonwealth*, 5 Watts & S. 461; S. C., 40 Am. Dec. 527; so also is a conspiracy to procure a young lady, then a ward of the court of chancery, to marry defendant: *Rez v. Locker*, 5 Esp. 107; or to inveigle a young girl from her home, ply her with liquor, and procure the marriage ceremony to be performed between her and one of the defendants: *Respublica v. Ilvice*, 2 Yeates, 114; or to procure a marriage between a gentleman's son and a woman of infamous reputation: *The Queen v. Blacket*, 7 Mod. 39; or to inveigle a young man, under the age of eighteen, and heir to a considerable estate, out of the custody and government of his father, and seduce him to a disgraceful marriage: *The King v. Thorp*, 5 Id. 221.

CONSPIRACIES BY OVERSEERS OF POOR TO RID PARISH OF PAUPERS.—Conspiracies of this kind have been generally held to be indictable. As where the overseers conspire to marry a pauper settled in their parish to a pauper belonging to another parish, to the relief of their own parish and the burdening of the other: *The King v. Edwards*, 8 Mod. 321; *The King v. Herbert*, 2 Keny. 466; *Rez v. Watson*, 1 Wils. 41; *Rez v. Tarrant*, 4 Burr. 2106; but a conspiracy to procure a marriage between poor persons of different parishes, for the purpose of exonerating the parish of the woman and charging the other parish, is not an indictable offense, unless the parties were unwilling to marry, or some forcible or fraudulent means of bringing about the marriage were resorted to. A conspiracy to exonerate from the prospective burden of maintaining a pauper not at the time actually chargeable, and to throw the burden upon another parish by means not in themselves unlawful, is not indictable: *The King v. Seward*, 3 Nev. & M. 557; and it was also held in *Overseers v. Aurand*, 10 Watts, 134, that the acts and exertions of the inhabitants of a township to get rid of one who is not but is likely to become chargeable as a pauper, will not render them liable to an action for conspiracy by the township to which he goes.

CONSPIRACIES TO OBSTRUCT OR DEFEAT PUBLIC JUSTICE.—All conspiracies to pervert, obstruct, or defeat the course of public justice in a criminal or civil proceeding are indictable; as where it is accomplished by suppression or fabrication of evidence: *State v. De Witt*, 2 Hill (S. C.), 282; S. C., 27 Am. Dec. 371; or by impeding an officer in the discharge of his official duty: *State v. Noyes*, 25 Vt. 415; or by inducing an important witness on the charge of felony to suppress evidence or give false evidence, and by persuading him to abscond or conceal himself: *People v. Chase*, 16 Barb. 495; or by obtaining a counterfeit bill from the hands of a person to whom it had been uttered, so that it could not be had as evidence upon a criminal prosecution: *State v.*

Barlett, 30 Me. 132; or by producing a false certificate in evidence to influence the judgment of the court: *King v. Mawbey*, 6 T. R. 619; or where it is formed for the purpose of preventing a prosecution for felony: *Claridge v. Hoare*, 14 Ves. 59. So also a conspiracy to assault and beat a justice of the peace and injure him is indictable: *State v. Ripley*, 31 Me. 386; and also one to raise an insurrection and obstruct the laws: *Regina v. Shellard*, 9 Car. & P. 277; see also *Regina v. Vincent*, Id. 9. No overt act is necessary to make up the crime: *State v. Ripley*, 31 Me. 386. But a combination to ascertain whether a certain party is violating an injunction preventing him from using a certain article, by employing another to call for that article, is not indictable: *Knowles v. Peck*, 42 Conn. 386; S. C., 19 Am. Rep. 542; compare *Johnson v. State*, 3 Tex. App. 590.

CONSPIRACIES TO CONTROL WAGES OR WORKMEN.—The subject of conspiracies to control wages or workmen is discussed at length in the note to *People v. Fisher*, 28 Am. Dec. 501, to which the reader is referred.

COMBINATION TO RAISE PRICE OF COMMODITIES OR OF GOVERNMENT FUNDS. It is illegal to combine dishonestly to stimulate the price of any marketable commodity; as to raise the price of salt, by a combination among dealers not to sell under a certain price: *The King v. Norris*, 2 Keny. 300; or to regulate the sale, price, etc., of coal. A "corner," whether to affect the price of articles of commerce or of vendible stocks, by confederation to raise or depress the price and operate on the markets, is a conspiracy: *Morris Run Coal Co. v. Barclay Coal Co.*, 68 Pa. St. 173; and so is a combination to compel a city to pay higher rates for labor and materials than it would if there were no confederation to prevent bidding for the contract for labor and materials: *Commonwealth v. Haines*, 11 Rep., N. S., 413; but on a motion for a criminal information against two persons for conspiring to raise the price of oil, it must distinctly appear that they combined together, as it is no offense for an individual separately so to endeavor: *Rex v. Hilbers*, 2 Chit. 163. An agreement between two persons to forestall and control the market for any necessary of life, by the employment of falsehood and displaying "an unmixed motive of mischief, either to the public or an individual," is clearly indictable. But a mere agreement between two persons to purchase on their joint account, with a view to profit upon the resale, is not indictable, although the effect of such purchase may be to advance the price. It is the motive which distinguishes the illegal from the legal agreement to purchase. If the motive is dishonest, and fraud, falsehood, or deceit is used, it is unlawful: *Commonwealth v. Tack*, 1 Brews. 511. It is also indictable to conspire on a particular day, by false rumors, to raise the price of the public government funds, with the intent to injure the subjects who should purchase on that day: *The King v. De Berenger*, 3 Mau. & Sel. 67.

CONSPIRACIES TO COMMIT TRESPASS OR TO INJURE PROPERTY.—An indictment will not lie for conspiracy to commit a civil trespass upon property, by agreeing to go and by going into a preserve for hares, the property of another, for the purpose of snaring them, although alleged to be done in the night by the defendants armed with offensive weapons for the purpose of opposing resistance to any endeavor to apprehend or obstruct them: *The King v. Turner*, 13 East, 228. "I should be sorry," said Lord Ellenborough in this case, "that the cases in conspiracy against individuals, which have gone far enough, should be pushed still further. I should be sorry to have it doubted whether persons agreeing to go and sport upon another's ground, in other words, to commit a civil trespass, should be thereby in peril of an indictment for an offense which would subject them to an infamous punishment." But if the defendants should meet and go out for the purpose of a fox-hunt, and should chase

and kill a bull belonging to the plaintiff, the act is conspiracy, notwithstanding there was no previous agreement: *Livery v. State*, 30 Tex. 402. But ordinarily an indictment will not lie for conspiring to commit a mere civil trespass; nor will it lie for erecting flash-boards upon one's own dam with the intention of defrauding and compelling back owners to dispose of their rights, where the only injury would be by throwing back the water: *State v. Straw*, 42 N. H. 393. But if A. and B. should go into the house and store of C., and in the presence of his wife take away the property of C. and others, it is a conspiracy, although C. may be indebted to A. and B. to a large amount, and is insolvent, and there is no prospect of the debt being paid: *People v. Bradford*, 1 Wheeler's Cr. Cas. 219. A conspiracy to injure the property of another is indictable: *State v. Hewitt*, 31 Me. 396; but the prosecution must fail if the injury was done in the exercise of an avowed legal right, and without malicious or fraudulent intent: *State v. Flynn*, 28 Iowa, 26. And the injury to property contemplated by the Iowa statute must be such as is punishable as a crime; it must also be a direct one against the property itself, and not an inchoate right, as that of a wife in the property of her husband: *State v. Stevens*, 30 Id. 391. In Maine, an indictment substantially alleging that the defendants forcibly committed a trespass upon one L., by forcibly taking from him his horse, and converting the same to their own use, does not charge a conspiracy within the statute of Maine: R. S., c. 126, sec. 17; *State v. Clary*, 64 Me. 369.

CONSPIRACIES UNDER UNITED STATES LAWS OR TO DEFRAUD REVENUE.—
"It is a settled doctrine in our jurisprudence that there are no common-law offenses against the government of the United States. An act or omission, to be criminally punished in the federal courts, must be declared to be an offense by an act of congress." *Per* Dillon, C. J., in *United States v. Walsh*, 5 Dillon, 58. Statutes have been passed, however, by congress, making conspiracy indictable in many cases; thus, under the act of March 7, 1867, it is an offense for an officer of a national bank to conspire with a third person, not an officer, to abstract or embezzle the funds: *United States v. Martin*, 4 Cliff. 156. Under the twenty-third section of the act of March 3, 1825, defining and punishing conspiracy to cast away, burn, or destroy a vessel with the intention of defrauding the underwriters, any combination of two or more persons to destroy a vessel or cargo consummates the offense: *United States v. Cole*, 5 McLean, 513; but the intent is an essential ingredient of the crime, under that statute, and it must be averred: *United States v. Hand*, 6 Id. 274. The revised statutes, section 5440, in respect to the crime of conspiracy to defraud the United States, change in material respects the offense of conspiracy as it existed at the common law, and every ingredient of the offense must be clearly alleged: *United States v. Walsh*, 5 Dillon, 58. That section provides that "if two or more persons conspire to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy," all of the parties shall be liable to a penalty. A conspiracy to defraud the United States can not exist in contemplation of that act where the contemplated fraud depends upon the passage of a future act of congress to make it effective: *United States v. Crafton*, 17 Am. L. Reg., N. S., 127. But a conspiracy to prosecute a false and fraudulent claim against the United States, and to procure the evidence of false witnesses to support and maintain it, falls within its meaning: *United States v. Dennee*, 3 Woods, 47; so also a scheme the necessary result of which would be to defraud some one is a scheme to defraud within the meaning of that statute, and a scheme to put counterfeit money in circulation is such a scheme: *United States v. Jones*, 13 Rep., N. S., 165; and

section 5519, revised statutes, making criminal a conspiracy, or going in disguise "for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or territory from giving or securing to all persons within such state or territory the equal protection of the laws," was not authorized by section 2 of article 4 of the original constitution, nor by the thirteenth, fourteenth, or fifteenth amendment thereof, and is unconstitutional: *United States v. Harris*, Am. Law Reg., Apr. 1883, p. 280 (S. C. U. S., Oct. 1882). But the society of the ku-klux-klan, for the purpose of intimidating voters, is an unlawful conspiracy: *United States v. Mitchell*, 1 Hughes, 439; see also *United States v. Butler*, Id. 439, turning on the intimidation of voters.

Conspiracies for defrauding the revenue have always been held indictable under the United States laws and in England: *The King v. Starling*, 1 Sid. 174; *The Queen v. Thompson*, 16 Q. B. 832; *The Queen v. Blake*, 6 Id. 126; *United States v. Graff*, 14 Blatch. 381; *United States v. Rindskopf*, 6 Biss. 250; and so is a conspiracy on the part of a public officer and others, whose object is the issuing of a pay certificate on a state treasury for the purpose of defrauding the state: *State v. Cardoza*, 11 S. C. 195.

MISCELLANEOUS INSTANCES OF CONSPIRACY.—Where such a fraud as may be punished criminally is actually committed by several persons in pursuance of a conspiracy between them for that purpose, the conspiracy, as such, is not indictable, but the fraud only: *Lambert v. People*, 9 Cow. 578. For a discussion of the merger of conspiracy in the offense committed, see 2 Whart. on Cr. L., sec. 2294; 2 Bishop on Cr. L., sec. 230. And no conviction can be had upon an indictment for conspiracy to violate the provisions of a statute which has been repealed before the trial: *Powell v. People*, 5 Hun, 169; but see *contra*, *The Queen v. Thompson*, 16 Q. B. 832. A conspiracy to obtain money by procuring from the lords of the treasury the appointment of a person to an office in the customs is a misdemeanor at common law: *Rex v. Pollman*, 2 Camp. 229; and parties are guilty of conspiracy where they fraudulently contrive to procure the election of certain persons as directors of a company, and thereby cause themselves to be employed in the service of the company: *State v. Burnham*, 15 N. H. 396; and a corrupt agreement between two justices, that each will vote for the other for a certain office in consideration of the other's vote for him, followed by the actual voting in pursuance of the agreement, is a misdemeanor, for which an indictment will lie: *Commonwealth v. Callaghan*, 2 Va. Cas. 460. A combination to entice a citizen within the jurisdiction of another state for the purpose of procuring him to be arrested on civil process is actionable, although the debt for which he is arrested is justly due: *Phelps v. Goddard*, 1 Tyler, 60; but it is not conspiracy for one who occupies the place of surety of a firm, either directly or indirectly, to use its property to discharge the debt for which the suretyship exists; and it makes no difference that the surety can not be called upon immediately to pay: *Kirkpatrick v. Lex*, 49 Pa. St. 122; nor can the police judge of a city maintain an action for conspiracy against the mayor and members of the city council to recover damages because of the passage of an ordinance requiring him to pay the fees of his office into the city treasury, and giving him a salary in lieu thereof: *McHenry v. Sneer*, 56 Iowa, 649. But it is a conspiracy, punishable by law, for several persons to persuade a maiden lady and her parents that a forged license is genuine, and that one of their number is a justice of the peace, and thus gain the consent of such parents and the daughter to the marriage of the latter: *State v. Murphy*, 6 Ala. 765; S. C., 41 Am. Dec. 79.

NILES v. RANSFORD.

[1 MICHIGAN, 338.]

ASSIGNMENT OF MORTGAGE PASSES THE POWER OF SALE CONTAINED THEREIN. After the assignment, the assignee must bring the suit to foreclose, and the mortgagee can no longer maintain a suit for that purpose.

PARTY FORECLOSING UNDER POWER OF SALE IN MORTGAGE must see that he in all material matters keeps within the powers given to him, for there are no legal presumptions or intendments raised by the law to support his proceedings, as there might be if the sale was made pursuant to a decree and order of a court of chancery.

ASSIGNEE OF MORTGAGE FORECLOSING UNDER POWER to foreclose contained in the mortgage can not advertise the sale in the name of the mortgagee, but must advertise it in his own name.

LEGAL NOTICE MUST SHOW ON ITS FACE that it emanates from some person or court claiming to have the power to act in the manner indicated by the notice.

WHERE MORTGAGEE ASSIGNS MORTGAGE AFTER ADVERTISING SALE of mortgaged premises under a power of sale contained in the mortgage, the mere act of continuing the advertisement in the name of the mortgagee, by the assignee after he acquires the whole interest in the mortgage, gives it no force; and a sale and purchase by the assignee under such advertisement is of no effect. In such a case the assignee should have renewed the advertisement in his own name.

ASSIGNEE OF MORTGAGEE MAY MAINTAIN EJECTMENT on the mortgage deed and the assignment to him against the mortgagor or his lessee.

TENANT CAN NOT DISPUTE LANDLORD'S RIGHT TO MAKE LEASE to him, but he is allowed to prove the nature of his landlord's title, and to show that, though originally a valid one, it expired before the commencement of the action, and that the land then belonged to another.

LESSEE OF MORTGAGOR IS NOT ESTOPPED by the lease from disputing the lessor's title, where subsequent to the lease he becomes assignee of the mortgage.

EJECTMENT. Niles, the plaintiff, purchased the premises in dispute from George Postal, sen., and George Postal, jun., and gave Postal, sen., a mortgage for part of the purchase price. At maturity, the mortgage not being paid, Postal, sen., advertised the premises for sale under a power in the mortgage, and pursuant to statute. Before the sale day arrived, he assigned the mortgage to Postal, jun., who had the lands sold under the advertisement of Postal, sen., by the sheriff, without any new advertisement, and became purchaser at the sale. Niles, a few days after the advertisement, leased the premises for a year to Ransford, and Postal, jun., and wife after the sale conveyed the premises to Ransford by a deed of warranty.

Joy, for the plaintiff.

J. M. Howard and Stevens, contra.

By Court, WING, J. The mortgage bears date the thirteenth April, 1836, and contains a power of sale. It was executed under the provisions of "An act entitled an act concerning mortgages," approved April 19, 1833: Laws 1833, p. 283. On sales under this act, for purchase money, no redemption is allowed. The act of 1837, Sess. L. 1837, p. 315, amendatory to the act of 1833, authorized a redemption within one year after sale on foreclosure of mortgages given for purchase money, and this provision was by the same act made applicable as well to mortgages executed before, as those executed after the passage of the act. After the amount secured to be paid by the mortgage fell due, George Postal, sen., the mortgagee, commenced a foreclosure of the mortgage by advertisement, which bears date the eighteenth April, 1838, and appoints the day of sale on the fourteenth July. Previous to the day of sale, and on the eighth June, the mortgagee assigned the mortgage to George Postal, jun. In this assignment no interest is reserved to the mortgagee.

In case of the non-payment of the sum of money secured by the mortgage, authority is given in the mortgage to the mortgagee, his executors, administrators, and assigns, to grant, bargain, sell, and convey the mortgaged premises at public auction, according to the provisions of any statute now in force or hereafter to be passed. By the eighth section of the law of 1833, it is provided that the sale shall be made by the person appointed for the purpose in the mortgage deed, or the sheriff, under-sheriff, or any deputy sheriff of the proper county.

To determine whether the mortgagee or his assignee has complied with the power granted in the mortgage, we will first consider the nature and extent of this power. Mr. Sugden, in his treatise on Powers, page 223, remarks: "We must be careful to distinguish cases where the power is originally authorized to be executed by the donee of the power and his assigns, for in those cases where the power is annexed to an interest in the donee, it will pass with it to any person who comes to the estate under him, although there are twenty mesne assignments, or whether the claimant is an assignee in fact or in law, as an heir or executor."

This is the general doctrine. In New York, they have a statute from which the act of 1833 was taken. Their courts have uniformly held that the ordinary power of sale in a mortgage is a power coupled with an interest; that it relates to the land, and

is given to a person who derives under the instrument creating the power, a present interest in the land: *Bergen v. Bennett*, 1 Cai. Cas. 1-15 [2 Am. Dec. 281]; *Wilson v. Troup*, 2 Cow. 236 [14 Am. Dec. 458]. In this last case, Judge Sutherland calls it "a power appendant or annexed to the land." There are abundance of cases in the New York reports asserting the same doctrine; and these authorities also establish the doctrine, which would seem to flow of necessity from what we have said, that by an assignment of the mortgage, the power to sell passes with it. And it follows, that after assignment, the assignee must bring the suit to foreclose, and the mortgagee can no longer maintain a suit for that purpose, or even to recover seisin of the land, and if he attempts to bring suit, his alienation of the mortgaged premises may be pleaded in bar: *Gould v. Newman*, 6 Mass. 241; *Wallace v. Dunning*, Walk. (Mich.) 416.

In the case of *Slee v. Manhattan Company*, 1 Paige, 78, Chancellor Walworth says: "The authority to execute the power is vested in the assignee by the mere act of assigning the legal interest in the mortgage. It always passes with the legal estate, unless there are some words of reservation." The authority to sell is a special power, and it must be strictly pursued: *Denning v. Smith*, 3 Johns. Ch. 344. When the owner of a mortgage forecloses under the statute and this power of sale, the mortgagor is not made a party, as in case of foreclosure in chancery, and in this case it does not appear that he knew of the assignment before, if he did on the day of sale. The person so foreclosing must see to it that he in all material matters keeps within the powers given to him, for there are no legal presumptions or intendments raised by the law to support his proceedings, as there might be if the sale was made pursuant to a decree and order of a court of chancery.

It is urged by defendant's counsel, that it was competent to advertise the sale in the name of the mortgagee, though he had parted with his interest, because the power expressly authorizes the mortgagee, as well as his executors, administrators, and assigns, to sell.

The power to sell was of necessity given to the mortgagee, but only because he had an interest; and I can see no better authority for his interfering, or for his name being used in this case, than there would be in an executor advertising a mortgage sale in the name of a deceased mortgagee. The notice might be seen, and the public and the mortgagor would be advised of the proceeding in the one case as well as in the other. I do

not understand that it is a mere matter of form, as is suggested by Justice Sutherland, in the case of *Wilson v. Troup*, 2 Cow. 195 [14 Am. Dec. 458]. It is a question of power, and was designed to be confided and confined to the person who, at the time of foreclosure, owned the mortgage, otherwise the legal positions which we have established would have no force. (See Justice Woodworth's opinion in the same case.) An advertisement in the name of the mortgagee in this case can have no greater force or effect than if it had been made in the name of a third person, a stranger to all the parties in interest, which would be none at all. If the advertisement may be made in the name of the mortgagee, it can only be on the ground of his having some power; and yet how can the power be divided or separated from the interest in the land? If it can be, what is to prevent a mortgagee, after he has assigned all his interest, from selling, after the mortgage is forfeited or due, without any regard to the wishes of the assignee? Where is the restriction?

It is urged, that the notice of sale is not required by the statute to be signed by any one, but no conception can be formed of a legal notice which does not disclose on its face that it emanates from some person or court claiming to have the power to act in the manner indicated by the notice. It is this that gives to it its force—that makes it a notice. The statute does not prescribe the form of the notice. It declares that a notice shall be given in which certain matters shall be specified—it does not regulate its form in other respects.

The mere act of continuing the advertisement in the name of the mortgagee, by the assignee after he acquired the whole interest in the mortgage, gave it no force—he was no party to the notice. But let us suppose that the advertisement could be made in the name of the mortgagee: how then does the case stand? What evidence have we that the assignee, the grantor of defendant, purchased the equity of redemption at the mortgage sale? Defendant produces in evidence affidavits of publication, and affixing notice of sale and of the circumstances of such sale, and insists that the assignee being the owner of the mortgage, no further act or deed was necessary to perfect the foreclosure and vest the equity of redemption in him. Admitting that the nineteenth section of the act includes assignees as well as mortgagees, does he bring himself within the provisions of the section? This section authorizes the mortgagee to "purchase at any mortgage sale made in virtue of a power of sale contained in a mortgage," and declares that "his title shall not.

on that account, be impeached or defeated at law or in equity: provided the sale was in every other respect conducted in good faith;" and it further declares, "that the affidavits of publication and affixing notice of sale and the circumstances of such sale, shall be evidence of the sale and of the foreclosure of the equity of redemption, without any conveyance or certificate from the officer, in the same manner and with like effect as if such conveyance had been made." This section was doubtless intended to obviate the sound and established rule of equitable policy which disqualifies a trustee from becoming a purchaser of the trust estate without leave from chancery: and the reason of the rule is, to bar the more effectually every avenue to fraud. It was also designed to obviate the further difficulty presented by the fact that he could not deed to himself, and thus pass the title to the equity of redemption. But the owner of the mortgage did not sell. The mortgagee advertised the sale, and the sale purports to have been made on the authority of his advertisement. If the assignee had advertised, sold, and purchased, then he might, perhaps, have purchased without a deed. In this case, and upon the assumption that the mortgagee might sell, a deed was necessary. None is shown, and none was ever executed.

This, then, is the position of the defendant before this court, in reference to the equity of redemption. The advertisement of sale was not made pursuant to the power given, and if it was, the grantor of the defendant obtained no deed, no title, and, consequently, we must regard the equity of redemption as being in the plaintiff.

From the case made, it appears that after the execution of the mortgage, and before the advertisement of sale, the defendant received from the plaintiff a lease of the mortgaged premises: that he entered into possession of the mortgaged premises under and by virtue of the lease, which was executed by both parties; and the plaintiff claims that the defendant is estopped from questioning his right to recover the possession of the land. The defendant bases his right to the possession of the land, first, as we have seen, upon the foreclosure and a conveyance from the purchaser at the mortgage sale. Secondly, if his title under the foreclosure is not valid, he insists that the deed from the assignee of the mortgage, though insufficient to convey the equity of redemption, carries the interest in the mortgage, and he occupies the position of a mortgagee in possession before foreclosure. The case of *Jackson v. Bowen*, 7 Cow. 20, is an authority in point.

Postal, jun., by his deed to the defendant, conveyed all his right, title, and interest in and to the mortgaged premises—he had no remaining interest—his lien on the land by virtue of the mortgage, passed to the defendant, and he thereby acquired the right of an assignee. The intention was to pass a greater interest. If that failed, it is no objection to the operation of the instrument as an assignment. *Valeat quantum valere potest*. The mortgagor being considered only tenant at will to the mortgagee, the latter may assign the mortgage without making an entry: 8 Mass. 559. And when the mortgage is assigned, either by indorsement or a separate instrument, the assignee is put in the place of the mortgagee, to every purpose. The assignee might have maintained ejectment on the mortgage deed and the assignment to him against the mortgagor or his lessee: *Schwartz v. Sears*, Walk. 170. The defendant might have attorned to and taken a lease from George Postal, jun.: *Jones v. Clark*, 20 Johns. 51; *Pope v. Biggs*, 17 Eng. C. L. 116; 4 Kent's Com. 174; Powell on Mort. 156.

But the law does not compel the tenant to resist the rights of the mortgagee—he may yield to them, and he has the right to show that the landlord's title has terminated. He could not dispute the right of his landlord to make the lease to him, but he is allowed, notwithstanding, to prove the nature of such title, and to show, though originally a valid one, it expired before the commencement of the action, and that the land then belonged to another: for such a defense is not inconsistent with the terms of the original possession: *Jackson v. Davis*, 5 Cow. 135 [15 Am. Dec. 451]; Ad. Eject. 276. He does not dispute the landlord's title—he confesses and avoids it by matter *ex post facto*: *Hopcraft v. Keys*, 9 Bing. 613; 2 Smith's Lead. Cas. 509, 510. He shows, that by consent of his landlord his title has passed to another, or rather, that as an incident to the mortgage, he, as assignee of the mortgagee, had the right to enter, and being in possession, though in the first place under a lease, he has the right to retain possession as purchaser of an interest it was competent for him to purchase, and the sale of which the landlord himself had authorized.

Certified accordingly.

POWERS OF SALE IN MORTGAGE, AND EXECUTION OF.—See *Bergen v. Bennett*, 2 Am. Dec. 281; *Demarest v. Wynkoop*, 8 Id. 468; *Doolittle v. Lewis*, 11 Id. 389; *Wilson v. Troup*, 14 Id. 458, and cases cited in the note.

MORTGAGES, NATURE OF, AND WHAT PASSES BY.—See *Waring v. Smith*,

47 Am. Dec. 299, and cases cited in the note; see also *Frische v. Kramer*, Id. 368.

ASSIGNMENT OF MORTGAGE, RIGHT OF MORTGAGEE GENERALLY.—See *Pratt v. Bank of Bennington*, 33 Am. Dec. 201; *Smith v. Kelley*, 46 Id. 595; *Lady Superior v. McNamara*, 49 Id. 184; *Mott v. Clark*, Id. 566. Quit-claim deed by mortgagee of premises covered by his mortgage may operate as an assignment: *Thayer v. McGee*, 20 Mich. 195; see also *Hunt v. Hunt*, 25 Am. Dec. 400. The principal case was cited as to the effect of an assignment of a mortgage, in *Johnstone v. Scott*, 11 Mich. 246.

MORTGAGEE MAY BRING EJECTMENT AFTER FORFEITURE: *Fuller v. Wadsworth*, 38 Am. Dec. 692, and note.

ESTOPPEL OF TENANT TO DENY LANDLORD'S TITLE.—See *Heath v. Williams*, 43 Am. Dec. 285, and cases cited in the note; *Bailey v. Kilburn*, Id. 422, and note; *Sims v. Glazener*, 48 Id. 120; *Bank of Utica v. Mercereau*, 49 Id. 189; *Farrow v. Edmundson*, 41 Id. 250.

CASES

IN THE

HIGH COURT OF ERRORS AND APPEALS

OF

MISSISSIPPI.

STEVENSON'S HEIRS *v.* MOREARY.

[12 SMEDES AND MARSHALL, 9.]

ADMINISTRATOR, IN SELLING DECEDENT'S REALTY, MUST COMPLY STRICTLY with every requirement of the law, and probate courts can not order a sale unless everything necessary to give them jurisdiction of the person and of the subject-matter appears upon their records.

LONG AND UNINTERRUPTED POSSESSION UNDER ADMINISTRATOR'S DEED is sufficient, when taken in connection with his deed and other evidences, and the fact that the probate judge acted irregularly and without any uniformity, to justify the presumption that the title in its inception was perfect, and that the administrator proceeded according to the requirements of the law, although all the steps are not shown to have been taken; in such a case, the burden of proving that he did not sell according to law is on those questioning the validity of the sale.

ADMINISTRATOR'S REPORT CAN NOT BE IMPEACHED COLLATERALLY, after a great lapse of time, because it was not sufficiently explicit.

PAROL EVIDENCE IS ADMISSIBLE TO PROVE CONDITION OF RECORDS of an office, and the manner in which they have been kept, as a means of accounting for that which is missing.

ABSENCE OF EVIDENCE THAT CITATIONS WERE POSTED IN PUBLIC PLACES ON ADMINISTRATOR'S SALE of realty, is cured by an uninterrupted possession of the purchaser for thirty-four years.

IN ADMINISTRATOR'S SALE, ABSENCE OF RECORD PROOF that he gave the required bond, or the requisite notice of the time and place of sale, or that he made a report of the sale to the court, is supplied by the presumption arising from the undisturbed possession of the purchaser for thirty-four years, where the recitals in the deeds show a full compliance, and there is evidence that the records were loosely and irregularly kept.

STRICT PROOF MAY BE DISPENSED WITH AFTER GREAT LAPSE OF TIME, and its place may be supplied by presumption.

REFUSAL TO GIVE ABSTRACT INSTRUCTIONS is not error.

CORRATATION AND HOLDING THEMSELVES OUT AS MAN AND WIFE are but presumptive evidence of marriage.

EXCEPTION IN ADMINISTRATOR'S DEED OF WIDOW'S DOWER DOES NOT ESTOP the purchaser from controverting the fact of the marriage, nor the legitimacy of the children.

RECITALS IN DEEDS SOMETIMES OPERATE AS ESTOPPELS, but none but privies and parties shall have advantage of them.

TWENTY YEARS' ADVERSE POSSESSION OF LAND UNDER ADMINISTRATOR'S DEED BARS HEIRS, unless they were saved by infancy or coverture.

WHEN STATUTE OF LIMITATIONS BEGINS TO RUN, it continues to do so.

IF PLAINTIFFS RELY ON EXCEPTIONS IN FAVOR OF INFANTS OR FEMALES COVERT in the statute of limitations, they must show that they are entitled to the benefits of the exceptions.

ERROR from the circuit court of Adams county. Facts necessary to an understanding of the case are stated in the opinion.

G. Baker, for the plaintiffs in error.

McMurren, contra.

By Court, **SHARKEY, C. J.** This action of ejectment was instituted in the circuit court of Adams county, on the twenty-eighth of February, 1840, and at May term, 1843, a trial was had, which resulted in a verdict for the defendant. The case is brought up by the plaintiffs, on exceptions taken to the rulings of the court. The plaintiffs claim title as the heirs of Stephen Stevenson, to whom the land was granted by the Spanish government by patent, bearing date the fifteenth of March, 1789, on which he received a certificate of confirmation by the United States commissioners. It appears that Stevenson resided on the land up to the period of his death, which occurred in 1804. The defendant claims title by virtue of a sale made by the administrator of Stevenson's estate in 1806. The whole case turns upon the evidences of the regularity of that sale. If the administrator proceeded to sell, according to law, which authorized him to sell real estate for the payment of debts in a particular manner, then of course there is an end of the controversy. But it is said that his sale was void, and passed no title, inasmuch as the law was not pursued, and the several points raised on the trial seem to center mainly in an inquiry into the regularity observed by the administrator in making this sale. The position is taken that in sales of this description the administrator must comply strictly with every requirement of the law, that the probate courts can not order a sale, unless everything necessary to give them jurisdiction of the person, and of the subject-matter, appears upon their records. Many authorities are cited in support of this position unnecessarily;

its general correctness we do not doubt; the principle is nowhere more rigidly enforced than by our own decisions. We certainly have not relaxed in any degree from the most rigid rule. But admitting this to be the general course of decision, is it fully applicable in the present case? It is, of course, unless there be counteracting principles which overcome it. It is presented to us as a question depending on the legal strength of proof. The defendants have an apparent title, but it is said that the administrator had no power to make it, because the proper preliminary steps were not taken. This objection is met by an assertion that all preliminary steps were taken; that enough appears of record to justify us in holding that the law was complied with.

The doctrine of presumption, arising from lapse of time, has been pressed as sufficient to overcome whatever may seem to have been omitted by the administrator in the discharge of his duty, and it is entitled to great force; sufficient, indeed, as it seems to us, to obviate most of the objections raised, and we shall first consider this doctrine, before we proceed to notice the several objections raised, as their force will be then best understood.

From the dates given, it will be seen that we must have many difficulties to encounter in the process of investigation. Here are many plaintiffs, mostly standing in the third generation from the ancestor under whom they claim, seeking to recover of a defendant who had been in possession under title adverse, for about thirty-four years before the commencement of the suit. Events are brought up which occurred in the early dawn of our territorial history. The legislative history is so imperfect that the archives of state furnish but a meager, broken outline of it, and the judicial history is equally destitute of accuracy and precision. In 1798, an imperfect territorial government was first organized. The legislative power was exercised by the governor and judges. In 1800, congress provided for a legislative body, to consist of nine representatives, to be elected by the people of the three counties, which then comprised the settled part of the territory. We know that the legislation was imperfect in character, and limited to the wants of the few inhabitants that then occupied the territory, and we know also that even until within a late period, judicial proceedings, and especially those of the probate courts, were conducted with but little regard to exactness. The judges of probate were probably not generally lawyers. They acted without any uniform system fixed by

construction of the statutes from which their powers were derived. Under the circumstances, we could not expect the utmost regularity in their proceedings. Even at the present day, under the same statutes which then existed, we find many defects in the judgments and proceedings of the probate courts. We must therefore make the greatest allowance, after the great lapse of time, for apparent omissions and discrepancies.

There seems to be, then, a fair field for the application of the doctrine of presumption to the present case. What is the effect of its application? It seems to be this: When the plaintiffs prove title in the ancestor, and heirship, their case is *prima facie* made out. To rebut this, the defendant introduces a deed from the administrator of the ancestor, and proves that some of the requisite steps are taken to enable the administrator to sell. But in ordinary cases this would not do; the defendant must prove affirmatively, by the records of the probate court, that all preliminary steps were regularly taken. As a substitute for the broken links in the chain of title, the defendant relies upon his long uninterrupted adverse possession, as sufficient to justify the presumption, in connection with his deed, and the other evidences, that his title in its inception was perfect; that the power of the administrator was duly exercised, and that the plaintiffs had virtually acknowledged his goodness of title by their long acquiescence. We have, then, the legal presumption in favor of the defendant to rebut the *prima facie* case of the plaintiffs. On this state of the case, the defendant must have the advantage, unless the legal presumption can be repelled. The burden of proof seems to be thrown back upon the plaintiffs, for they must recover on a title paramount to that of the defendant. If this be so, then it is incumbent on them to prove that the administrator did not sell according to law, for unless they do this, the law, on the state of facts, presumes that he did. If they could make such showing, then, of course, the presumption yields, but nothing of the kind has been attempted in this case. Now we shall see how far the authorities go in sustaining counsel in this doctrine of presumption.

The case of *Gray v. Gardner*, 3 Mass. 399, seems to be directly in point. A sale of land had been made by an administrator. A lapse of twenty years, with proof that the probate office had been kept in a loose and careless manner, was held sufficient to justify the presumption, that the administrator had posted up the requisite notices, and had also taken the necessary oath preceding the sale. It was held to be necessary to a

valid sale, that the administrator should have posted up the notices and taken the oath, and yet the court said that it might be presumed that he had done so. This case also decides, that the recitals in a deed of that age might be received to aid the presumption.

The decision in *Knox v. Jenks*, 7 Mass. 488, rests upon the same principle. The court say: "The rights of persons thus connected with the estate conveyed, and whose interests are affected by the authority to sell, are regarded by these provisions, and they, and any claiming under them, are not concluded by the exercise of the authority and license to sell in derogation of their rights, unless every essential requisite and direction of the law in this respect has been fully complied with. But even heirs and creditors are concluded after a long acquiescence; and a legal presumption of the regular exercise of the authority is accepted instead of proof."

So after a lapse of thirty years, numerous defects in a tax collector's sale were supplied by presumption: *Colman v. Anderson*, 10 Mass. 105; *Pejepscut Proprietors v. Ransom*, 14 Id. 145. If such presumptions will supply the place of proof with regard to sales made by the tax collectors, surely they should do so in the case of administrators; the former sell by a naked statute power; the latter under a decree of a court of competent jurisdiction.

In *Hazard v. Martin*, 2 Vt. 84, the plaintiff claimed by an administrator's deed, but there was no record of an order of sale, or any record showing that such order ever had been made by the probate court. Amongst the loose papers of the office was found this memorandum: "December 22, 1792, judgment of court, estate insolvent, and administrators ordered to sell the real estate." This was deemed sufficient, in connection with possession for thirty years and the deed, to justify a presumption, that the administrator had proceeded regularly. It is insisted by the opposite counsel, in commenting on this case, that it does not appear from the opinion of the court that an order was necessary to enable the administrator to sell; the court does not say so, though perhaps the opinion might warrant the inference. But it is admitted that insolvency was necessary before sale could be made. Then, we may ask, where was the judgment of insolvency, or the evidences of it? It is found in the loose memorandum above extracted. Vague as it is, it was held sufficient foundation for all presumptions. The case is a very strong one in support of our position.

The language of Judge Archer in *Beall v. Lynn*, 6 Har. & J. 361, is worthy of being extracted at some length: "Presumption is often resorted to for the purpose of supplying defective evidence; and, in this country, it is not oftener applied to any subject than to supply defective title to lands. It would be difficult to make out the titles to many of the elder tracts of land in this state, by a regular deduction of title deeds from the patentees down to the present proprietors, without resorting, in some stage of them, to presumption. Records may sometimes be lost or destroyed; and ancient title papers may be defectively executed, or the proof of them, from lapse of time, may be impossible. Yet in all these cases the possession may have been invariably in the person claiming the land, and in those from whom he derives title. In such cases, possession which has been long undisturbed, and which is, in general, the concomitant of title, induces a belief in the mind, of title, little short of that which would be produced by the adduction of the most undeniable and best-authenticated evidences of right." In accordance with this language, the court presumed title, where one of the mesne conveyances, between the patentee and the holder of the land, was missing, on the strength of the lapse of time, and the recitals in one of the deeds subsequent to the missing conveyance. The same court, on one occasion, held, that from a void deed, in connection with long possession, a valid conveyance might be presumed: *Gittings v. Hall*, 1 Id. 14.

After twenty-three years' possession under a deed made by attorney, the power of attorney was presumed: *Buhols v. Boudousquie*, 6 Mart., N. S., 153. The same point has been decided in other cases, and they furnish strong authorities in the present case, as both an attorney and an administrator convey by a power conferred, and it is as fair to presume the existence of the power in the one case as in the other. Indeed, the grant of administration is a circumstance in aid of such presumption, and gives a better ground for it than is to be found in the case of an attorney.

In New York the same principle seems to have been uniformly recognized. In favor of long possession, conveyances are presumed, and those made by attorney are sustained without proof of the authority; and recitals in old deeds are received as *prima facie* evidence: *Jackson v. Lunn*, 3 Johns. Cas. 117; *McDonald v. McCall*, 10 Johns. 377; *Clinton v. Campbell*, Id. 475; *Jackson d. Schuyler v. Russell*, 4 Wend. 543.

A leading case in England is found in *Earl ex dem. Goodwin v.*

Baxter, 2 W. Black. 1228. The plaintiff sued in ejectment, claiming as assignee of an old term for one thousand years. Several assignments had been made prior to that under which plaintiff claimed, but he was able to prove only one of them. The others were presumed from his long possession. And it is now the settled doctrine there that grants, even as against the king, will be presumed, rather than disturb long possession; for it is truly said that otherwise ancient possession would injure rather than strengthen a title: See 1 Phil. Ev. 161. But why multiply authorities, when the rule is so universally admitted? The decided cases will be found collected in note 311, 2 Phil. Ev., and in the argument for the appellant in *Grand Gulf Bank v. Bryan*, 8 Smed. & M. 256, where the same doctrine was discussed by counsel, and fully recognized by this court.

The reasons on which this rule of law is founded are too obvious to require much comment. Laws and judicial tribunals are established for defining and settling rights, so that order and tranquillity may prevail in the community. The policy of the law favors the repose of society, and hence it makes due allowances for the frailties of human memorials, and the difficulties in establishing perpetual evidences of the transactions of men. When so long a time has elapsed that certainty in the proof of events can not be expected, it receives as a substitute that which is less certain in order to protect apparent right. A contrary policy is not to be tolerated. It would convert the law into an engine to work incalculable mischief. Instead of giving repose to society, it would be the means of promoting contention and strife which would often terminate in injustice.

Let us, in the next place, see whether the defects in the defendant's title are such as are cured by the doctrine of presumption. The preliminary steps to be taken by an administrator in making sale of real estate, at the time this sale was made, are pointed out by the statute as follows, to wit:

1. When the personal estate was discovered to be insufficient to pay the debts, he was required to return on oath an inventory of the estate and debts, as far as he could discover the same, to the orphans' court or chief justice, and report the insufficiency of the personalty.

2. The court or chief justice was then to cause citations to issue, requiring persons interested to show cause why the land should not be sold; which citations were to be put up at three of the most public places in the county for thirty days, and to be published for the same length of time in a newspaper.

3. At the time specified, or subsequently, the court was to hear the allegations and proofs, and if necessary, to make an order for the sale of the land.

4. Before the administrator obtained the order from the clerk's office, he was required to give bond that he would follow the directions of the law in making the sale, and faithfully account for the proceeds.

5. To the foregoing may be added the duties of the administrator in conducting the sale. He was to give notice of the time and place of sale, by advertising the same at three of the most public places in the county for forty days, and publish the same for three weeks in some newspaper published in the territory; he was to sell at public vendue to the highest bidder on a credit of twelve months; he was to take bond and security for the purchase money, and was moreover required to make a written report of his proceedings to the orphans' court.

6. He was, lastly, to make a deed to the purchaser.

Let us now see how far the defendant falls short in proving a strict compliance with the foregoing requisites. The first was substantially complied with. It is admitted that James Dunlop was duly appointed administrator, and at the July term, 1805, he returned an inventory, called an exhibit of the personal estate and debts due by Stephen Stevenson, deceased. The particular property was not specified, but the aggregate amount of value was put down at one thousand five hundred dollars. Certain debts were specified, but it is stated in the report that there were also a number of other claims against the estate, some unliquidated and some in suit, and that the estate was insolvent. This report was sworn to by the administrator. It can not now be impeached collaterally because it was not sufficiently explicit. It was deemed sufficient by the court.

We next find two citations which seem to conform to the requisites of the law, advertised in two numbers of a newspaper then published in Natchez, the first number issued on the third, and the second on the tenth of December, 1805. The citation is dated third December, 1805, and signed by the clerk officially. There is proof in the record that these two papers were the last in the volume. This proof was surely sufficient to show a compliance with the law, so far as it required the citations to be published in a newspaper, as but the two papers are to be found; but there is no proof that the citations were put up at three of the most public places in the county, and this is the first defect.

In the next place, we find that the records of the orphans'

court show an order of sale in this way; the rough minutes of the court, as this evidently was, contains several entries, the subsequent referring to the precedent, viz.: "Afterwards, to wit, at the January term of said orphans' court, A. D. one thousand eight hundred and six, it was ordered by said orphans' court of Adams county that Joshua Vail, administrator of John Lee, make sale of all the personal property of said Lee, deceased;

"That the real property of Patrick Connelly, deceased, except the widow's dower.

"The same order respecting the estate of Stephen Stevenson, deceased."

These several orders follow each other on the minutes, and though imperfect in form, are yet sufficiently intelligible to be understood, even without explanation. They are better than the order of sale which was sustained in the case of *Hazard v. Martin*, 2 Vt. 77. That was on a loose piece of paper, and not more certain; these are of record. But in aid of this order, the present clerk of the court was examined, and testified that the book in which this order was found was the oldest book of records in the office. He was well acquainted with the records of the office; that at the date of said order, the papers and records were kept very loosely, and the orders were frequently very imperfect, put down frequently in short, and could not be understood without reference to a preceding order. Dr. Wren, who was also clerk in 1818, and acquainted with the records of the office, testifies that he found them in a very loose and disordered condition, many things unrecorded which should have been placed on record; that, from the negligence of his predecessors, many of the records may have been lost. He also stated that he knew the clerk who made this entry; that he was a man of intemperate habits, and loose in his office business. It is insisted that the testimony of North and Wren should have been excluded; we do not think so. Nothing is more common than to prove by parol the condition of the records of an office and the manner in which they have been kept. Such proof was admitted in several of the cases already cited, and we held evidence of this character admissible in the case of *Pagaud v. The State*, 5 Smed. & M. 497, and probably have done so in other cases. It is not converting parol proof into record evidence, but it is a means of accounting for that which is missing. It is introduced to show the probability of a loss of record evidence. With this testimony we can have no difficulty in saying that the order of sale is sufficiently established. Indeed, we should probably

have come to the same conclusion from the face of the record, without the explanatory proof. This book was evidently a rough minute of the proceedings, and from it a more perfect record should have been made out; but if it was ever done, it has been lost.

There is no proof that the administrator gave the bond required by law, or that he gave notice of the time and place of sale. Some of the witnesses speak of a sale of the land made by Dunlop, but whether it was sold for cash or on a credit does not appear. There is no proof that he made a written report to the orphans' court; but he made a deed to the purchaser, which is very full in reciting the title, seisin, and death of Stevenson; the appointment of Dunlop as administrator; the insufficiency of the personal estate to pay the debts; the report of insolvency; the order of court to sell the tract of land; the giving of due and timely notice of the sale according to the directions of the statute; and the actual sale at public vendue to the highest bidder.

Up to the time the administrator was invested with power to sell by the order of court, we find but one deficiency in the proof, that is the absence of any evidence that the citations were posted up at three public places in the county. That was a matter *in pais*. There was no way of putting proof of a compliance in this particular upon record, except by taking the depositions of witnesses and having them recorded. The law did not require this to be done. There was no way provided by law for perpetuating evidence of a compliance with this requisition. After the lapse of thirty-four years, it would be too much to require of a party to prove that the law had been complied with in this particular. In the nature of things, such proof becomes next to impossible after so great a lapse of time, and the law does not require impossibilities. This is the only deficiency the law of presumption is called on to supply prior to the existence of a perfect right to sell according to the ceremonies to be observed by the administrator in conducting the sale. We have been strict in our decisions, in holding that everything necessary to give the court jurisdiction of the subject-matter and of the person must appear on the record, but we have not yet held that the subsequent irregularities of the administrator in making the sale, having a valid order for that purpose, are to be visited by the same consequences. On analogy to other sales under judgments, perhaps we should not be authorized in going so far. A *bona fide* purchaser at sheriff's sale looks to the

validity of the judgment; he must know that the court had jurisdiction of the subject-matter and of the person; he is not affected by the irregularities of the sheriff in making the sale. An administrator sells under a power derived from the judgment. The law favors the defective execution of a power, but it can not cure a defective power. But admitting, for the present, that it was necessary for the administrator to pursue the statute strictly, and that there is no record proof that he gave the required bond, that he gave the requisite notice of the time and place of sale, or that he made the report of sale to the court, still we think that the authorities abundantly show that, under the circumstances, the law will presume that these several conditions were complied with. But the recitals in the deed show a full compliance, and they are entitled to some weight; they have been held in similar cases to be *prima facie* evidence. If we are so to regard them, then there is no defect in the proof; it establishes a complete title.

Having thus stated the principles, and having also shown the several defects in the proof to be supplied by them, it will be an easy matter to test the rulings of the court on the trial. We pass over the first, second, and third errors assigned. They question the admission of the deeds, the testimony of North and Wren, and the advertisements from the newspaper.

The fourth error assigned is, that the court refused to give the fifth, sixth, eighth, twelfth, and thirteenth instructions, asked for by the plaintiffs' counsel. The first instruction refused is in substance this, that it must appear by the records of the court that citation was issued to the heirs of Stevenson to show cause why the land should not be sold, or the order of sale is void. Admit that in a case differently situated, this charge should have been given, we have shown why it should not have been given in the present case, and charges must always be applicable to the state of case before the court. The law is, that after a great lapse of time this strict proof may be dispensed with; its place may be supplied by presumption. To have given this charge would have been to exclude the legal presumption, and the possibility of supplying the place of lost records. From such a charge the jury would have been bound to conclude that the record must show everything, and that no secondary proof could be received.

The second charge refused is, that it must appear by the record that the administrator gave the bond required before he obtained the order of sale, or such order of sale is without au-

thority. This admits of the same remarks that were made as to the first; but it also admits of this further answer. The order of sale preceded the giving of the bond, and the failure of the administrator to give bond could not vitiate a valid order, even if it would vitiate his sale. And, moreover, the statute makes no provision for recording the bond; how then should it appear of record? And why not as well presume that he had given bond, as to presume that he had taken an oath, which we have seen may be done?

The third charge refused is, that the reservation of the widow's dower in the order of sale, and in the deed from the administrator to the purchaser, is evidence that Stevenson left a widow, and estops the defendant from denying the same. If the widow were a party to this controversy, the force of this position might be more apparent. If it were intended to justify the presumption of the legitimacy of the children, its pertinency is not perceived, as it would not prove their legitimacy. It may have been that Stevenson left a widow, and still a part of the plaintiffs may be illegitimate. It would not follow necessarily that any of them were legitimate. We have found no law which, at that day, made the children legitimate by the subsequent marriage of the mother and reputed father. The charge then seems to have propounded but an abstract proposition, as it is wholly immaterial to the merits of this controversy whether Stevenson left a widow or not.

The last charge refused is, that cohabitation and acknowledgment are legal evidences of marriage, and if the jury believe, from the evidence, that Stephen and Mary Stevenson cohabited and held themselves out as man and wife, and raised and provided for a large family of children, which they acknowledged and held out to the world as their children, they must find for the plaintiffs. This was asking the court to weigh the evidence. The court might have charged the jury, as it afterwards did, that such circumstances would justify them in presuming a marriage, but such proof could not, under all circumstances, justify a verdict for the plaintiff. It must be recollected that there was rebutting testimony on this subject; and although cohabitation, etc., may have been proved, yet the rebutting proof may have been sufficient to show that it was an illegal cohabitation. Cohabitation, and holding themselves out to the public as man and wife, furnished but presumptive evidence of marriage. The charge was too strong; it left no room for the jury to determine on the weight of evidence. The weight of

evidence may have been against the actual marriage, but by giving the charge the court would have cut out all rebutting proof, by directing the jury that under proof of cohabitation, etc., they must find for the plaintiffs, notwithstanding the proof that no marriage was solemnized.

Several of the charges given at the instance of the defendant were objected to. The most of them may be resolved into this proposition: that, in connection with his long possession, the defendant had proven enough to justify the jury in presuming that all necessary steps had been taken to enable the administrator to make a valid sale. The truth of the proposition, we trust, has been sufficiently shown, and we shall therefore omit to notice each charge particularly.

Certain other charges given will receive a passing notice; to wit, that by the warranty in the deed the defendant was not estopped from controverting the fact of the marriage of Stephen and Mary Stevenson, nor from questioning the legitimacy of the plaintiffs. The warranty is general, "excepting only the widow's right of dower." In this controversy we do not see how this exception in the deed is to estop the defendant from disproving the marriage, and certainly it does not estop him from disproving the legitimacy of the plaintiffs. The exception has no connection with their legitimacy. If it was now a question as to the widow's right of dower, the exception might be entitled to great force. We need not now say what weight it might be entitled to. This is not a recital in the deed, but an exception. Recitals in deeds sometimes operate as estoppels, but none but privies and parties shall have advantage of them. They depend upon the same principles that the admissions of a party do. Recitals only estop the party making them, and those claiming under him, but estoppels must be mutual. The plaintiffs deny that they are bound by anything in this deed. Their legitimacy is not recited, and the defendant can not be precluded from disproving it.

Most of the plaintiffs are obviously barred by the statute of limitations, and certain charges given on that subject were excepted to, which were, in substance, that if the defendant had held twenty years' adverse possession, the plaintiffs were barred, unless they were saved by infancy or coverture; that when the statute begins to run, it continues to do so, and if the plaintiffs rely on the exceptions in favor of infants or *femes covert*, they must show that they are entitled to the benefits of the exceptions. To these charges we see no objection.

On the motion for a new trial, we need only remark that we do not think the verdict was contrary to law or the evidence, but in strict accordance with both.

The laborious investigation which this case received from counsel has induced us to give our views on the prominent points more at length than we should have otherwise deemed it necessary to do. We have bestowed upon it due deliberation, and the result is that we think that the court, from the facts proven, was correct in its charges, and that enough was before the jury to authorize them to indulge every presumption in favor of the defendant's title.

Judgment affirmed.

STATUTE AUTHORIZING TRANSFER BY ADMINISTRATOR MUST BE STRICTLY PURSUED: *Atkins v. Kinnan*, 32 Am. Dec. 534, and note; *Worten v. Howard*, 41 Id. 607, and note; *Williamson v. Williamson*, Id. 636; *Doe v. Henderson*, 48 Id. 216.

PURCHASER AT ADMINISTRATOR'S SALE, AFTER GREAT LAPSE OF TIME, IS NOT HELD TO PROOF OF PROPER POSTING OF NOTICES OF THE SALE: *Jackson ex dem. Grignon v. Astor*, 39 Am. Dec. 281.

PROOF OF MARRIAGE BY COHABITATION AND REPUTATION: See note to *Taylor v. Sweet*, 22 Am. Dec. 159, discussing this subject at length.

RECITALS IN DEEDS AS ESTOPPELS: See *Talbot's Ex'rs v. Bell's Heirs*, 43 Am. Dec. 126; *Hall v. Benner*, 21 Id. 39; *Stow v. Wyse*, 18 Id. 99; *Den v. Chaffin*, 22 Id. 711; *Graff v. Castleman*, 16 Id. 754, and note.

TITLE ACQUIRED BY ADVERSE POSSESSION, WHEN: See *Moody v. Flemming*, 49 Am. Dec. 211; *Patterson v. Reigle*, 45 Id. 684; *Hoey v. Furman*, 44 Id. 129; *Berthelemy v. Johnson*, 38 Id. 179.

DISABILITIES OF INFANCY AND COVERTURE, EFFECT OF, ON STATUTE OF LIMITATIONS: See note to *Moore's Lessee v. Armstrong*, 36 Am. Dec. 63.

SUCCESSIVE AND SUBSEQUENT DISABILITIES, EFFECT OF, ON RUNNING OF STATUTE OF LIMITATIONS: See note to *Moore's Lessee v. Armstrong*, 36 Am. Dec. 78.

LILE v. HOPKINS.

[12 SMEDES AND MARSHALL, 299.]

IN EVERY SALE OF CHATTEL THERE IS AN IMPLIED WARRANTY OF ITS EXISTENCE, and that the vendor has title to it.

PARTY ASSIGNING JUDGMENT MUST BE HELD TO IMPLIED WARRANTY that there is such a judgment, and that the defendant is liable to pay it; and if the judgment has in fact been paid, the assignee can recover from the assignor the amount paid him.

ERROR from the Claiborne county circuit court. The opinion states the case.

James H. Maury, for the plaintiff in error.

H. T. Ellett, contra.

By Court, CLAYTON, J. In March, 1841, the defendant, Hopkins, assigned to the plaintiff all his right and title to a judgment, in the Claiborne circuit court, of *McLean v. McGilvary*, "to be collected by said Lile for his own use, and in any manner he might think proper." In point of fact, the judgment had been previously paid off, and afterwards there was a perpetual *superseas* granted to its enforcement. This action for money had and received was brought to recover back the amount paid for the judgment.

Upon the trial the plaintiff asked the court to charge the jury, "that the sale of a chattel carried with it an implied warranty that there was such a chattel." This charge the court refused to give, but instructed the jury, "that no action will lie by the assignee of a judgment against the assignor, to recover the consideration paid, unless there is an express agreement to refund."

In both the court erred. In every sale of a chattel there is an implied warranty of its existence, and that the vendor has title to it: Story on Sales, 184, 367. So in every assignment of an instrument, even not negotiable, the assignor impliedly warrants that the instrument is valid, and the obligor liable to pay it: *Howell v. Wilson*, 2 Blackf. 418. In *Caton v. Lenoir*, 5 Rand. 47, the court says, "the law does not tolerate that any person should transfer to another a right which he has not himself." In Indiana and in Virginia, the statute law in regard to assignments is similar to our own, and the assignment is not governed by the law merchant: *Bullitt v. Scribner*, 1 Blackf. 14; *Mackie v. Davis*, 2 Wash. (Va.) 219; *Norton v. Rose*, Id. 233.

From this principle it follows, that a party who transfers a judgment must be held to an implied warranty, that there is such judgment, and that the defendant is liable to pay it. A satisfied judgment is, in fact, no judgment, as regards those to whom it may be transferred after its payment. If it were the intention of the parties that the assignor should not be held to such an implied warranty, that fact must be established by him. *Prima facie* the implication arises from the transaction, and the payment of the consideration by the assignee, and it must stand unless rebutted by proof.

The judgment must be reversed, and a new trial granted.

LAND v. WILLIAMS.

[12 SMITH AND MARSHALL, 362.]

WRIT OF ERROR CORAM NOBIS, or *quæ coram nobis resident*, to correct errors in matter of fact only, is addressed to the same court where the judgment was rendered, and the jurisdiction is in that court; consequently, the circuit court can not issue the writ to correct an erroneous entry of judgment in this court in a certain cause affirming a judgment of the circuit court.

ERROR from the Yalabusha county circuit court. The opinion states the case.

Acee, for the plaintiff in error.

A. H. Davidson and Sheppard, contra.

By Court, THACHER, J. A petition for a writ of error *coram nobis*, and for the *supersedeas* of an execution, was addressed to the judge of the circuit court in and for the county of Yalabusha. By the fiat of the judge, the writ of error and *supersedeas* were directed to be issued. Upon the hearing of the writ, it was directed by the circuit court to be dismissed.

Upon an inspection of the petition, upon which the writs were directed to be issued, it appears that the error complained of consisted in an erroneous entry of judgment, in a certain cause in the high court of errors and appeals of this state, affirming a judgment rendered by the circuit court of Yalabusha county. The alleged error is as to the character of the parties against whom the judgment was affirmed in this court. But this is of immaterial consideration.

The circuit court had not jurisdiction of the subject-matter of this petition. The writ of error *coram nobis*, or *quæ coram nobis resident*, to correct error in matter of fact only, is addressed to the same court where the judgment was rendered, and consequently the jurisdiction was in this court. It is so called from its being founded on the record and process which are remaining in such court: 2 Tidd's Pr. 1137. And so the circuit court decided correctly in dismissing it.

Judgment affirmed.

WRITS OF ERROR CORAM NOBIS, WHEN LIE: See *Dowe v. Harper*, 27 Am. Dec. 270. In *Adler v. State*, 35 Ark. 517, it was held that a circuit court judge had power, after the expiration of a term, to issue a writ of error *coram nobis* to reverse a judgment of conviction in a criminal case, where it appeared that the defendant was insane at the time of the trial, and the fact was not known at the trial, citing the principal case; see also *Holford v. Alexander*, 48 Am. Dec. 253.

BROWN v. JOHNSON.

(12 SWEDES AND MARSHALL, 398.)

IF AUTHORITY OF AGENT IS PARTICULAR AND SPECIAL, it must be strictly pursued; and if the agent vary from it, his act is void as to his principal.

IF AGENT MISAPPLIES MONEY OF HIS PRINCIPAL, it is a fraud upon him, and if this be known to the party who receives it, he, too, is a participant in the breach of faith, and can not hold the money.

ABUSE OF TRUST DOES NOT CONFER ANY PRIVILEGE on the guilty party, nor on those in privity with him.

AGENT EMPLOYED TO BID FOR PARTICULAR PIECE OF LAND SOLD BY STATE has no authority to bid for another tract; and upon disaffirmance of the act by the principal, and an application before confirmation of the sale, the principal has a right to have the sale rescinded and the money paid by the agent under the contract refunded.

AGENT EXCEEDING HIS AUTHORITY IN MAKING PURCHASE is himself liable, but the opposite party should have the discretion either to affirm, or rescind for non-performance of the conditions of the sale.

WHEN EQUITY DECREES RESCISSION OF CONTRACT, it places the parties as nearly as possible *in statu quo*. (*Per Clayton, J.*)

WHERE AGENT'S AUTHORITY IS SPECIAL AND LIMITED, the party dealing with the agent must look to the extent of his power; if he permits the authority to be transcended, the loss will not fall on the party who gave the authority. (*Per Clayton, J.*)

APPEAL from the superior court of chancery. The opinion states the case.

John D. Freeman, attorney general, for the state.

George S. Yerger, for R. M. Johnson.

By Court, SHARKEY, C. J. R. M. Johnson authorized B. F. Johnson to purchase for him a particular parcel of land, being part of section thirty-two in township nine, range four west, which was about to be sold under a decree of the chancery court, for default of payment by a purchaser from the state, it being part of the seminary lands. The agent did not buy the land he was authorized to purchase, but bid off and purchased, in the name of his principal, part of section thirty-one. He borrowed money in the name of his principal to make the cash payment required by the terms of the sale, and in his name, also, executed bonds to the state for the remaining two thirds of the purchase money.

So soon as R. M. Johnson was informed of what had been done, he disaffirmed the contract of the agent, and filed a petition in the chancery court to prevent the confirmation of the sale, and the chancellor thereupon set it aside, and ordered the bonds to be delivered up, and also that the land should be resold

according to the terms of the original decree. Governor Brown, some time afterwards, filed a petition that the order of rescission should be set aside, which was refused, and thereupon an appeal was prayed, which professes to be an appeal from the original order. As counsel have filed a written agreement that the merits of the case only shall be considered, we pass over objections that might arise to the regularity of the proceedings.

The case was decided at last January term, but a reargument was granted. It was then decided that the sale was void, because the agent had exceeded his authority. This is undoubtedly so. The authority in this instance was particular or special, and required to be strictly pursued. If the agent vary from an authority of this description, his act is void as to his principal: Paley on Agency, 150. The agent had no authority whatever to purchase any part of section thirty-one, and the principal was entitled to have his bonds delivered up. But the important question is, Had he also a right to have the money refunded? If the contract was absolutely void as to him, and it was his money, this would seem to follow as a necessary consequence, even if the contract should be valid as to the agent. If the money is not to be refunded, then the contract is only void in part. This is a matter in which the state is concerned, but this does not vary the principle. Is the state to say to Johnson, True, your agent exceeded his authority, and this was known to the officers, and the contract was void, but you must look to your agent for your money? The agent states that he borrowed the money in the name of his principal. The validity of that transaction is not now involved. It may be that it was borrowed under ample authority for that purpose. It was a different contract with a different person. We can not decide that the agent exceeded his authority in that particular, also, for that would be to pre-judge the rights of the lender, who is not before us. For all the purposes of this investigation, we are to regard R. M. Johnson as legally bound for the payment of the borrowed money; he claims it as his money, and the agent says it was his. The circumstance of borrowing can make no change in the principle which must govern the case. It must stand precisely as though R. M. Johnson had taken the money from his pocket, and placed it in possession of his agent for the particular purpose.

It is important to be kept in mind that the seller of this land contracted with B. F. Johnson as agent. He bid as agent, and gave the bonds as agent, and made payment as agent. It was impossible for the officer who took the bonds to be ignorant of

the agency, and it was therefore incumbent on him to examine the extent of the authority, and to know that the agent was not exceeding it.

Then if it be true, that this contract was void, and the money paid by the agent belonged to R. M. Johnson, which fact was known to the seller, it would seem that he should be allowed to recover it back. It was a misapplication of the money with the knowledge of the party who received it. If an agent misapplies the money of his principal, it is a fraud upon him, and if this be known to the party who receives it, he too is a participant in the breach of faith, and can not hold the money. There are many cases enumerated, in which it is said the principal may recover back money paid by his agent. He may do so where the contract has been rescinded: Story on Agency, sec. 435; Smith's Mercantile Law, 75, 76. He may recover property, or even follow the proceeds of property improperly sold by his agent: Story on Agency, secs. 224, 229; *Taylor v. Plumer*, 3 Mau. & Sel. 562. An abuse of trust does not confer any privilege on the party who has abused it, nor does it confer rights on those who claim in privity with him. That is the case here; the agent abused the trust by applying money differently from the directions of his principal, and this misapplication was known: See Dunlap's Paley, 335 *et seq.*, note g. This contract has been rescinded, and therefore seems to fall within the very language of Judge Story above cited. The effect of a rescission is to place the parties as they stood before the contract was made. The principles above referred to apply in courts of law; courts of equity, it is said, go further in applying them: Story on Agency, sec. 230. This is a case in equity, and the application is made to set aside a judicial sale, before that sale was confirmed; it was still incomplete at the time the application was made, when it was competent for the court to render justice to all parties, by putting an end to the sale before it was consummated.

As to R. M. Johnson, then, the sale must be set aside, and the actual amount of money paid refunded. But as to B. F. Johnson, the sale was not void. An agent who exceeds his authority in making a purchase is himself liable. But the opposite party should have the discretion either to affirm, or rescind for non-performance of the conditions of the sale; and the election can be made in the court below.

Decree reversed and cause remanded.

CLARKE, J. I agree with the conclusion of the chief justice in this case.

All the court concur in the opinion, that the contract of purchase is not valid as to R. M. Johnson. It is a uniform principle of a court of equity, that when it decrees a rescission of a contract, it places the parties as nearly as possible *in statu quo*. This is especially so, when a contract is avoided. The court endeavors to place the parties in the situation they respectively occupied before the contract was entered into: *Fitzgerald v. Reed*, 9 Smed. & M. 103. In the case just cited, the contract was set aside by this court, because of the want of mental capacity in the purchaser. The want of mental capacity to make a contract, has the same effect with a want of power. In either event, the contract is invalid, because of the want of consent of those who have legal power and capacity to act in the given case. When the contract is avoided in consequence thereof, each party is bound to give up all advantage derived under it. The duty of restitution necessarily follows from the total dissolution of the contract.

This is a case of special and limited authority, and the party dealing with the agent must look to the extent of his power. If he permits the authority to be transcended, the loss will not fall on the party who gave the authority. He has marked the limit to which he is willing to be bound by his agent, and the law will not bind him further. I do not think this case is complicated with the question of fraud, or of notice, further than the notice furnished by the power of attorney itself. In my view, it is a naked question of excess of power. When it is declared, that the power has not been pursued, the contract is not binding upon the principal, and if another person has gained any advantage from the unauthorized act of the agent, he must give it up.

There is no doubt in my mind, but that the contract is binding upon B. F. Johnson, if the state chooses so to regard it; or he is answerable to it in damages, for any injury it may sustain, by reason of his unauthorized act. As to him it may confirm or set aside the sale at pleasure, and as it may best accord with its interests. As to R. M. Johnson the sale is set aside, and the state is bound to refund his money to him, if the payment were in money, if not, the value of what was paid.

The decree is reversed, and cause remanded for further proceedings.

TRACHEE, J., delivered an assenting opinion, but agreed with Clayton, J., on the question of fraud.

AUTHORITY OF SPECIAL AGENT MUST BE SPECIALLY PURSUED, and persons dealing with him must look to his powers: *Baring v. Pierce*, 40 Am. Dec. 734, and note.

AGENT IS PERSONALLY LIABLE ON CONTRACTS unless he shows authority to bind principal: *Gillaspie v. Wesson*, 31 Am. Dec. 715; *Pitman v. Kintner*, 33 Id. 469, and notes to these cases.

NECESSITY OF PLACING PARTY IN STATU QUO ON RESCISSION OF CONTRACT: See *Fay v. Oliver*, 49 Am. Dec. 764.

MCGEE v. METCALF ET AL.

[12 SMEDES AND MARSHALL, 535.]

SURETY IS NOT DISCHARGED BY AGREEMENT TO SUSPEND EXECUTION where no positively defined period was agreed upon for the suspension, and the direction to the sheriff was "not to execute the execution until ordered to do so," as in such a case, the time being indefinite, the stay could have been arrested at any time that the surety requested it to be done.

FAILURE OF PLAINTIFF IN EXECUTION TO ENROLL JUDGMENT upon a forfeited forthcoming bond until more than a year after its rendition, does not discharge the surety on the bond, although such failure lets in the lien of younger judgments, which take all the principal's property.

APPEAL from the chancery side of the Holmes county circuit court. The opinion states the case.

H. W. Brown, for the appellant.

Brooke, for the defendant.

By Court, THACHER, J. John T. McGee filed his bill in chancery in the Holmes county circuit court. He charges, that in November, 1844, Metcalf & Fuller recovered a judgment for three hundred and sixty-two dollars and twenty-four cents against Cook, and that in consequence of his uniting with Cook in the execution of a forthcoming bond, and its subsequent forfeiture, a judgment was rendered by operation of law against said Cook and himself in April, 1845; that at this juncture Cook was possessed of ample means to respond to this, as well as all other judgments against him, but that by direction of Fultz and Brooke, the attorneys at law of Metcalf & Fuller in said action against Cook, the execution emanating upon the forthcoming bond was directed to be indefinitely held up, in consideration of a sum of money, or something else, paid to them, and which suspension of the execution was ordered without his knowledge or consent; that after the judgment upon the forfeited bond, other judgments were obtained against Cook, but that neither Metcalf & Fuller, nor their attorneys nor agents, procured the judgment

upon the bond to be enrolled until the twenty-fourth day of November, 1846, by which time judgment against Cook, obtained after Metcalf & Fuller's first judgment against him, and enrolled before theirs, had exhausted in their satisfaction all of Cook's property, leaving nothing to respond to the judgment upon the forfeited bond; and that Metcalf & Fuller are now pressing another execution, in the hands of Swann, sheriff of the county, who threatens to levy the same upon the complainant's property. The bill makes Metcalf & Fuller and Swann parties, and prays for a perpetual injunction against the enforcement of the judgment upon the forfeited forthcoming bond.

Fuller voluntarily came in and filed his answer to the bill. He denies that Fultz and Brooke directed a suspension of the execution against Cook by order either of Metcalf or himself, or with their consent, and that, as he is informed, was only so held up to enable Cook to take time to pay it; that no consideration for such suspension was given them by Cook or any one else, and that the allegation of the bill, that the same was ordered in consequence of the payment of a consideration to Fultz and Brooke, as he is informed by Brooke, is unqualifiedly false. The answer adds, that the firm of Metcalf & Fuller had been dissolved recently, and that the respondent holds a power of attorney from Metcalf, authorizing him to settle all the affairs of the firm. To the answer is appended the affidavit of Fuller, certifying that Metcalf has removed from New York to one of the western states, but which is unknown to him, and that Metcalf is entirely unacquainted with the matters set up in the complainant's bill.

Upon the bill and Fuller's answer, and without service upon Metcalf or Swann, the circuit court, upon motion, decreed the injunction to be dissolved.

The answer of Fuller was sworn to in New York in September, 1847, and the circuit court decreed in June, 1848. The record does not exhibit any irregularity in the proceedings of that court.

In *Newell and Pierce v. Hamer et al.*, 4 How. 692, it was held, that among the things necessary to constitute an agreement for extending the time of payment, which shall be sufficient to discharge the surety, are a consideration for the extension, and a definite period of extension. Now, without relying upon the matter of consideration, which, however, is positively sworn not to have passed either between Cook and Metcalf & Fuller, or Cook and Fultz and Brooke, the bill does not allege that any

positively defined period was agreed upon for the suspension of execution; the direction to the sheriff was, "not to execute the execution until ordered to do so." The time being indefinite, the stay could have been arrested at any time that the surety requested it to be done. Such delay as this has been frequently held not to prejudice a surety: *Wade v. Staunton*, 5 How. 631; *Melton v. Howard*, 7 Id. 103; *Johnson v. Planters' Bank*, 4 Smed. & M. 165 [43 Am. Dec. 480]; *Payne v. Commercial Bank of Natchez*, 6 Id. 24; *Haynes v. Covington*, 9 Id. 470; *Baine v. Williams*, 10 Id. 113; *Union Bank of Tennessee v. Govan*, Id. 333.

In the case of *Pickens v. Finney et al.*, 12 Smed. & M. 468, decided at this term of the court, the question was, whether the failure of the plaintiff in an execution at law, to have the judgment upon a forfeited forthcoming bond enrolled according to the statute, discharges the surety in the bond, when such failure lets in the lien of younger judgments, which take all the principal's property. By analogy to the principle decided in *Johnson v. The Planters' Bank*, 4 Smed. & M. 171 [43 Am. Dec. 480], and *Cohea et al. v. Com. Sinking Fund*, 7 Id. 441, we then held, that the surety was not thereby discharged. These cases cover that point as it is made in this case.

From the foregoing, it follows, that the circuit court might have decreed the dissolution of the injunction, even for want of equity upon the face of the bill.

The decree is affirmed.

FORBEARANCE OF CREDITOR TO ENFORCE EXECUTION AGAINST PRINCIPAL, effect of, on surety's rights: See *Blandford v. Barger*, 33 Am. Dec. 519; *Sneed v. White*, 20 Id. 175. Promises for delay for an uncertain time will not discharge the surety: *Gardner v. Watson*, 13 Ill. 352; and an agreement for an extension of time to discharge a surety must not only be valid and binding in law, but the time of the extension must be definite and precisely fixed: *Williams v. Covilland*, 10 Cal. 427, both citing the principal case.

MATHEWS v. CHRISMAN.

[12 SMEDES AND MARSHALL, 595.]

GUARANTY, DEFINITION OF.—A guaranty, in its enlarged sense, is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person, who is in the first instance liable.

CONTRACT IS NOT A GUARANTY WHEN one guarantees to pay a certain sum, and at a certain day, for and on account of a third person, as it is an original and primary undertaking to pay a certain sum on a certain

day. It is not a collateral undertaking, but a contract with the payee, and no notice of any kind is necessary.

NOTICE OF ACCEPTANCE OF GUARANTY AND OF NON-PAYMENT by the debtor is not necessary where the guaranty was to pay a particular sum at a particular time.

ERROR from the Hinds county circuit court. The opinion states the case.

Hutchison and Freeman, for the plaintiff in error.

Charles Scott, contra.

By Court, SHARKEY, C. J. This action was founded on an instrument in the following words: "Mr. Isaac Chrisman, I will guarantee the payment to you of six hundred and twenty-five dollars, in treasury warrants, to be paid on or before the twentieth day of August, on and for account of Mr. James Wade. July 13, 1844. James E. Mathews."

The declaration contains seven counts. The plaintiff, however, discontinued as to the second, third, sixth, and seventh counts, and the demurrers to the others were overruled, and the case comes up to test the correctness of the decision overruling the demurrers.

The first count sets out the instrument, and avers, that thereby defendant became liable to pay according to the tenor and effect of the instrument, and his failure to do so. The fourth count also sets out the instrument, and avers that it was then and there delivered by defendant, in consideration that the plaintiff did then and there, at the special instance and request of defendant, loan and advance to the said James Wade the sum of six hundred and twenty-five dollars, in treasury warrants, by means whereof defendant became liable, etc. The fifth count avers that Wade was then and there indebted to the plaintiff in the sum of six hundred and twenty-five dollars, in treasury warrants, and that defendant, in consideration of the indebtedness, and of forbearance until the twentieth of August, made his written promise to pay the sum specified on the twentieth of August, for and on account of said Wade. It also avers that the forbearance was given, that Wade has not paid, and that defendant had due notice, whereby he became liable, etc.

The objection to the first count, set down as cause of demurrer, is, that it avers no facts showing defendant's liability, nor does it contain any averment of a promise. The causes of demurrer to the fourth count are, that it states no cause of

action, no consideration, and contains no averment of an *assumpsit*; and to the fifth count the same causes were assigned.

The case might very well be made to rest on the sufficiency of the fourth count, which certainly contains a statement of a good cause of action. It sets out the contract as an entire transaction, consummated at the same time the loan was made, in consideration of which loan, the defendant then and there executed the instrument. The contract set out is this: Mathews says to Chrisman, "If you will loan Wade six hundred and twenty-five dollars, I will give you my written promise to pay it by the twentieth of August;" whereupon the loan was made, and the written promise given. It certainly requires no argument to prove that Chrisman could recover on such a contract. But it is believed that the demurrer was also misconceived as to the other counts.

The case has been elaborately argued for the plaintiff in error, on the construction of the contract. It has been insisted, that it is a commercial guaranty, and, as such, that it was incumbent on the party to whom it was made to give notice of its acceptance, and also to give notice of non-payment by the debtor. A guaranty, says Chancellor Kent, in its enlarged sense, is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person, who in the first instance is liable: 3 Kent, 121. This definition seems to cut off the inquiry at the threshold, inasmuch as no indebtedness of Wade is shown by the pleadings, or by the contract. It was an agreement to pay on account of Wade, but whether on account of a pre-existing debt, or a debt which was to be contracted by Wade, does not appear; nor does it appear whether Wade is liable at all. Proof might have shown such a case, but certainly the pleadings do not. Reference is made to a class of cases which establish the principle that in commercial guaranties notice of acceptance and of non-payment must be given to the guarantor, but no case is cited which holds an instrument like this to be such a guaranty. The case of *Edmondston v. Drake*, 5 Pet. 624, was on a letter of credit addressed by a merchant in Charleston to a mercantile house in Havana, in favor of one about to sail for the island of Cuba for purposes of speculation. It was but an authority to give credit in future; and the case of *Douglass v. Reynolds*, 7 Id. 113, was of a similar character, addressed by certain citizens of this state to a commercial house in New Orleans, to aid the party, in whose favor it was drawn, in his business operations, by extending to him

credit and cash advances. The case of *Lee v. Dick*, 10 Pct. 482, was also on a letter of credit, guaranteeing the payment of a debt to be thereafter contracted, in case credit should be given. The declaration averred that a draft was drawn by the person in whose favor the letter was given, and accepted on the strength of the guaranty. In such cases it was held, that notice of acceptance was necessary; and the case of *Adams v. Jones*, 12 Pet. 207, was also on a letter of credit, addressed to a person and authorizing future credit to be given. The case only decides, that in such cases notice must be given of the acceptance of the guaranty, and that credit has been given on the strength of it. The case of *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 288], is cited, but it certainly goes to establish a doctrine that defeats the purpose for which it was cited. It was an action on a guaranty of payment of a promissory note, in these words indorsed on the note: "For value received, I sell, assign, and guarantee the payment of the within note to John Allen or bearer." It was held that proof of demand and notice was not necessary, because it was an absolute undertaking that the maker should pay the note.

The case of *Williams v. Staton*, 5 Smed. & M. 347, was also on a letter, undertaking to become responsible in case certain credit should be given; there it was held that notice was necessary. The principle decided by these cases is too well settled to be doubted; it is admitted to the fullest extent. But is the contract here sued on a letter of credit? Certainly not; it bears no resemblance to a commercial guaranty. It is not an undertaking to be responsible for a debt to be afterwards contracted, or that another will pay a debt already existing; but it is an original and primary undertaking to pay a certain sum on a certain day. It is not a collateral undertaking, but a contract with the payee, and no notice of any kind was necessary. In support of this position, the following authorities are cited: *Allen v. Rightmere*, 20 Johns. 365 [11 Am. Dec. 288]; *Thrasher v. Ely*, 2 Smed. & M. 139; *Wren v. Pearce*, 4 Id. 91; 3 Kent's Com. 121-123; *Hough v. Gray*, 19 Wend. 202; *Miller v. Gaston*, 2 Hill (N. Y.), 188.

But even if it was but a guaranty, it would fall within the exception to the general rule, because it was a guaranty to pay a particular sum at a given time. It was not an indefinite promise either as to amount or time of performance. The party knew what he had contracted to pay, and when it was to be paid; and it was his business to see that the amount was paid. The

declaration then is sufficient, and the judgment must be affirmed.

NOTICE OF ACCEPTANCE OF GUARANTY AND OF NON-PAYMENT, NECESSITY OF: See *Fellows v. Prentiss*, 45 Am. Dec. 484, and note; *Whiton v. Mears*, Id. 233, and note.

WHITESIDES v. THURLKILL.

[12 SWEDES AND MARSHALL, 599.]

BY COMMON LAW, A CARRIER OF GOODS IS REGARDED AS AN INSURER, and is held accountable for any damage or loss to them, unless from inevitable accident, which is the same thing with the act of God, or of the public enemy; but the party may limit this common-law liability by express stipulation in his contract.

LOSS BY COLLISION COMES WITHIN EXCEPTION OF "DANGERS OF THE RIVER," if the loss arose without any fault on the defendant's part, or that of the hands upon his boat; but if they had been guilty of negligence, or might have prevented the loss by the exercise of reasonable skill and diligence, then the defendant would be liable.

ERROR from the Itawamba county circuit court. The opinion states the case.

R. Davis, for the plaintiff in error.

By Court, CLAYTON, C. J. This was an action in the circuit court of Itawamba county to recover damages for injury done to thirty bales of cotton, shipped by Thurlkill upon a flat-boat belonging to Whitesides. The bill of lading was in the usual form, agreeing to deliver the cotton in Mobile in good order, the dangers of the river excepted. The boat was descending the river below Dunopolis, in the night, when a steamboat, likewise going down, struck the flat-boat, knocked off some of the planks, and sunk it. The cotton was recovered and sent to Mobile, but in a damaged condition.

The question is as to the liability of the carrier. The court charged the jury: 1. "That the defendant is liable, unless the loss was occasioned by inevitable accident, and that by inevitable accident the law means such accident or casualty as no human foresight could have guarded against."

2. "That if the jury believe that defendant could have avoided the loss by keeping up larger or better lights, or by keeping the boat nearer the shore, or by changing her course or position at the time, then he is liable."

3. "The exception in the bill of lading of 'the dangers of

the river,' does not embrace a loss occasioned by a collision which might have been avoided by human foresight."

4. "That if the loss occurred from an accident against which no human skill, prudence, or foresight could have guarded, then the defendant would not be liable."

The correctness of these charges is to be determined.

By the common law, a carrier of goods is regarded as an insurer, and he is held accountable for any damage or loss to them, unless from inevitable accident, which is the same thing with the act of God, or of the public enemy: *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 381; *Neal v. Saunderson*, 2 Smed. & M. 576 [41 Am. Dec. 609]. But the party may limit and narrow down this common-law liability, by express stipulation in his contract. The exception of the "dangers of the river," is one instance of this limitation. In *Neal v. Saunderson*, Id. 578 [41 Am. Dec. 609], the court said: "This exception has the effect to exempt the carrier from losses arising not only from natural causes, but from accidents which are usually considered as peculiar to the river." The term "perils of the sea," has been held to include losses by collision of two ships, where no blame is imputable to the injured ship: *Story on Bail.* 330. But if the loss be directly and immediately occasioned by the ignorance or inattention of the master and mariners, it is not deemed a loss by the perils of the sea. Hence it is, that if the loss occurs by a peril of the sea, which might have been avoided by the exercise of any reasonable skill, or diligence, at the time when it occurred, it is not deemed to be in the sense of the phrase, such a loss by the perils of the sea as will exempt the carrier from liability, but rather a loss by the gross negligence of the party: Id. 331. These special stipulations are not held to exempt the parties for losses arising from willful misconduct, gross negligence, or want of ordinary care: *New Jersey Steam Nav. Co. v. Merchants' Bank*, 6 How. 383.

By comparing the charges given in the court below with what is here stated, it will be readily seen that the law was laid down with too much stringency against the defendant below. The first charge especially enforced all the rigor of the common-law rule, without any modification growing out of the exception of "the dangers of the river."

Instead of this, the jury should have been told that the defendant was not liable, if the loss arose without fault on his part, or that of the hands upon his boat; but if they had been guilty of negligence, or might have prevented the loss by the

exercise of reasonable skill and diligence, then he would be liable.

The parties must have intended something by the exception. The object was to modify the responsibility imposed by the common law, and to diminish the risk of the carrier. This was lawful. The effect of the modification, as indicated by previous decisions, is shown by what is stated above.

The case of *Gilmore et al. v. Carman*, 1 Smed. & M. 279 [40 Am. Dec. 96], may seem to stand opposed to this conclusion. We do not mean to interfere with the point there decided, that a loss occasioned by fire upon a steamboat is not within the exception of the dangers of the river. The attention of the court was there directed to the facts before it, and the general expressions must be taken in connection with the facts.

For the error in the charge of the court, the judgment will be reversed and a new trial awarded.

COMMON CARRIER, HIS POWER TO LIMIT HIS LIABILITY: See *Hollister v. Nowlen*, 32 Am. Dec. 453, and the note to *Cole v. Goodwin*, Id. 470, discussing this subject at length. The principal case is cited on the point as to the power of a carrier to exempt himself from liability, in *Railroad Co. v. Lockwood*, 17 Wall. 371; *McMillan v. M. S. & N. I. R. R. Co.*, 16 Mich. 116.

COLLISIONS ARE PERILS OF THE SEAS, WHEN: See note to *Van Horn v. Taylor*, 41 Am. Dec. 282.

ANDERSON v. HILL.

[12 SMEDES AND MARSHALL, 679.]

WHERE, ON PUBLIC SALE OF TOWN LOTS, it is in proof that a certain lot extending to the Tombigbee river was, on the day of sale, reserved as a depot for a railroad, which was to have its terminus at that point, and the lot bought by the defendant and other lots similarly situated were regarded at the sale as front business lots, and consequently brought higher prices, and afterwards the railroad was abandoned and the lot intended for the depot was sold out in small lots, covered, at the time of the trial, with cotton-sheds, cutting off from the river the lots purchased, and making it a back instead of a front lot, causing it to greatly depreciate in value, these facts would justify and require a court of equity to rescind the contract, and will form a good defense to an action on a writing obligatory given for the price.

DEFENSE OF FRAUD IN A CONTRACT OF SALE MAY, apart from and independent of any defect of title, be made in an action for the price of the land, although the defendant has not been evicted or disturbed in the possession of his lot.

WHERE THERE WERE NO EXCEPTIONS TO THE CHARGES OF THE COURT, at the time they were given, but after the motion for a new trial was over

ruled the testimony and charges of the court were set out, and the bill of exceptions says, "and therefore the jury returned a verdict for the defendant, to all of which the plaintiff excepts," this does not amount to anything more than an exception to the refusal to grant a new trial, because not reserved or taken until after the verdict; and the instructions can not therefore be reviewed.

ERROR from the Monroe county circuit court.

Adam G. Smith, for the plaintiff in error.

Good and Burnett, contra.

By Court, CLAYTON, J. This was an action of debt brought upon a writing obligatory, given for the purchase of a town lot, at the public sale of lots, in the town of Aberdeen. The defense is fraud and failure of consideration. In many respects the case is like that of *Anderson v. Burnett*, 5 How. 165 [35 Am. Dec. 425], and *Bell v. Henderson*, 6 Id. 311, which grew out of sales of lots in the same town. The advertisements, and the vague general representations, were there held not to amount to fraud, because they related to matters open to the examination of all persons, and about which they could form their own conclusions.

But there is one feature in this case different from the others. It is in proof that a lot extending to the Tombigbee river was, on the day of sale, reserved as a depot for the railroad, which was to have its terminus at that point, and that the lot 858, for which this note was given, adjoined the depot lot, which was situated between it and the river. This lot 858, and others similarly situated, were regarded at the sale as front business lots, and consequently brought higher prices than they would otherwise have done. Afterwards the railroad was abandoned, and the lot which had been reserved for the depot was sold out by the trustees in small lots, which were covered at the time of the trial with cotton-sheds, which cut off the lot 858 from all direct communication with the river, and made it a back instead of a front lot. It had, consequently, greatly depreciated in value, and was worth scarcely one twentieth of the original price. We think this would have justified and required a rescission of the contract by a court of equity: *Donelson v. Weakley*, 3 Yerg. 178. The very object for which the lot was purchased was defeated by the act of the plaintiff. There is no railroad or depot, and the lot is shut out from the river, so that it is no longer regarded as a business lot, according to the testimony.

But it is said, the party has not been evicted or disturbed in his possession of the lot, and can not, therefore, defend at law. That is certainly the rule where the defense attempted is a failure of consideration from defect of title: *Hoy et al. v. Taliaferro*, 8 Smed. & M. 740. But where the defense set up is fraud in the contract of sale, apart from any defect of title, and independent of it, there the defense may be made in an action upon the instrument: *Barringer v. Nesbit*, 1 Smed. & M. 22; *Brewer v. Harris*, 2 Id. 84 [41 Am. Dec. 587]; *Ellis v. Martin*, Id. 187.

The jury found a verdict for the defendant. There were no exceptions to the charges of the court, at the time they were given; but after the motion for a new trial was overruled, the testimony and charges of the court were set out, and the bill of exceptions says, "and therefore the jury returned a verdict for the defendant; to all of which the plaintiff excepts." This did not amount to anything more than an exception to the refusal to grant a new trial, because not reserved or taken until after the verdict. Smedes' Dig., Bill of Excep., sec. 4. The instructions can not therefore be reviewed.

We think the verdict was in accordance with the testimony, and with the law as herein stated, and, therefore, direct that it be affirmed.

Judgment affirmed.

FRAUD OF VENDOR, VENDEE RELIEVED ON GROUND OF, IN EQUITY, WHEN: See *Cullum v. Branch Bank*, 37 Am. Dec. 725, and note; *Ingram v. Morgan*, 40 Id. 626, and note. The principal case was cited in *Johnson v. Jones*, 13 Smed. & M. 582, to the point that a vendee may defend at law for any fraud in the contract of sale apart from and independent of any defect in the title.

OBJECTION NOT TAKEN AT THE TRIAL, and not presented to the court, can not be sustained: *State v. Morgan*, 47 Am. Dec. 329; *Clark v. State*, 40 Id. 481; *Hewett v. Buck*, 35 Id. 243. The principal case was cited in *Drake v. Surget*, 36 Miss. 487, to the point that an objection to instructions taken for the first time on a motion for a new trial will not be considered.

SANDS v. ROBISON.

[12 SMEDES AND MARSHALL, 704.]

NO OATH OF SECRECY IS REQUIRED FROM GRAND JURORS as to what transpires among them in the discharge of their office.

COMPETENCY OF GRAND JURORS TO TESTIFY is peculiarly a matter of discretion with the court to discriminate as to it; and in an action of slander, grand jurors are competent to testify to the uttering of the supposed slanderous words before them, while officiating as grand jurors.

IN AN ACTION OF SLANDER, where the defendant, a justice of the peace, voluntarily stated before the grand jury the charge against the plaintiff, as having repeatedly come to him as a rumor, the occasion on which the words were spoken furnishes a *prima facie* excuse for their having been spoken, and it falls upon the plaintiff to show that the occasion was only used as a colorable pretense, and to establish express malice in the defendant.

ERROR from the Monroe county circuit court. The opinion states the case.

Goodwin and Sale, and Ligon, Lindsay, and Copp, for the plaintiff in error.

Davis and S. Adams, contra.

By Court, THACHER, J. This is an action of slander, in which the jury found for Robison, the plaintiff below, one thousand dollars damages.

The competency of certain grand jurors to testify to the uttering of the supposed slanderous words before them, while officiating as grand jurors, was objected to upon the trial.

In this state, no oath of secrecy is required from grand jurors, as to what transpires among them in the discharge of their office. The question then is, whether, by the policy of the law, communications to them, etc., are to be deemed privileged.

It would certainly be a great breach of duty for a grand juror, while the inquest was in session, to disclose the business of that body, by means whereof persons accused and not yet arrested might make their escape, or take other measures to defeat the course of public justice. Indeed, in a certain state of case, a grand juror might thereby render himself liable to a criminal charge as an accessory, after the fact, in the commission of a crime. So, as many charges are confided to that body against individuals, which, for want of sufficient proof, or from want of foundation in fact, do not mature to a presentment or indictment, common prudence and charity, and a regard for the peace of society and innocent men's reputations, imperatively should close the mouths of grand jurors, as to their proceedings, after the expiration of their session. It is the interest of all good citizens to observe this rule, in order to secure freedom of deliberation and opinion, which would be to a great extent impaired if the occurrences of a session were afterwards made the subject of comment and loose and malicious conversation. Indeed, thus a grand juror might well subject himself to an action of slander. But the policy of the law was never designed to injure or punish the innocent, or to obstruct the course of jus-

tice; nor can that rule be upheld, by which a grand jury room shall be converted into an occasion for the safe and irresponsible utterance of false and malicious slander against upright and honorable citizens: *Huidekoper v. Cotton*, 3 Watts, 56. Hence it will be seen that so much depends upon time and circumstances, that the competency of a grand juror to testify is peculiarly a matter of discretion with the court to discriminate as to it. In the present case we see no valid objection to the competency, since the subject-matter of their evidence had been already disclosed, and it was for the good of both plaintiff and defendant that the merits of the affair should be fully exposed.

The principle by which the finding in this instance may be safely tested is laid down by Chief Justice Shaw of Massachusetts, in *Bradley v. Heath*, 12 Pick. 163 [22 Am. Dec. 418]. He says: "Where words, imputing misconduct to another, are spoken by one having a duty to perform, and the words are spoken in good faith, and in the belief that it comes within the discharge of that duty, or where they are spoken in good faith to those who have an interest in the communication, and a right to know and act upon the facts stated, no presumption of malice arises from the speaking of the words, and therefore no action can be maintained in such cases, without proof of express malice. If the occasion is used merely as a means of enabling the party uttering the slander to indulge his malice, and not in good faith to perform a duty or make a communication useful and beneficial to others, the occasion will furnish no excuse." *Bromage v. Prosser*, 4 Barn. & Cress. 247; Stark. on Slander, 200.

The defendant below was a justice of the peace of the county, and he stated the charge against the plaintiff, as having repeatedly come to him as a rumor. This he stated voluntarily to the grand jury. No prosecution ensued for the want of evidence, or other reasons which do not appear.

It is the duty of every citizen, and more especially of justices of the peace, even without the statutes requiring them so to do, to prosecute, in every legal mode, persons who have within their knowledge been guilty of crimes or misdemeanors. The occasion, therefore, on which the words were spoken furnishes a *prima facie* excuse for their having been spoken. It fell, then, upon the plaintiff below to show that the occasion was only used as a colorable pretense, and to have established express malice in the defendant. The only ground for proof of this, was that, on some previous occasion, the plaintiff had exacted specie from the defendant in the payment of a debt. The

present record does not disclose enough, in our opinion, to justify the finding of the jury.

The judgment is reversed, and a new trial awarded. ,

GROUND OF POLICY OF SWEARING GRAND JURORS TO SECRET: See *State v. Broughton*, 45 Am. Dec. 507.

EXPRESS MALICE MUST BE SHOWN IN ACTION OF SLANDER, where the words were spoken in the exercise of a duty or for good motives: *Faris v. Starke*, 33 Am. Dec. 536.

WORDS PRIVILEGED BECAUSE SPOKEN IN JUDICIAL PROCEEDING, so as not to be actionable, when: See *Faris v. Starke*, 33 Am. Dec. 536, and note; *Hastings v. Lusk*, 34 Id. 330; *Mower v. Watson*, Id. 704.

PACK v. THOMAS.

[13 SMEDES AND MARSHALL, 11.]

PAROL EVIDENCE IS INADMISSIBLE TO VARY TERMS OF CHECK; consequently, if one give a check for so much money, it is not competent for him to prove, by oral testimony, that it was agreed, either expressly or impliedly, at the time the check was given, that it should be payable in bank notes.

COMPETENCY OF EVIDENCE IS TO BE DETERMINED BY ITS LEGAL EFFECT; it is immaterial how long or circuitous the chain may be by which the end is reached.

RULE AS TO VARYING WRITTEN INSTRUMENT BY PAROL EVIDENCE is that where the law requires a written instrument, or where parties adopt that mode of contracting, it is a matter of principle and policy to prevent inferior evidence from being used, either as a substitute for, or an alteration of, the written contract. The operation of an instrument can not be varied by showing that a different intention existed at the time it was made. Its legal effect must be preserved, and all contemporaneous expressions or circumstances which tend to vary it must be excluded, unless established by proof of the same character.

NOTICE OF DISHONOR OF CHECK IS NOT NECESSARY where the drawer had no funds in the bank at the time, although he may have had reasonable grounds to believe that it would be paid.

DRAWER OF CHECK, INJURED BY WANT OF NOTICE OF ITS DISHONOR, is only exonerated to the extent of the injury. A mere partial injury would not entitle him to be exonerated from the whole debt.

ERROR from the Madison county circuit court. The opinion states the case.

D. Mayes, for the plaintiff in error.

A. H. Handy, contra.

By Court, SHARKEY, C. J. This action was brought on a check for one thousand three hundred and thirty-five dollars, drawn

on the branch of the Commercial Bank of Natchez, at Canton, by Thomas in favor of Pack. There was a verdict for the defendant, and it is now insisted that the court erred in admitting testimony, and also in its charges to the jury.

The first point raised relates to the admissibility of Stephens' testimony, which was to this effect: in conversation, Pack stated to the witness, that he (Pack) had met defendant, Thomas, in Canton, who informed him, that he had collected a debt for him as attorney in notes of the Brandon Bank, and asked Pack if he would receive them in payment; Pack replied that he would not, and they separated. They met again, when Thomas asked Pack what he ought to do with the Brandon notes; the latter replied that his advice would be to deposit them in the Commercial Bank. They met a third time, when Thomas informed Pack that he had deposited the notes as advised, and offered Pack the check in question, which he received, without saying whether he would or would not receive the Brandon notes. His reason for doing so was, that he thought the bank might use the notes and pay him in money.

The cashier of the bank was examined, who stated that Thomas had no money in the bank at the time the check was drawn, or afterwards, except in Brandon notes, which had been received as a kind of special deposit, and that Thomas was informed when he made the deposit, that money would not be paid on it. Payment of the check was demanded and refused, though the cashier states that he would have paid it in Brandon notes.

Under these circumstances, it must be very clear that Stephens' testimony was improperly admitted. It was an effort to prove, from circumstances, an agreement to receive the Brandon notes in payment of the check. This was the effect of the testimony, and, beyond all doubt, the object of its introduction. Then the question is plainly this: If one give a check for so much money, is it competent for him to prove by oral testimony, that it was agreed, either expressly or impliedly, at the time the check was given, that it should be payable, not in money, but in something else? Is it competent to show that it was not intended as a check for money, although it calls for money on its face? This is too clearly varying the legal effect of the instrument; it is changing the contract. And the objection is not obviated by the circuitous method of arriving at the fact. The competency of evidence is to be determined by its legal effect. It is immaterial how long or circuitous the chain may be by which the end is reached. It would have been just as free from objection, if

the witness had said in so many words, Mr. Pack agreed to receive Brandon notes for the check. By the face of the instrument it is one thing, a check payable in money; by the proof offered it is a different thing, it is a check payable in depreciated bank notes, which are not money. It might as well have been converted into a check for any other commodity. And the object was not to defeat the instrument by matter subsequent, which operated as a discharge or a new contract; but to vary its effect by showing facts which transpired before and at the time it was delivered.

The rule is very distinctly laid down, that where the law requires a written instrument, or where parties adopt that mode of contracting, it is a matter of principle and policy to exclude inferior evidence from being used, either as a substitute for, or as an alteration of, the written contract. The operation of an instrument can not be varied by showing that a different intention existed at the time it was made. Its legal effect must be preserved, and all contemporaneous expressions or circumstances which tend to vary it must be excluded, unless established by proof of the same character: 3 Stark. Ev. 994-1008. Oral evidence is inadmissible to prove that a general acceptance of a bill of exchange was intended to be conditional only: *Heaverin v. Donnell*, 7 Smed. & M. 244. It is inadmissible to prove that a promissory note was intended to be payable at a particular time, when no time of payment was expressed, as that would alter its legal effect: *Thompson v. Ketchum*, 8 Johns. 189 [5 Am. Dec. 332]; or to prove that one who had engaged in writing to become surety on a promissory note, was only to be held liable in case of the insolvency of the principal: *Hunt v. Adams*, 7 Mass. 519; or to show that a note payable at a day certain was to be payable on a contingency only: 3 Stark. Ev. 1008. The law presumes that parties mean exactly what they have said in writing, and that they have said all that was intended, and it is dangerous to relax the rule which holds them to their written contracts.

It is also insisted, that the court erred in refusing to instruct the jury, that if they believed from the evidence that when Thomas drew the check he had not funds in bank for its payment in cash, or any part of it, but only Brandon notes, placed there as a special deposit to be paid out in the same notes, and that he knew cash would not be paid by the bank on account of such deposit, they ought to find for the plaintiff. This charge

should have been given. A check for cash is not payable in depreciated bank notes, or other specific thing. If it was the agreement of the parties that Brandon bank notes should be received in payment, the check should have been so drawn. Such an agreement would have justified the refusal of the charge, and the court was influenced, no doubt, by the consideration that Stephens' testimony might establish such an agreement, but we have shown that it was incompetent for that purpose. The propriety of the charge is made manifest by the testimony of the cashier.

At the request of the defendant, the court gave three charges, which were also made the ground of objections. The first was, that if the defendant, when he drew the check, had any reasonable ground to believe it would be paid, he was entitled to due notice of dishonor, and the law was for the defendant.

Some of the decided cases have held this doctrine applicable to checks, on the ground of their resemblance to inland bills of exchange. Whilst there is a resemblance in form, they are still very different things; they differ in their origin and object, and it may be very questionable whether notice of dishonor is necessary in any case, except as rebutting evidence. If the defendant should show, that the bank in which the deposit was made had failed, then a presumption would arise, that he had sustained an injury, which would be rebutted by proof of notice. But if the bank continues solvent, no injury can result for want of notice. A check is supposed to be drawn on an actual deposit of money, which has been made for the convenience and safety of the depositor, in a bank of his own selection, which acts as his agent in making payments. It is not drawn on a commercial transaction, past or future, but it is a means of making a cash payment. The debtor answers the call of his creditor by saying: "I have deposited the money with my banker for you; call and get it on this voucher, which transfers the amount to your use." If the check be received by the creditor, he thereby impliedly agrees to make demand; but as a notice is required on commercial paper to protect the drawer, its object must be the same as regards checks. If, therefore, no injury can result from want of notice of the non-payment of a check, then of course notice may be dispensed with. If a check be drawn without funds to meet it, the drawer can not be injured by a failure to give notice; he has nothing at stake to lose, and to draw a check under such circumstances is a fraud. Both

demand and notice may be dispensed with, where the drawer has no funds in bank: *True v. Thomas*, 16 Me. 36; *Mohawk Bank v. Broderick and Powell*, 10 Wend. 304.

If, on the other hand, there are funds in bank, and payment be refused, they, of course, remain there still as the funds of the depositor. They are just where he placed them, and he loses nothing. If he gets clear of the check for want of notice, he is evidently a gainer that much, as he still has the money on deposit. The law there would not presume an injury until it be shown, or until some circumstance be established, such as the failure of the bank, from which it might be inferred. This view is in accordance with the opinion of Judge Story: *In the matter of Brown*, 2 Story, 516. It is the doctrine, too, of the case of *Murray v. Judah*, 6 Cow. 484, in which it was decided to be incumbent on the holder of a check to present it, but that a demand at any time before suit brought, was sufficient, unless it appeared that the drawer had failed, or that the drawer had in some other way sustained an injury. The plain import of this case is, that it is sufficient for the holder, in the first instance, to prove demand, and this will entitle him to recover, unless the defendant has sustained an injury for want of notice of dishonor. That proof must, of course, come from him either by showing it directly, or by establishing circumstances from which the law would infer an injury, as the failure of the bank. And then, again, the plaintiff may negative the injury. The holder of a check takes the risk of the failure of the bank by holding it up, but that is the only risk he does take: *Conroy v. Warren*, 3 Johns. Cas. 259 [2 Am. Dec. 156]; 3 Kent's Com. 88, 5th ed. The charge then was wrong. It was an application of a rule of commercial law, which prevails as to bills of exchange, to a check which is a thing not subject to the rule. According to the common understanding as to the object of a check, it is a fraud to draw it without money in deposit. He who gives a check, gives with it also a guaranty that he has the money in bank, and he can have no reasonable ground, in a legal sense, to expect that it will be paid, when he has no funds in bank.

The second charge given was this: "If the defendant had reasonable ground to believe the check would be paid, and sustained damage or injury by the failure to notify him of the dishonor in due time, the plaintiff can not recover." This charge was manifestly wrong, not only for the reasons above given on the preceding charge, but for the further reason, that if the defendant was even injured by the failure to give notice, he was only

thereby exonerated to the extent of the injury. A mere partial injury would not entitle him to be exonerated from the whole debt: *Story on Prom. Notes*, p. 650, sec. 492.

The third charge given the jury, was, that if they believed from the evidence that the Brandon notes were deposited in bank by the defendant, in consequence of the advice or authority from the plaintiff, and that the plaintiff afterwards took the check, and then knew that it was drawn on the faith of the Brandon notes, which had been deposited, then the defendant was entitled to notice of dishonor, if the check was not paid, and if no such notice was given, they must find for the defendant.

Enough has been said already to show the impropriety of this charge. The "advice or authority of the plaintiff," as to the propriety of making the deposit, can have no influence on the question, unless they amounted to an agreement to receive the Brandon notes, and it was not competent to prove such agreement in the manner attempted. The check should have been drawn payable in the Brandon notes. It may be, that in good faith the plaintiff should have received the Brandon notes, but with that question we have nothing to do. But the charge was moreover wrong in another respect. Even if notice was necessary, the failure to give it only entitled the defendant to be discharged to the amount of injury he actually sustained. He may have suffered a loss, but it may have been inconsiderable. If he lost a fourth, a third, or half the amount of his deposit, such loss would not entitle him to be discharged from the whole debt.

Judgment reversed, and cause remanded.

PAROL EVIDENCE TO VARY LEGAL EFFECT OF WRITING: See *Bond v. Fordyce*, 49 Am. Dec. 561; *Bank of Utica v. Finch*, Id. 175; *Sylvester v. Downer*, Id. 786; *Barnes v. Simms*, Id. 435, and note.

GARLAND v. HULL.

[13 SMEDES AND MARSHALL, 76.]

EQUITY HAS NO JURISDICTION OF SUIT TO RECOVER GENERAL BALANCE OF AN ACCOUNT for goods sold, where the demands sought to be recovered are all legal demands unconnected with any fraud, lien, or trust.

GOODS SOLD THE GRANTOR OF A PLANTATION CONSTITUTE NO CHARGE upon the plantation, although bought for its use, and a grantee could not be rendered liable for them unless by direct agreement in writing.

PRO CONFESSO ORDER CAN NOT JUSTIFY A DECREE against one who has been directed to answer over, upon exceptions being sustained to his answer, and fails to do so, unless a state of facts is made out by the bill which rendered him liable in this mode of proceeding.

BILL in chancery filed by Hull against Burr Garland and Samuel Garland, alleging substantially that Samuel Garland was the owner of a plantation, and that Burr Garland was his superintendent and agent; that complainant sold merchandise to a large amount to Burr Garland as agent for Samuel Garland (who resided in another state), for the use of the plantation, not on his personal responsibility, but relied on the plantation as security; that a portion of the debt remained unpaid; the bill further alleges that there was a debt owing certain physicians for services on the plantation, and also a debt owing the overseer, and that the complainant was the assignee of these claims. The bill prays for an account to be taken, and for a decree for the balance found due. The answer of Burr Garland denies that the goods were sold on the credit of Samuel Garland, and alleges that it was contracted on his own credit; the answers of both defendants allege that Burr Garland had been owner of the plantation, and had sold it to Samuel Garland; that the greater part of these debts had been contracted before the sale; both defendants deny that Burr Garland was the agent and superintendent of the plantation; and both defendants claim that equity has no jurisdiction of the case. Various exceptions to the answers having been sustained, the bill was taken for confessed on a failure to answer further. The chancellor decreed an account to be taken of all that had been furnished the plantation since Samuel Garland's ownership, and that he should be charged; Samuel Garland prayed an appeal from this interlocutory decree, which was granted.

William and William G. Thompson, for the appellant.

D. Shelton, contra.

By Court, CLAYTON, J. This was a bill filed in the superior court of chancery to recover the amount of several open accounts. Answers were filed, which were also framed to operate as demurrers.

It is not easy to perceive under what head of equity jurisdiction the cause can be placed. The demands sought to be recovered are all plainly legal demands, unconnected with any lien or trust which could give a court of chancery jurisdiction. There is no fraud in the case. There is no ground for the as-

sumption in the argument that it is a proceeding *in rem*. The bill is not framed with any such view. It claims a general balance of account, and claims to have it satisfied out of a particular estate, but it shows no lien or incumbrance upon the estate, nor any right to proceed against it, which does not exist in every instance where credit is given to any one who owns property or estate of any kind.

The very exhibits, too, filed with the bill, defeat the recovery. The accounts are all made out against Burr Garland. Nearly all of them arose before the sale of the estate to Samuel Garland. They constituted no charge upon the estate. There is no allegation of any direct undertaking, upon the part of Samuel Garland, to pay them. He could not be rendered liable for them, unless by direct agreement in writing.

Exceptions were filed to the answer of Samuel Garland, and sustained to some extent. He was directed to answer over, but failed to do so, and a *pro confesso* order was thereupon taken against him. This order could not justify a decree against him, unless a state of case is made out by the bill which rendered him liable in this mode of proceeding. We have endeavored to show that this was not done, and that the demurrer was a full answer to the whole bill. To hold that the court of chancery might render a decree in this case, would be to enlarge its jurisdiction beyond any known limit.

Decree reversed and bill dismissed.

EQUITY JURISDICTION IN MATTERS OF ACCOUNT: See *Breckenridge v. Brooks*, 12 Am. Dec. 401; *Smiley v. Bell*, 17 Id. 813; *Ludlow v. Simond*, 2 Id. 291; *Breckenridge v. Holland*, 20 Id. 123; *Dulaney v. Hoffman*, 28 Id. 207; *Sturtevant v. Goode*, 27 Id. 586; *McClure v. Miller*, 21 Id. 522; see also *Bracken v. Preston*, 44 Id. 412; *Green v. Creighton*, 48 Id. 742.

BOX v. STANFORD.

[13 SMEDES AND MARSHALL, 93.]

PART PERFORMANCE OF PAROL CONTRACT FOR SALE OF LAND does not take it out of the statute of frauds.

ON PAROL CONTRACT FOR THE SALE OF LANDS, the fact that it formed a part of the agreement itself that it should be reduced to writing, and that the defendant fraudulently evaded this part of the contract, is not sufficient to take the case out of the statute of frauds.

COURTS HAVE NO DISPENSING POWER OVER STATUTES; where they contain no exceptions, the courts can make none; if they are too rigid in their terms, the remedy is with the legislature.

STATUTE OF FRAUDS MAY BE TAKEN ADVANTAGE OF BY DEMURRER, although the bill alleges that the contract was prevented from being put in writing by the fraud of the defendant, if, admitting the fraud as charged, the complainant is entitled to no relief.

APPEAL from a decree for specific performance, rendered on the chancery side of the circuit court of Tippah county. The opinion states the case.

T. J. Word, A. Hutchison, and N. S. Price, for the appellants.

O. Davis, J. W. Thompson, and H. W. Waller, contra.

By Court, CLAYTON, J. This was a bill filed on the chancery side of the circuit court of Tippah county, by the purchaser against the vendor, to enforce the specific performance of a parol contract for the sale of a tract of land. The bill states that it was agreed, when the contract was first made, that it should be reduced to writing at some convenient time afterwards, but whenever the complainant would make application for that purpose, Box would waive it in some way, and say it should all be right. It also alleges acts of part performance to take the case out of the statute of frauds. These last may be laid out of view at once, because it is now the settled doctrine of this court, that no exceptions of that character will be ingrafted upon the statute: *Beaman v. Buck*, 9 Smed. & M. 210. There was a demurrer to the bill, which was overruled in the court below, and after answer filed, a decree was rendered for the complainant, directing a specific performance of the contract. The statute of frauds was not relied upon, either in the answer or by plea.

The circumstance principally relied on, to take this case out of the statute, is the allegation that it formed a part of the agreement itself, that it should be reduced to writing, and that the defendant fraudulently evaded this part of the contract. Is that sufficient, upon demurrer, to take the case out of the statute? The distinct ground upon which equity interposes at any time, to take a case out of the statute, is to prevent a fraud by one party upon the other. They are all cases of exception out of the statute. The exception made by the English courts in favor of agreements intended to be reduced to writing, but prevented by the fraud of one of the parties, rests upon precisely the same ground: 2 Story's Eq. 63, 77. The doctrine which lets in one equitable exception, opens the door for the whole innumerable series. There is no consistent medium course. Either all the equitable exceptions introduced by the English courts must be admitted, or we must adhere to the plain provisions of the statute.

One of the greatest masters of the English equity system has said, "that the relaxation of the statute has been the ground of much perjury and of much fraud. If the statute had been vigorously observed, few instances of parol agreements would have occurred; of necessity, they would have been reduced to writing. Whereas it is manifest that the decisions on the subject have opened a new door to fraud. It is a common expression at the bar, that it has become a practice to 'improve gentlemen out of their estates.' It is, therefore, absolutely necessary, for courts of equity to make a stand, and not to carry the decisions further:" *Lindsay v. Lynch*, 2 Sch. & Lef. 4.

If it were a mere matter of policy and expediency, we should be inclined to follow this reasoning, and to take a stand upon the statute itself, refusing to introduce any exceptions. But with us it assumes a higher attitude. It has been our course to adhere to the plain provisions of our statutes, because they are guides as well for the courts as for the country. The courts have no dispensing power over them. Where they contain no exceptions, the courts can make none. If they are too rigid in their terms, the remedy is with the legislature.

If it be said that the defense should have been made by plea and answer, rather than by demurrer, because, as a general rule, a charge of fraud must be answered, the reply is, that an answer is needless, if, when it admits the fraud as charged, the complainant is still entitled to no relief. This is the case here, otherwise a dangerous innovation would be made upon the statute.

A party may admit the parol agreement in his answer, and yet insist on the statute: 2 Story's Eq. 60. It is the same thing to demur, thereby admitting the facts, but denying the right to relief.

These principles show that the decree of the circuit court is erroneous. It must be reversed, the demurrer sustained, and the bill dismissed.

PART PERFORMANCE TAKES PAROL CONTRACT OUT OF STATUTE OF FRAUDS, when and when not: See *Osborne v. Phelps*, 48 Am. Dec. 133; *Briscoe v. Bronaugh*, 46 Id. 108; *Weed v. Terry*, 45 Id. 257; *Robbins v. McKnight*, Id. 406.

STATUTE OF FRAUDS CAN NOT BE TAKEN ADVANTAGE OF BY DEMURRER, but must be specially pleaded: *Switzer v. Skiles*, 44 Am. Dec. 723.

EFFECT OF STATUTE OF FRAUDS WHERE IT IS PART OF ORIGINAL AGREEMENT TO PUT CONTRACT IN WRITING.—The lord keeper, in *Hollis v. Whitting*, 1 Vern. 151, was of the opinion that if it was a part of the original agreement that the contract should be put in writing, that the statute of

frauds could not be pleaded, and the defendant would have to answer. As this point was not in issue, this opinion is but dictum, and not binding as authority. But in *Leak v. Morrice*, 2 Ch. Cas. 135, the point was directly involved. In that case, the complainant filed a bill to enforce a parol agreement, and alleged that it was part of the original agreement that it should be executed by a writing by a certain time; and the lord keeper, on ascertaining that such was the case, overruled a plea of the statute of frauds. In the very few cases that have arisen presenting this question, the doctrine of these cases has not been followed. Browne, in his work on the statute of frauds, disapproves it. In discussing this question and the above cases, he says, section 446: "Lord Keeper North, in a case arising a few years after the enactment of the statute, and where it was pleaded and the plea allowed, is reported to have been of opinion that if a plaintiff laid in his bill that it was part of the agreement that the agreement should be put in writing, it would alter the case, and possibly require an answer [*Hollis v. Whiting*, *supra*]. And he appears to have actually decided to that effect in the case of *Leak v. Morrice*, occurring shortly afterwards at the same term. But Lord Thurlow, when the first of these cases was quoted before him, remarked that it was never decided, and added: 'I take that to have been a single case, and to have been overruled. If you interpose the medium of fraud by which the agreement is prevented from being put into writing, I agree to it; otherwise, I take Lord North's doctrine to be a single decision, and contradicted, though not expressly, yet by the current of opinions' [*Whitechurch v. Bevis*, 2 Bro. C. C. 565.] In speaking of it as a single decision, his lordship would seem to have overlooked the case of *Leak v. Morrice*; but however the question might stand upon a view of the early authorities, the doctrine referred to has clearly not been recognized in those of later cases. Indeed, as is remarked by an acute writer on equity pleadings, 'If an allegation that it was part of the agreement that the contract should be put in writing could prevent a plea of the statute, the effect in practice would be that the statute never could be pleaded, at least without a particular denial of such allegation, rendering the plea anomalous' [Beames' Elements of Pleas in Equity, 181, 182]."

The rule is different where it was originally intended to put the agreement in writing, but the execution of the writing was prevented by fraud; and in such a case, the writers on this subject are agreed that the statute of frauds does not apply: 1 Fonbl. Equity, c. 3, sec. 8, p. 186; 3 Wooddesson's Lectures, 258; Newland on Cont., c. 10, p. 179; Waterman on Specific Performance, sec. 240; 1 Story's Eq. Jur., sec. 768. The reason of this is plain: "This statute was made to prevent fraud as well as perjury. It has, therefore, been considered in equity that where a party sets up the statute of frauds as the means of eluding the performance of an agreement, the object of which his own fraudulent conduct at the time prevented from being secured by the proper means, it would be encouraging one of the evils which the legislature wished to correct to allow the statute to be applied to such purpose." Newland on Cont., c. 10, p. 179. This doctrine has not, however, met with the approval of some judges. Wells, J., in *Glass v. Hulbert*, 102 Mass., at page 30 of the opinion says: "It makes no difference whether the want of a writing was accidental or intentional, by way of refusal or by reason of mutual mistake; nor that there were false representations and a pretense of conveying the land, but a fraudulent evasion, by means whereof there was no conveyance in fact, and no proper written evidence of the agreement to convey. From the oral agreement there can be derived no legal

right, either to have performance of its stipulations or written evidence of its terms. So long, therefore, as the effect of the fraud or mistake extends no further than to prevent the execution, or withhold from the other party written evidence of the agreement, it does not furnish sufficient ground for the court to disregard the statute of frauds, and enter into the investigation of the oral agreement for the purpose of investigating it." And at pages 38 and 39 he says: "It has often been asserted that where one, by deceit or fraudulent contrivance, prevents an agreement intended to be put in writing from being properly written or executed, he shall not avail himself of the omission, and shall not be permitted to set up the statute of frauds against the proof or enforcement of the parol agreement, or of the parol stipulation improperly omitted. But in our opinion, this doctrine would practically annul the statute. The tendency of the human mind, when fraud and injustice are manifest, is to strain every point to compass its defeat, and to render full redress to the party upon whom it has been practiced: *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; *Taylor v. Luther*, 2 Sumn. 233. This influence has led to decisions in which the facts of the particular case were regarded more than the general principles of public policy upon which the statute is founded and entitled to be maintained. Courts have sometimes regarded it as a matter of judicial merit to wrest from under the statute all cases in which the lineaments of fraud in any form were discernible. But the influence of moral reprobation of deceit and fraud, however commendable in itself, is liable to mislead, if taken as the guide to judicial decrees. We apprehend that in most instances where fraud, occasioning a failure of written evidence of an agreement, or particular stipulation, has been held to take the case out of the statute of frauds, there was some fact of prejudice to the party, or change of situation consequent upon the fraud, which was regarded as sufficient to make up the elements of an equitable estoppel. In such case, the argument is transferred to the simple question of the sufficiency of the additional circumstance for that purpose. * * * It must be manifest, however, that without such consequent act there would be no standing for the case in a court of equity. That which moves the court to a decree to enforce the agreement is not the artifice by which the execution of the writing has been evaded, but what the other party has been induced to do upon the faith of the agreement for such a writing. It is not that deceit, misrepresentation, or fraud, of itself, entitles a party to an equitable remedy; but that equity will interfere to prevent the accomplishment of the fraud which would result from the enforcement of legal rights contrary to the real agreement of the parties. Indeed, the fraud which alone justifies this exercise of equity powers, by relief against the statute of frauds, consists in the attempt to take advantage of that which has been done in performance or upon the faith of an agreement, while repudiating its obligations under cover of the statute." In *Wilson v. Ray*, 13 Ind. 1, also, it was held that a fraudulent refusal to put a contract in writing could not have the effect of putting it in writing. And although in *Viscountess Montacute v. Maxwell*, 1 P. Wms. 618, the lord chancellor said that in cases of fraud equity would relieve even against the words of the statute, yet where there was no fraud, but only a reliance upon the honor, word, or promise of the defendant, the statute would apply and equity would not interfere.

WOLFE v. DOE EX DEM. DOWELL.

[13 SMEDES AND MARSHALL, 103.]

UPON PAYMENT OF DEBT SECURED BY MORTGAGE, the mortgagee must, on the mortgagor's request, enter satisfaction, which will operate as a discharge of the mortgage. When this is done, the whole legal and equitable title reverts in the mortgagor, as if a formal reconveyance had been made; but until this is done, or some other mode pursued to vest him with the legal title, the mortgagor, even after payment of the debt, has but an equity.

DEED OF TRUST IS BUT A SPECIES OF MORTGAGE, and is included within the statute prescribing the entering of satisfaction of mortgages.

LIABILITY TO EXECUTION OF MORTGAGOR'S INTEREST.—When the debt is fully paid, the mortgagee, or the trustee in a deed of trust, holds but a naked legal title for the debtor, who has the whole beneficial interest, which is subject to sale on execution; but until full payment, the debtor has no interest which can be sold; and if satisfaction has not been entered, the purchaser gets but an equity, which must be enforced in chancery.

WHEN GRANTOR IN DEED OF TRUST CONVEYS THE PROPERTY afterwards to the party secured by the deed of trust, the conveyance does not extinguish the deed of trust, but passes only his equitable title; in such a case the legal title remains in the trustee, and until it is united with the equitable title, an ejectment can not be sustained.

ON PAYMENT OF DEBT SECURED BY DEED OF TRUST, the trust does not become extinguished and the title absolute in the grantor until something has been done which is equivalent to a reconveyance.

PLAINTIFF IN EJECTMENT CAN ONLY RECOVER UPON STRENGTH OF HIS OWN TITLE, as being good against the world, or as being good against the defendant by estoppel.

WHERE BOTH PLAINTIFF AND DEFENDANT IN EJECTMENT CLAIM UNDER COMMON SOURCE of title, the plaintiff, in the first instance, need go no further than the title of the person under whom they both claim; but the defendant may set up a title adverse to that of such person, and if he does, the plaintiff must show such title to be invalid or produce some superior title, or fail.

EJECTMENT for four lots of land. The plaintiffs claim under execution sale on judgments against Haring, Rappelye, and others, rendered November 6, 1837; the sale took place on October 17, 1842. The defendants showed that Rappelye and wife, on January 17, 1837, conveyed the property in question to trustees, to secure Haring the payment of fifty thousand dollars. It was also proved that Rappelye and wife, on April 9, 1837, conveyed the property to Haring by a deed of warranty, for a valuable consideration. There was also evidence tending to show that the debt secured by the deed of trust had been discharged. The defendant claimed under Haring through sundry mesne conveyances. The charges given sufficiently appear from the opinion

of the court. Verdict for the plaintiff. The defendant moved for a new trial, and on it being denied, sued out a writ of error.

Mason and Burwell, for the plaintiff in error.

Smedes and Marshall, *contra*.

By Court, CLAYTON, J. This was an action of ejectment in the circuit court of Warren county, for four lots in the city of Vicksburg. Various exceptions were taken in the progress of the trial to the admission and exclusion of testimony; to the charges given and refused by the court; and to the refusal to grant a new trial. As the judgment will have to be reversed, we shall not notice all of the very numerous points made in the cause.

Before we proceed to consider the charges in this case, we will make some remarks in regard to the case of *Brown v. Bartee*, 10 Smed. & M. 268, which has been very much relied on by the counsel of the plaintiff in error. There Turner had executed a deed of trust to Wade, for the benefit of Bartee, and had afterwards conveyed the lots to Bartee, by what purported to be an absolute conveyance in fee simple. Wade, the trustee, afterwards sold and conveyed the lots likewise to Bartee. After the execution of the deed of trust, and before the execution of the absolute conveyance from Turner to Bartee, a judgment had been recovered against Turner, and the lots sold under the execution, after the absolute deed had been made, but before the trustee conveyed to Bartee. Brown became the purchaser at the execution sale. It was contended, that the absolute conveyance by Turner to Bartee, was a rescission of the deed of trust, and set in the judgment against Turner. There was no question involved as to the sale of an equity, when the whole interest was, in fact, in the debtor, and nothing but a naked outstanding legal title in another for his use. The truth in that case was, that the whole equitable interest was in the creditor, the naked legal title was in the trustee, and the debtor had neither a legal nor an equitable estate. The only point decided, therefore, was, that the purchaser under the execution got nothing, for the debtor had no title of any sort. The case comes far short of deciding, that an equitable interest, whether an equity of redemption or of any other character, can not be sold under execution, when the whole beneficial interest is in the judgment debtor, and nothing is outstanding but a naked legal title for his use. Some of the expressions of the court are very general, but when construed with reference to the facts before it, have a very remote, if any,

bearing in this cause. They can not relate to a case in which the trust has been extinguished by the full payment of the debt due, and the whole beneficial interest therefore is in the mortgagor, or grantor in the deed of trust, with nothing but the naked legal title in the trustee for his benefit.

Our statute directs, that upon payment of a debt secured by mortgage, the mortgagee shall, "at the request of the mortgagor, enter satisfaction upon the margin of the record of such mortgage, which shall forever thereafter discharge, defeat, and release the same:" Hutch. Code, 611. When this is done, the whole legal and equitable title revert in the mortgagor, as if a formal reconveyance had been made. But until this is done, or some other mode pursued to vest him with the legal title, the mortgagor, even after payment of the debt, has but an equity: See *Watson v. Dickens*, 12 Smed. & M. 615. A deed of trust is but a species of mortgage, and is included by the statute.

In regard to the statutes for the sale of trust property under execution (Hutch. Code, 610; H. & H. 349, 644), this court has heretofore had occasion to pass upon them, with respect to that particular class of cases in which the vendee of lands holds a bond for title to be made upon payment of the purchase money. It is decided, that where the whole purchase money has been paid, the vendee in such case has a title and interest, which can be sold under execution at law. But if the whole purchase money be not paid, he has no such interest as can be the subject of such sale. But even in the case of a sale of such interest under execution after full payment of the purchase money, the purchaser, it is decided, must go into equity to divest the legal title, and can not recover in ejectment. He bought but an equity, which a court of chancery alone could enforce: *Thompson v. Wheatley*, 5 Smed. & M. 506; *Goodwin v. Anderson*, Id. 730. In cases of this kind, the original vendor stands in the situation of a mortgagee, and the vendee in that of a mortgagor: *Dollahite v. Orne*, 2 Id. 592; *Graham v. McCampbell*, Meigs, 52 [33 Am. Dec. 126]. The principle of these cases extends to mortgages, to the sale of an equity of redemption, or to the interest of the grantor in a deed of trust. They are all of kindred character. When the debt is fully paid, the mortgagee or trustee holds but a naked legal title for the debtor, who has the whole beneficial interest, which is subject to sale. But until full payment, the debtor has no interest which can be sold. If satisfaction has been entered upon the margin of the record of the mortgage, as directed by the statute, the purchaser

at execution sale obtains the legal title; if it has not been so entered, and the legal title not otherwise revested in the mortgage debtor, the purchaser gets but an equity, which must be enforced in chancery.

These principles will decide this case, when applied to it. The second charge given at the request of the plaintiff, states, that "when the grantor in a deed of trust conveys the property afterwards to the party secured by the deed of trust, such conveyance will extinguish the deed of trust." This charge totally overlooks the legal title which is in the trustee. Such conveyance by the grantor can pass only his equitable title, and the legal title still remains in the trustee; and until it is united with the equitable title, an ejectment can not be sustained. This is clear, as well from the case of *Brown v. Barte*, 10 Smed. & M. 268, as from the other cases already cited.

The third and fourth charges lay down the doctrine, "that if the debt secured by the deed of trust be paid or satisfied, the trust becomes extinguished, and the title absolute in the grantor, so that the title conveyed by the trust deed can no longer be considered as outstanding." This does not accord with the principles before laid down. In such case, the interest of the grantor of the deed of trust may be reached by execution, but it is only an equitable interest, and the title of the trustee is still outstanding, unless, as before stated, something has been done which is equivalent to a reconveyance.

The seventh, eighth, and ninth charges are but variations of a single proposition, "that if both parties to an ejectment claim title through one person as a common source, the defendant will not be permitted to set up an incumbrance by such person as an outstanding title." This proposition is too broad. The law is laid down very plainly in *Doe v. Pritchard*, 11 Smed. & M. 327. It is there said, "the plaintiff in ejectment can only recover upon the strength of his own title, as being good against the world, or as being good against the defendant by estoppel." The plaintiff in the first instance need go no further than the title of the person under whom they both claim. But the defendant may set up a title adverse to that of such person, and if he does, the plaintiff must show such title to be invalid, or produce some superior title, or fail. The defendant may hold adversely to the debtor, because of an incumbrance. He may have the title of the incumbrancer as well as of the debtor; and if he have, we see no reason why he may not oppose it to the plaintiff. The case referred to of *Doe ex dem. Robinson v. Par-*

ker, 3 Id. 114 [41 Am. Dec. 614], was against the judgment debtor himself. As to him there was an estoppel, and he was therefore not permitted to set up an outstanding title.

To prevent misapprehension, it may be well to remark, that in the case of *Thornhill v. Gilmer*, 4 Smed. & M. 163, in which it was held that an equity of redemption was not the subject of seizure and sale under execution at law, the mortgage debt had not been paid at the time of the sale.

We shall not examine the other questions made in argument, because they may not again arise. The case will be reversed and remanded, and the plaintiff can use his discretion as to further proceedings.

Judgment reversed, and cause remanded.

IN EJECTMENT, PLAINTIFF MUST RECOVER ON THE STRENGTH OF HIS OWN TITLE: *Doe ex dem. Reynolds v. Ingersoll*, 49 Am. Dec. 57, and note.

ESTOPPEL OF PERSONS CLAIMING UNDER COMMON SOURCE OF TITLE: See *Gilliam v. Bird*, 49 Am. Dec. 379, and note discussing this subject at length.

MORTGAGE, NATURE OF, AND WHAT PASSES BY: See *Waring v. Smith*, 47 Am. Dec. 299, and note; *Frische v. Kramer's Lessee*, Id. 368; *Smith v. Kelley*, 46 Id. 595, and note.

PAYMENT OF MORTGAGE DEBT EXTINGUISHES IT without reconveyance or release: *Breckenridge v. Ormsby*, 19 Am. Dec. 71.

WILSON v. POLK.

[13 SMEDES AND MARSHALL, 131.]

WRITS OF ASSISTANCE CAN NOT REGULARLY BE ISSUED AT INSTANCE OF ONE NOT PARTY to the cause; the purchaser at commissioner's sale can only proceed by getting the vendor to make application for the process; and he has no right of appeal on the refusal of the chancellor to grant his application for a writ of assistance.

APPEAL from the superior court of chancery. The opinion states the case.

By Court, CLAYTON, J. The appellant became the purchaser of a tract of land at a commissioner's sale under a decree of the superior court of chancery, in the case of *J. J. Parker v. James M. Baker and Charles J. Starr*. After his purchase, he filed a petition in the court for a writ of assistance to turn Polk and Edwards out of possession of the premises, and to put him in. The chancellor refused the application, and an appeal was taken to this court.

This appeal is not taken by a party to the suit, either com-

plainant or defendant. The same may be said of the application for the writ. It is laid down in 2 Smith's Ch. Pr. 214, that this writ of assistance can not regularly be issued at the instance of one not a party to the cause. The purchaser can only proceed by getting the vendor to make application for the process. The chancellor did right, therefore, in refusing the application.

This appeal does not seek a review of the former decree; but it asks a decision upon the rights of persons not then before the court. Such summary mode might do great injustice. It might involve a decision of legal titles, which ought only to be settled in a court of law. Or it might lead to a summary determination of equitable titles, which ought to be adjudicated in a regular and plenary suit. In a mere order for process, a person might be turned out of possession whose rights had never been tried. The present appellees were not parties to the suit in the court below, but are the persons sought to be turned out of possession.

Without determining the other points which have been presented, we think the application was properly refused.

Order affirmed.

WRITS OF ASSISTANCE.—Abbott, in his law dictionary, title, "Writ of Assistance," says that a writ of assistance is "a writ issuing out of chancery to aid or assist the sheriff in giving possession of lands pursuant to an execution upon a judgment at law for recovery of possession." In England this writ is no longer resorted to, as a writ of possession has been substituted for it, whether between parties or as against strangers to the action: *Hall v. Hall*, 47 L. J. Ch. 681, following *Re Holden*, cited in Seton's Decrees, Judgments, and Orders, p. 1562, but it is of extensive use in the United States. The definition of Abbott is not broad enough to cover all of the uses for which it is applied, although it is sufficient to give a general idea of its nature and use. This writ is a summary proceeding: *City of San Jose v. Fulton*, 45 Cal. 316; and its object is to put a person who purchases at judicial sale into the possession of the premises: *Jones v. Hooper*, 50 Miss. 510. It is proper only where a party concluded by the proceedings refuses to give up possession on request: *Howard v. Bond*, 42 Mich. 131; and it can only issue against the defendants in the suit and parties holding under them, who are bound by the decree: *Burton v. Lies*, 21 Cal. 87. Consequently, it will not be granted against one not a party to the record, who is claiming possession adversely and independently of the parties to the record, and who can not appear and defend his rights before the court of strict right: *Gelpeke v. Mil. & Hori-con R. R. Co.*, 11 Wis. 454; nor against a person in possession of premises sold under a decree rendered in a suit to which he was not a party, where his possession began before the commencement of the suit; for not being a party nor coming in *pendente lite*, his rights are in no way affected by the suit, and will not be adjudged in a summary manner upon a motion for a writ: *Gilcrest v. Magill*, 37 Ill. 300. A question of legal title will not be

tried on an application for the writ, nor will it be granted in cases of doubt: *Barton v. Beatty*, 28 N. J. Eq. 412; nor will questions of equity between the plaintiff and persons in possession of the land, not parties, be litigated on motion for it: *Henderson v. McTucker*, 45 Cal. 647. If upon the application by the grantee of a purchaser it appeared that the defendants had acquired, or claimed to have acquired, a new right to possession from the purchaser, the writ should be denied, as "the court on an application by his grantee for a writ of assistance will not undertake to settle the legal or equitable rights of the parties. They are matters which ought to be adjudicated in a regular suit; they should not be determined upon affidavits taken in a collateral proceeding. It is evident that the appellants have some rights under the contracts of sale, and great injustice might be done them were they to be turned out of possession before those rights have been adjudicated." *Langley v. Volk*, 54 Cal. 435. So, also, if the rights of the parties have been changed since the decree and sale by reason of any agreement between the defendant and the purchaser at the sale, or his *cestui que trust*, or if it be alleged that such is the case and the allegation is controverted, or if the sheriff's grantee holds the title in trust for another, and such other has contracted with the defendant to sell him the land conveyed by the sheriff's deed, or if it be alleged that such is the fact and a real controversy exists in relation to it, then, in any such case, the writ should not issue: *City of San Jose v. Fulton*, 45 Cal. 316. And where, on a motion for the writ, the counsel for the defendant alleged that he had assigned the house and goods for a valuable consideration to one H., it was ordered that H. come in and be examined *pro interesse suo*, and the counsel for defendant give notice to the plaintiff within two days of H.'s abode, and on affidavit that H. could not be found to be served with the last order, a writ of assistance was issued: *Bird v. Littlehales* (19 March, 1743), 3 Swans. 300, n.

A purchaser may obtain this writ if he is kept out of the possession of property sold by the court: *Wilson v. Angus and Toynbee v. Ducknell*, both cited in Seton's Decrees, Judgments, and Orders, 1563. And a sheriff may convey to the assignee of a purchaser of lands sold on execution at law or in equity, who would then be entitled to the writ: *Ekins v. Murray*, 29 N. J. Eq. 388. And a purchaser at a judicial sale under a judgment directing the purchaser to be put into possession has a right to this writ, if necessary; and this notwithstanding the death of the plaintiff, after judgment and before sale, and in such a case a revival of the action is not necessary: *Lynde v. O'Donnell*, 12 Abb. Pr. 286. It will also be granted in aid of the pursuivant if a proper case be made for it: *Mahoney v. Aylward*, 1 Hogan, 474. And in *Acland v. Atwell*, 3 Swans. 499, note, writs of prohibition and assistance were granted to prevent a prebendary from committing waste on his prebend. It may also be issued to put a receiver in possession: *A. G. v. Trustett*, cited in Seton's Decrees, Judgments, and Orders, 441; as where the defendant locked up his goods and absconded with the key: *Cazet de la Borde v. Othon*, 23 W.R. 110. And a court will put a receiver in possession in a summary way, and will order the tenants to attorn to him, and grant the writ without first awarding an injunction for the possession, which is the usual way: *Sharpe v. Carter*, 3 P. Wms. 379, note. This writ, however, is only granted in aid of the service of a writ or in execution of the process of the court. It will not be granted to aid a receiver in levying a distress for rent: *Robinson v. Wynne*, 6 All. & S. 63; *Anonymous*, 1 Hogan, 207; *White v. Phibbs*, Sau. & Sc. 88. Nor will it be granted to aid the sheriff in executing an attachment directed to him, which issued against a tenant of the court for non-payment of rent: *Meagher*

v. *Meagher*, 1 Jones & L. 31. This writ is an incident to an injunction or to a sequestration, and is issued whenever it becomes necessary to enforce either: *Commonwealth ex rel. Smith v. Dieffenbach*, 3 Grant's Cas. 368. In England it was held that such a writ would not issue to sequestrators: *Broune v. Cuffe*, 1 Hogan, 145. But it was said in 1 Barbour's Ch. Pr. 72, that if sequestrators were obstructed in the performance of their duty such writ would issue. The purchaser at a tax sale made in pursuance of the fifth section of the act of April 3, 1858, for the collection of delinquent taxes in Sacramento, Cal., is entitled to the writ against the person in possession of the premises, notwithstanding the existence of such fiduciary relations between the parties at the time of the sale that a court of equity would hold the purchaser a trustee for the possessor in the purchase on the ground of constructive fraud: *Mills v. Tukey*, 22 Cal. 373; compare *People v. Doe*, 31 Id. 220. But such a writ will not issue in favor of one who was the purchaser from one who has received a sheriff's deed for land sold under a judgment for delinquent taxes: *People v. Grant*, 45 Id. 97; *City of San Jose v. Fulton*, Id. 316. And this writ is discretionary, and will not be granted except in a clear case; consequently it was refused because the sale under the execution was not sufficiently advertised in *Vanmeter v. Borden*, 25 N. J. Eq. 414.

"The most familiar instance of its [the writ of assistance] use is where land has been sold under a decree foreclosing a mortgage:" *Jones v. Hooper*, 50 Miss. 510. And Kent, chancellor, in the leading case of *Kershaw v. Thompson*, 4 Johns. Ch. 609, discussing the power of a court of chancery to issue the writ on a foreclosure and sale of mortgaged premises, and a refusal of the defendant or one coming in under him *pendente lite* to give them up, says: "I have examined this point with a disposition not to enlarge the established jurisdiction of the court, but with an anxiety at the same time to afford the suitor the adequate and perfect relief to which he may be justly entitled. It does not appear to consist with sound principle that the court which has exclusive authority to foreclose the equity of redemption of a mortgage, and can call all the parties in interest before it, and decree a sale of the mortgaged premises, should not be able even to put the purchaser into possession against one of the very parties to the suit, and who is bound by the decree. When the court has obtained lawful jurisdiction of a case, and has investigated and decided upon its merits, it is not sufficient for the ends of justice merely to declare the right without affording the remedy. If it was to be understood that after a decree and sale of mortgaged premises, the mortgagor, or other party to the suit, or, perhaps, those who have been let into the possession by the mortgagor, *pendente lite*, could withhold the possession in defiance of the authority of this court, and compel the purchaser to resort to a court of law, I apprehend that the delay and expense and inconvenience of such a course of proceeding would greatly impair the value and diminish the results of sales under a decree." Prior to the passage of the act of May 18, 1861, judges of courts had no power to issue writs of assistance to place the purchaser of property in possession under a decree of foreclosure, in California: *Chapman v. Thornburg*, 23 Cal. 48. But it is settled beyond doubt that this is the appropriate remedy to place a purchaser of mortgaged premises under a decree of foreclosure in possession as against parties who are bound by the decree, and who refuse to surrender possession pursuant to its directions: *Terrell v. Allison*, 21 Wall. 289; *Montgomery v. Tutt*, 11 Cal. 190; *Montgomery v. Midlemiss*, 21 Id. 103; *Beatty v. De Forrest*, 27 N. J. Eq. 482; *Ludlow v. Lansing*, Hopk. Ch. 264; *Bell v. Birdsall*, 19 How. Pr. 491; *New York Life Ins. & Trust Co. v. Rand*, 8 How. Pr. 35; S. C., affirmed, Id. 352; *Diggle v. Boul*

den, 48 Wis. 477; and the purchaser can not be denied the writ to put him in possession, where he is kept out under a claim that the mortgagor had no title when he made the mortgage: *Bowery Savings Bank v. Foster*, 11 Weekly Digest, 493; and a tenant in possession, who has been made a party, is bound to attorn to the purchaser at foreclosure sale or be removed by the writ, notwithstanding he claims under an unexpired lease of several years, executed by the mortgagor several years before the date of the mortgage foreclosed: *Lovett v. German Reformed Church*, 9 How. Pr. 220.

In *Blauvelt v. Smith*, 7 C. E. Green, 31, the writ of assistance was termed an "extraordinary relief;" but Beardale, C. J., in *Beatty v. De Forrest*, 27 N. J. Eq. 482, referring to this language, said he saw no reason so to regard it. But the power of chancery to issue the writ extends only against those persons who are parties to the foreclosure suit, or who have come into possession of the premises subsequent to the commencement of the suit, or with the assent of those who are such parties: *Boynton v. Jackway*, 10 Paige, 307; although see *N. Y. Life Ins. Co. v. Rand*, 8 How. Pr. 35; S. C. affirmed, Id. 352. And a person who, pending an action for the foreclosure of a mortgage, and with notice of its pendency, purchases from one of the defendants therein a portion of the mortgaged premises, occupies the same position as his grantor in reference to the issuance of the writ: *Montgomery v. Byers*, 21 Cal. 107; but it will not issue against a purchaser who is not a party, and who has no notice, actual or constructive, of the pendency of the suit: *Harlan v. Rack-erby*, 24 Id. 561; and it was held, in *Van Hook v. Throckmorton*, 8 Paige, 33, that it would not issue to turn a person out of possession of mortgaged premises, though he went into possession *pendente lite*, unless he went in under or by permission of one of the parties to the suit; nor will it issue to remove persons who go into possession after the purchaser has received his deed and conveyed the premises to another: *Bell v. Birdsall*, 19 How. Pr. 491. The owner of the property mortgaged, whether the original mortgagor or not, is an indispensable party in a suit for foreclosure; a decree, if he is not made a party, will not bind him or those claiming under him, and the purchaser at such sale is not entitled to the writ: *Terrell v. Allison*, 21 Wall. 289. And a tenant of the mortgagor, or a person who has gone into possession of the mortgaged premises subsequent to the mortgage but before the commencement of the foreclosure suit, must be made a party to the suit to enable the court to turn him out of possession by a writ of assistance upon the application of the purchaser under the decree, although the tenant had no defense, and might have been turned out of possession by an ejectment suit brought by the purchaser: *Boynton v. Jackway*, 10 Paige, 307; and the right to turn out of possession by this writ does not extend to the case of the wife of the mortgagor, not a party to the suit, claiming under color of title acquired from one of the defendants before suit brought, although such title may be void or inoperative by statute: *Thompson v. Smith*, 1 Dill. 458. And where, after the death of the mortgagor, the mortgagee commenced a suit to foreclose, making the executors parties, but not the widow, the mortgagee, on purchasing at the foreclosure sale, is not entitled to the writ as against the widow, who retains possession of a portion of the premises, which on demand she refuses to surrender: *Burton v. Lies*, 21 Cal. 87.

Where the mortgagor and his wife move to set aside the writ on the ground that they moved upon and occupied the premises as a homestead before the execution of the mortgage by the husband, the motion will be denied where it appears that the mortgage was given for the purchase money of the premises, even though the wife was not a party to the fore-

closure: *Skinner v. Beatty*, 16 Cal. 156. A party who forecloses a mortgage given by one partner on and obtains a sheriff's deed for an undivided interest in the partnership property, without making the other partner a party, is not entitled to the writ as against a receiver who has been appointed by the court at the instance of the other partner in an action commenced by him to dissolve the partnership and have the property sold to pay the debts: *Autenreith v. Hessenauer*, 43 Cal. 358. A purchaser on foreclosure can not demand possession until the commissioner's report of the sale is confirmed; and a demand and refusal made before will not justify the writ after confirmation, if there was no demand and refusal after the confirmation: *Howard v. Bond*, 42 Mich. 131. Where proceedings by writ of assistance on foreclosure were taken against the wife, leave being taken to discontinue as against the husband, the objection that the papers were wrongfully entitled in the names of both defendants was held a mere technicality, especially as it was not clear from the record whether the order of discontinuance had been entered: *Howe v. Lemon*, 47 Mich. 544. And matter set up in defense of a motion can not be received to affect the decree determining the rights of the defendants: *Id.* And it was held in *Rauiser v. Hamilton*, 51 How. Pr. 297, that where the writ was issued upon notice in favor of a purchaser under a mortgage foreclosure suit against a tenant in possession of the mortgaged premises, and was executed by putting the purchaser in possession, it was conclusive upon the tenant and purchaser as to the right of possession. If the tenant had any defense to it, it should have been presented on the hearing of the motion for the writ. The question whether the writ was properly awarded can not be reviewed in a collateral action in another court.

It is the duty of the sheriff, in the execution of the writ, to place the purchaser on foreclosure of a mortgage of an estate in common in the possession of every part and parcel of the land jointly with the other tenants in common, but in the execution of the writ the sheriff can not remove any part of the tenants in common who hold under a title independent of him through whom the purchaser claims: *Tevie v. Hicks*, 38 Cal. 234; but an officer is protected in executing a writ fair upon its face, even though it was irregularly issued, and the defendant would be entitled to have the same set aside on motion: *Arrex v. Broadhead*, 19 Hun, 269; and the sheriff can not excuse himself from executing a writ lawfully issued, because the defendant in the writ claims to hold the possession under a party having a title older than the title of the claimant in the writ: *State ex rel. Chappell v. Giles*, 10 Wis. 101; but the writ will not justify an officer in putting out of possession a person who was neither a party to the suit nor named in the writ: *Brush v. Fowler*, 36 Ill. 53. In an action against the sheriff for refusing to execute the writ by putting him in possession of land purchased by him at a foreclosure sale, the complainant should show the parties to the foreclosure suit and the term at which it was entered, otherwise it does not state a cause of action; but it is not necessary in such a case that the complainant should set forth all the facts that give the circuit court jurisdiction of the foreclosure suit: *Loomis v. Wheeler*, 18 Wis. 524.

We will now proceed to discuss the practice on issuing writs of assistance. These questions are to a great extent regulated by the statutes of the several states; but there are interesting matters relating to this subject that exist independent of statutes. At the common law it was said that all process was to issue out in course before any injunction or writ of assistance to put the party in possession would be granted: *Venables v. Foyle*, Rep. Ch. 179; that after a writ of execution of a decree and an attachment served on

the defendant, the plaintiff might have an injunction to the defendant to deliver up possession, and then if he refused, a writ of assistance issued: *Stribley v. Hawkie*, 3 Atk. 275; and an injunction to deliver possession of land would be decreed as a ground for obtaining the writ: *Huguenin v. Baseley*, 15 Ves. 180. And it was held in *Dove v. Dove*, 1 Dick. 619; S. C., 1 Bro. C. C. 175, that the following steps were requisite to the issuance of a writ of assistance: first, service of a writ of execution, of an order to deliver, a demand, and the issuing of an attachment for disobeying; next, an injunction to enjoin the defendants to deliver possession, and upon proof of service of the injunction and its not being obeyed, upon motion without notice, and an affidavit of the facts, the writ would be ordered. In Alabama, also, it was held, that if the possession was withheld, the court would direct a writ of possession to issue, and if this order was not obeyed, an injunction would be granted, and if that was not obeyed, the writ of assistance would issue as a matter of course: *Creighton v. Paine*, 2 Ala. 158; and in *Kershaw v. Thompson*, 4 Johns. Ch. 609, it was said, that if the defendant disobey an order to deliver up possession, an injunction issued of course, on affidavit of service of the order, etc., to enjoin the defendant to deliver possession; and on proof of service of the injunction and a refusal of the party to comply, a writ of assistance issued, of course, to the sheriff. But the tendency of the courts has been to dispense with these formalities and to issue the writ immediately on proof of demand of possession and refusal. In *Valentine v. Teller*, Hopk. Ch. 480, it was held that the writ was, in ordinary cases, the first and only process for giving possession of land under an adjudication of the court. The court, in discussing the course mentioned in *Kershaw v. Thompson*, *supra*, said: "This circuitry seems unnecessary; at least, it is not necessary, in the ordinary case of a proceeding for possession, against a party who was a defendant in the suit. When once the principle is established that this court is to give possession, that possession should be given by the most direct, simple, and efficacious means, and the process of this court should be in effect the same with the *habere facias possessionem* at law."

On a decree setting aside a conveyance and demanding a reconveyance, a motion for a writ of assistance, made upon the following documents, should be granted: Notice of motion and affidavit of personal service of a copy of the same and of the other papers; a certified copy of the decree; the certificate of enrollment of the decree; deed of reconveyance, approved by a master; affidavit showing a demand of possession and execution of a deed of reconveyance and refusal to do either: *Devaucene v. Devaucene*, 1 Edw. Ch. 272. Under the California system, the order to deliver possession should be first made, unless a direction to that effect is contained in the decree, and if, upon its service, that is disregarded, the court can at once direct the writ to issue; but if the delivery of possession to the purchaser is directed by the decree, no preliminary order will be requisite, but upon proof of disobedience to the decree, the party will be entitled, as a matter of course, to the writ as against the defendant in the suit: *Montgomery v. Tutt*, 11 Cal. 190; but in that state it has been held that the purchaser under a decree of foreclosure is entitled to the writ without any preliminary order, although the decree contained no direction to deliver the possession; that all that is necessary is to furnish the court proper evidence of a presentation of the deed to the defendant or those claiming under him, a demand of the possession of them, and their refusal to surrender it: *Montgomery v. Middlemiss*, 21 Id. 103; *Montgomery v. Byers*, Id. 107. In Mississippi, all that is necessary is that the complainant should file with the clerk a petition and proof of service of the

order of the chancellor upon the defendant and demand of possession and refusal to surrender it: *Griswold v. Simmons*, 50 Miss. 123; compare *Jones v. Hooper*, Id. 510. No notice of the application for the writ is necessary, but it may be made *ex parte*: *New York Life and Trust Co. v. Rand*, 8 How. Pr. 35; S. C., affirmed, Id. 352; *Harvey v. Morton*, 39 Miss. 508; *New York Life Ins. and Trust Co. v. Cutler*, 9 How. Pr. 407; *Lynde v. O'Donnell*, 12 Abb. Pr. 288; *Dove v. Dove*, 1 Dick. 619; S. C., 1 Bro. C. C. 375; *Cazet de la Rarde v. Othon*, 23 W. R. 110. In Mississippi, however, the defendant should have reasonable notice of the application for the writ: *Jones v. Hooper*, 50 Miss. 510. And in California, when application is made for a writ of assistance under a sheriff's sale enforcing the lien of a tax, notice should be given to the defendant and also the terre-tenant, if there be one who will be disturbed by the execution of the writ: *City of San José v. Fulton*, 45 Cal. 316. The application for the writ should be made in the court below, and not in the higher court: *Ryerson v. Eldred*, 18 Mich. 195; *Harvey v. Morton*, 39 Miss. 508; and it should be granted, not by the clerk, but by the court on hearing the facts: *Bruce v. Roney*, 18 Ill. 67; *Smith v. Brittenham*, 3 Ill. App. 62. Under rule 9 for courts of equity of the United States, the clerk of the court may issue writs of assistance, and some of the states have followed this procedure. In Pennsylvania, it was held that under this rule the writ was so much a matter of course that the prothonotary might issue it in the cases prescribed by the rule without any application to the court: *Commonwealth ex rel. Smith v. Dieffenbach*, 3 Grant's Cas. 368.

This practice was followed also in Wisconsin, where it was held that no discretion was left with the clerk to withhold the writ, when the party shall have complied with the terms of the rule: *Attorney General ex rel. Caleb Cushing v. Lum*, 2 Wis. 507; but the writ, under this rule, as against a stranger to the suit, can issue only upon the order of the court, though it is otherwise where the party in possession is a defendant: *Golt in the suit of Knapp v. Dickerman*, 20 Id. 631. This rule entirely changes the former practice of courts of equity in regard to the mode of obtaining this writ: *Attorney General ex rel. Caleb Cushing v. Lum*, *supra*. Where a writ, improperly granted, is afterwards set aside, the person dispossessed under it is entitled to be put into possession: *Chamberlain v. Choles*, 35 N. Y. 477. If the return of the first writ does not declare clearly that it has been fully executed, and it is made to appear by affidavit that it has not been, it is competent for the court to issue another writ: *Tewis v. Hicks*, 38 Cal. 234. But an appeal lies from an order refusing to vacate an order granting the writ: *City of San José v. Fulton*, 45 Cal. 316; but one who is not a party to the record can not appeal from an order granting the writ; such a person may, however, move to vacate the order granting it, and in that way place himself on the record, and then if the motion is denied, appeal from the order denying the motion; or if the writ is executed, move to be restored to the possession; and if the motion is denied, take his appeal: *People v. Grant*, Id. 97. But in *Bryan v. Sanderson*, 3 McArthur, 402, it was held an appeal did not lie from an order awarding the writ or from an order refusing to grant it; and where there is a doubt in the mind of the court whether an order granting a writ of assistance in a cause pending in the circuit court is an appealable order, that doubtfulness is a sufficient reason why an application to the supreme court to stay proceedings upon such writ pending an appeal to the supreme court upon the order should not be granted: *Gelpcke v. Mil. & Hori-con R. R. Co.*, 11 Wis. 454.

GOODLOE. v. GODLEY.

[15 SNEDES AND MARSHALL, 233.]

IF HOLDER IS IGNORANT OF PLACE WHERE INDORSER RESIDED at the time of protest, and could not ascertain it after diligent inquiry, notice sent to the place where the note bears date will be sufficient.

JURY DETERMINES WHETHER DUE DILIGENCE IN GIVING NOTICE of demand and non-payment was used.

NOTICE TO AN OFFICER OF A BANK CAN NOT AFFECT BANK when in regard to a matter not pertaining to his duties. Consequently, notice to some of the officers of a bank for collection, of the residence of an indorser, does not prevent the bank from excusing want of notice of non-payment at the indorser's residence by the ignorance of the officers charged with the duty of collecting notes.

CONDUCT OF AGENT ONLY BINDS EMPLOYER when he acts within the limits of the power granted to him, and with reference to the subject-matter of the agency.

DUE DILIGENCE TO ASCERTAIN INDORSER'S RESIDENCE IS USED if inquiries are made by the notary in the place where the note was payable.

WHERE MATTER IN EXCUSE FOR WANT OF DEMAND AND NOTICE IS RELIED UPON, it is usual to declare as if there had been due presentment and notice. Sufficient matter in excuse is in legal effect equivalent to demand and notice.

DEMAND ON NOTE PAYABLE AT BANK after banking hours is sufficient; indeed, where a note is payable at a particular time at a bank, and indorsed to such bank for collection, no specific demand is necessary.

ASSUMPSIT, by Godley, on a promissory note, dated at Tuscumbia, and payable at the branch of the Bank of the State of Alabama. Goodloe was an indorser on the note. Plea, *non assumpsit*. On the trial, two depositions of one Lane, a notary, were read, stating substantially that the note was handed to him as a notary; that he presented the note at the counter of the bank, and payment was refused, as no funds were there to meet the note; that after diligent inquiry for the makers and indorsers, and having no positive information as to Goodloe's particular post-office, he sent notices to the original makers and to Goodloe at Tuscumbia; that the notices were sent in time for the first mail; that the reason of sending the notices in this manner was from information received from the cashier and other officers of the bank, who are always required to state where the notice should be sent; the deposition stated that the notary had made inquiry of these officers. Evidence was offered on the part of Goodloe, showing that his residence and nearest post-office was not Tuscumbia but La Grange, about ten miles distant, and that by inquiry at Tuscumbia he would have learned his address. The charges to the jury are stated at sufficient length in the opinion. Verdict for the plaintiff; the defendant brought error.

D. Mayes, for the plaintiff in error.

A. H. Handy, *contra*.

By Court, CLAYTON, J. This case was formerly in this court, and is reported in *Godley v. Goodloe*, 6 Smed. & M. 255 [45 Am. Dec. 287]. It was then reversed, because of the refusal of the court to give the following charge at the instance of the plaintiff's counsel: "That if the holder of the note was ignorant of the place where the indorser resided at the time of protest, and could not ascertain it after diligent inquiry, notice sent to the place where the note bears date will be sufficient."

Upon the present trial the plaintiff asked no instruction, but a repetition of the foregoing, which was granted. The defendant asked several instructions, a part of which were given, and a part refused.

We see no reason now to say, that the instruction given for the plaintiff is erroneous, as it precisely accords with our former decision in the case. The argument addressed to us on the point, would have been very appropriate before the jury, to show that the holder was not ignorant of the defendant's residence, but it can have no application in the decision of the legal principle. In the same case it was decided, that "what shall be deemed due diligence must be submitted to the jury under appropriate charges, where the question depends upon the testimony of witnesses given before the jury." That course was pursued in this case, and there is no such preponderance of evidence against the verdict as would authorize us to set it aside.

We shall proceed to consider those charges which were asked by the counsel of the defendant and refused by the court. The first is as follows: "The bank where the note was payable, and to which the note was sent for collection, was the holder of the note for that purpose, and the plaintiffs can not avail themselves of ignorance of the defendant's residence, as an excuse for the omission of actual notice, if it appears that the bank, through any of its officers, had knowledge of such residence." Banks, of necessity, carry on all their business through the medium of agents. The acts of their agents bind them to the extent of their authority. Each is confined to the sphere which is assigned to him. Where a bank has several agents, to whom separate and independent duties are intrusted, notice to one of them, in regard to a matter not appertaining to his duties, can not affect the bank. It is the duty of the cashier or of the teller to superintend the collection of paper deposited in the bank for

payment. It is the duty of the same officers to give information as to the residence of the indorsers. If the bank may be justly chargeable with notice to either of these officers, as to such residence, it can not be so chargeable by the knowledge of, or the notice to, one of its clerks not intrusted with the duty of superintending such collections. The principle is a general one, that the conduct of the agent only binds his employer, when he acts within the limits of the power granted to him, and with reference to the subject-matter of the agency: *Fortner v. Parham*, 2 Smed. & M. 164; *Wilkins v. Commercial Bank of Natchez*, 6 How. 220; *Wilcox v. Routh*, 9 Smed. & M. 476. We think, therefore, there was no error in refusing this charge.

The next charge, the refusal of which is excepted to, is in these words: "It is not sufficient to charge the indorser in this case, that inquiries were only made where the note was payable." This refusal is justified by the case of *Hunt v. Nugent*, 10 Smed. & M. 548. That case is also an authority for the sufficiency of notice in this. It says: "The information the notary received was direct and positive. It was given to him at the place where it was most natural for him to inquire, the place where the note was payable. He had no reason to doubt but that the information he received was correct, because it was given without hesitation, not as a mere opinion. He was put at rest upon the subject." So in this case, the notary states, "he received the information as to the residence of Goodloe from the cashier and other officers of the bank, and he presumed they knew his residence." See also *Farmers' and Merchants' Bank v. Eddings*, 4 Humph. 521; *Spencer v. Bank of Salina*, 3 Hill (N. Y.), 520.

The other charge asked and refused is as follows: "If the declaration avers that notice was given to the indorser, proof that diligent search was made for his residence to excuse the omission of notice will not support the averment, and unless the proof corresponds with the averment in this particular, the jury must find for the defendant." On this point, the rule is thus laid down by Greenleaf, in his treatise on Evidence, vol. 2, p. 162: "Where matter in excuse for want of demand and notice is relied upon, it is usual to declare as if there had been due presentment and notice. Sufficient matter in excuse is, in legal effect, equivalent to demand and notice." The same doctrine is in substance stated by Chitty: Bills, 591.

In regard to the demand, we think that it was sufficient in this case. The notary says he made the demand of the bank after banking hours, and after the note had been handed to him

as notary, that he was answered by the proper officer that no money had been deposited for its payment. That this was a sufficient demand, is established by the case of the *Commercial and Railroad Bank v. Hamer*, 7 How. 448. Indeed, where a note is payable at a particular time at a bank, and indorsed to such bank for collection, no specific demand is necessary. It is enough if the note be in bank on the day appointed for its payment: *State Bank v. Napier*, 6 Humph. 270 [44 Am. Dec. 308]; *Bank of U. S. v. Carneal*, 2 Pet. 543; *Cohea v. Hunt*, 2 Smed. & M. 227 [41 Am. Dec. 589]. This case is not like that of *Harrison v. Crowder*, 6 Id. 471 [45 Am. Dec. 290]. There the demand was made before the close of banking hours. The court charged the jury, "that if the demand were made at some reasonable or convenient time, before the doors were closed on the third day of grace, it was sufficient." This court reversed the judgment, because this charge was too indefinite; but the decision does not apply in this case. The demand here was not made until the close of banking hours, and the notary was informed that no funds had been deposited to pay it.

On the whole, the judgment is affirmed.

FACTS EXCUSING A DEMAND AND NOTICE MAY BE GIVEN IN EVIDENCE under the ordinary allegation of demand and notice. Facts which dispense with a demand and notice will, in law, be deemed proof of a demand and notice: *Spann v. Baltzell*, 46 Am. Dec. 346, and note.

SUFFICIENCY OF DEMAND AND NOTICE, BY WHOM DETERMINED: See *Godley v. Goodloe*, 45 Am. Dec. 237 (the principal case came before the court of errors and appeals before, and is reported in this series); *Harrison v. Crowder*, Id. 290; *Whitaker v. Morrison*, 44 Id. 627, and the notes to these cases.

DEMAND ON NOTES PAYABLE AT PARTICULAR BANK: See *Harrison v. Crowder*, 45 Am. Dec. 290, and note.

NOTICE ADDRESSED TO DRAWER AT PLACE OF DATE of note, when and when not sufficient: See *Lovely v. Scott*, 35 Am. Dec. 627; *Foard v. Johnson*, 36 Id. 421; *Godley v. Goodloe*, 45 Id. 237.

NOTICE TO OFFICER OR AGENT OF CORPORATION AFFECTS CORPORATION, WHEN: See *Bank of Pittsburgh v. Whitehead*, 36 Am. Dec. 186, and note discussing this question at length.

CASES
IN THE
SUPREME COURT
OF
MISSOURI.

BANK OF MISSOURI v. WELLS.

[12 MISSOURI, 361.]

LIEN OF EXECUTION WAS PRESERVED by the act of general assembly approved February 24, 1843 (session acts, page 51), and the act concerning courts (revised code 1835, page 160, section 52), and no *scire facias* was necessary to continue it, when the court did not hold any session at the return term of the writ on account of its postponement by the legislature. These acts were designed to make the writs as effectual to all intents and purposes as if executed at the term to which they were made returnable.

EFFECT OF EXECUTION SUED OUT AND DELIVERED TO SHERIFF is to continue the lien of the judgment until the execution of the writ, although the time had elapsed during which the lien of the judgment continued.

PRIOR LEVY OF EXECUTION UNDER JUNIOR JUDGMENT does not divest the priority of the older judgment.

JUDGMENT REVIVING LIEN OF PREVIOUS JUDGMENT CAN NOT RELATE BACK and give the purchaser at the sheriff's sale a right which did not exist at the time of the purchase, where the judgment reviving the lien was not rendered until after a sale of the premises; although, if the sale did not satisfy the judgment, it might have had the effect of reviving the lien on any real estate owned by the defendant in the execution, or which he had disposed of while subject to it.

ERROR to the Marion circuit court. The opinion states the case.

Glover and Campbell, for the plaintiff.

Pratte and Anderson, contra.

By Court, **SCOTT, J.** This was an action of ejectment brought by the plaintiff in error against the defendant in error for lands and lots in Marion county. In consequence of adverse instruc-

tions, the plaintiff submitted to a nonsuit, and after an unsuccessful application to set it aside, sued out this writ of error.

The plaintiff claimed the premises in controversy under a sheriff's sale and deed, on a judgment dated the fourth of May, 1840, on which execution issued the first of July, 1842, returnable to the first Monday of September following. The execution was levied the second of July, 1842, and the sale was made the eighteenth of August, 1843. On the fifth of April, 1843, a *scire facias* was sued out on the above-mentioned judgment for the purpose of continuing the lien of it, and a judgment of revival was entered on the twenty-fourth of November, 1843, after a sale of the premises had taken place.

The defendant's title was a sheriff's deed, under a judgment entered the eleventh of January, 1840, on which execution issued the nineteenth of August, 1842, returnable to the first Monday in September following: which was levied the day of its date, and the sale under it was made the eighteenth of August, 1843.

This controversy has arisen from the failure of the judge to hold a session of the circuit court at the return term of the writ; and the act of the general assembly, approved the twenty-fourth of February, 1843 (session acts, p. 51), which was passed before the next regular term of the court, and which postponed its session until the first Monday in August, 1843. The fifteenth section of the above-recited act provides that no recogizance, suit, or other matter shall be dismissed, discontinued, or fail by reason of the alteration of the times of holding said courts; and sales of property which would have been made at the first term, as heretofore established, shall be made at the next term to be held under this act. The act concerning courts (revised code, 1835, p. 160, sec. 52) provides that no writ, process, plea, or proceeding whatsoever, civil or criminal, shall be deemed discontinued or abated by reason of the failure of any term or session of any court; but the same shall be continued on as if no such failure or adjournment had taken place.

The defendant contended that by virtue of these acts, his lien was preserved, and no *scire facias* was necessary to continue it. The plaintiff, on the other hand, maintained that the liens being executed by statute, could continue for no longer time than was allowed by law, and, having expired before the sale, the subsequent revival of the judgment by *scire facias* issued before the expiration of the lien, related back and gave him a priority. The court entertaining views corresponding with those contended for by the defendant, ruled accordingly.

The obvious intent of the acts above cited, was to annihilate, as it were, the time intervening between the return day of the writs and that to which their execution was postponed. They were designed to make the writs as effectual to all intents and purposes, as if executed at the term to which they were made returnable. The delay was involuntary and against the consent of the party, and to hold that it worked him an injury would be the greatest injustice. The words of the statute are sufficiently comprehensive to bear this interpretation, and respect for the general assembly requires that they should be thus construed.

The lien of the judgment, under which the defendant deduces his title, was prior to that of the plaintiff, and long before the expiration of the prior lien, an execution was sued out and delivered to the sheriff, the effect of which was to continue that lien until the execution of the writ, although the time had elapsed during which the lien of a judgment continues: R. C., tit. Execution, sec. 18. It would be an act of supererogation to require him to revive his judgment in order to preserve his property. The only effect of it would be delay. Then the prior levy of the execution under the junior judgment, although the lien of that had not expired, did not divest the priority of the older judgment.

The judgment reviving the lien of the junior judgment was not rendered until after a sale of the premises in dispute. The party thus by his own act having disposed of the property on which he wished to impose or continue his lien, it is obvious that the judgment of revival could not relate back and give the purchaser at the sheriff's sale a right which did not exist at the time of the purchase. The party suing out the *scire facias* to recover his judgment was under no obligations to continue the proceeding after the sale. He might have discontinued it at his pleasure; the purchaser, therefore, could not have been influenced in his conduct by any assurance of a revival of the lien. If the sale of the property did not satisfy the judgment, the revival would have had the effect of reviving the lien on any real estate owned by the defendant in the execution, or which he had disposed of while subject to it, but surely a creditor could not thereby entitle himself to a lien on property of the defendant which had been disposed of by his own act.

The judgment of the court below is affirmed, the other judges concurring.

PRIORITY WHERE SEVERAL WRITS OF EXECUTION DELIVERED TO SHERIFF:
See *Kennon v. Ficklin*, 44 Am. Dec. 776.

EFFECT OF SUING OUT EXECUTION TO CONTINUE LIEN OF JUDGMENT.—The rule laid down in the principal case is not adopted in the other states. Mr. Freeman, in his work on Judgments, section 349 a, 3d ed., referring to this question, says: "The time during which judgments have the force of liens on the lands of judgment debtors is usually prescribed by statute. In many instances, executions have been taken out and levies made within the time prescribed for the continuance of the lien, but so late that the sale did not take place until after the lapse of such time. In regard to such cases, so far as our observation has extended, it has, except in the state of Missouri, been uniformly held that the execution and levy did not continue the lien; and that to preserve the priority acquired by the judgment, the sale must be made during the statutory period. The title acquired at such a sale is therefore precisely the same as though the judgment had never been regarded as a lien." In *Isaac v. Swift*, 10 Cal. 71, this subject was ably argued and carefully considered by the court. Burnett, J., delivered an opinion, concurred in by Terry, C. J., and Field, J., in accordance with the above position. At page 81, he said: "The section 204 [of the code] creates the lien of the judgment, and also fixes the period of its continuance. Taking the different portions of the section together, and the intent is clear that the lien should not continue beyond the time specified. The power that creates confines the existence of the thing created within a specified period. The lien itself would not exist without this provision of the statute, and of course can not exist beyond the time expressly stated. We could as well assume the existence of the lien in the first instance, without the statute, as to assume its continuance without the statute. It required express words to create the lien, and it equally requires express words to continue it beyond the time specified. Had the code simply created the lien without limiting the period of its existence, then we could not presume that any limit was intended. But when a limit is expressly stated, we can not presume a continuance beyond it."

"The rule that confines the lien of the judgment strictly within the two years is the most simple and certain in theory, and the most beneficial in practice. If we hold that the lien of the judgment may be prolonged beyond the period stated by the issue and levy of an execution within the time, then we can fix no definite and certain limits to the continuance of the lien. Once we pass the limits of the statute, we open a door to the most vexatious litigation. The titles to real estate would become uncertain, and the useful and intended to be accomplished by our recording system would in fact be defeated. A party wishing to purchase the land of the judgment debtor could not do so with safety without the exercise of extraordinary diligence. The provisions of the code give the judgment creditor ample protection. He can cause an execution to issue at any time; and under it the sheriff can advertise and sell within the short period of twenty days. There is, therefore, no reason for allowing him the privilege of delaying the issue of execution until it is too late to sell before the lien expires. It is true that an occasional hard case may arise under the strict rule, but upon the whole it must be productive of the most good." The rule is no doubt settled the other way, however, in Missouri; and the principal case was followed in *Durrett v. Hulse*, 67 Mo. 201, and its language quoted approvingly in *Rice v. Morton*, 19 Id. 286; but that the states generally follow the contrary rule may be seen by referring to the cases cited by Mr. Freeman in support of his position.

STATE, USE OF JACOBS AND WIFE, v. HEARST.

[12 MISSOURI, 365.]

WHERE THE OBLIGATION OF PAYING MONEY AND DUTY OF RECEIVING IT UNITE in the same person, no suit can be brought in the event of an omission to pay. At the common law, where such a state of things is produced by the act of the creditor, the debt is extinguished, but where it is created by the law, no extinguishment takes place.

WHERE AN EXECUTOR IS APPOINTED GUARDIAN OF HEIRS to whom a debt from the estate is due, the latter can not maintain any suit to compel the executor to pay it over, as the obligation of paying and the duty of receiving are in the same person; but as no suit can be brought, the law will *eo instanti* the money becomes payable transfer it from one character to the other.

THIS was a suit instituted to the use of Jacobs and his wife Polly against George Hearst, the administrator of William Hearst, who was one of the securities of Joseph Funk, executor of John Horine. Polly was one of the children of Horine, who had left all his property to his children. Funk had received several different sums of money for land sold belonging to Horine. This suit was instituted against the administrator of the security of Funk for the distributive share of Polly Jacobs. The executor defended on the ground that he had been appointed the guardian of Polly Horine, the wife of the plaintiff. The court found for the defendant. A motion for a new trial was overruled, and the case was brought here by writ of error.

Johnson, for the plaintiff in error.

Stringfellow, *contra*.

By Court, SCOTT, J. The facts of the case abundantly show that the executor, as such, had no further use for the money in his hands. Then the duty of paying it over must have arisen. The obligation of paying money, and the duty of receiving it, uniting in the same person, no suit could be brought in the event of an omission to pay. At common law, where such a state of things is produced by the act of the creditor, the debt is extinguished, as there is no means of enforcing its payment. The character of creditor and debtor being here united by the act of the law or its agents, an extinguishment can not take place; but as no suit can be brought, the law will *eo instanti* the money becomes payable transfer it from one character to the other. The authorities sustain the correctness of these views. In the case of *Watkins v. State*, 2 Gill & J. 220, it was held, that when a sole executor sustained the twofold character of an ex-

ecutor and guardian, the law will adjudge the ward's proportion of the property in his hands to be in his hands in the capacity of guardian, after the time limited by law for the settlement of the estate, whether a final account has been passed by the orphans' court or not. So in the case of *Karr v. Karr*, 6 Dana, 3, the court held, that where the same person is executor and guardian of a distributee, and makes no settlement or election showing in what capacity he held the funds, he shall be presumed, after a reasonable time for settling the estate has elapsed, to hold them, or, at least, the portion not necessary for the payment of debts, as guardian. To the same effect is the case of *Adm'r of Johnson v. Ex'rs of Johnson*, 2 Hill (S. C.), 285 [29 Am. Dec. 72], in which it was maintained, that when from the facts an executor, who was also guardian, might be charged with the receipt of moneys either as executor or guardian, he must account in the latter character; for whatever funds he had in his hands as executor were by operation of law transferred to him as guardian.

The other judges concurring, the judgment of the court below will be affirmed.

WHERE THE SAME PERSON IS ADMINISTRATOR AND GUARDIAN of the heir, the balance, upon final account, shall be considered as in the hands of a guardian: *Seegar v. State*, 14 Am. Dec. 265; see also *Carroll v. Bosley*, 27 Id. 460; the principal case was cited in *Walker v. Walker*, 25 Mo. 376.

GIBSON v. ZIMMERMAN.

[12 MISSOURI, 335.]

AT COMMON LAW, A CONVEYANCE TO HUSBAND AND WIFE IN FEE vests the estate in them as one person, the whole of which remains in the survivor of them. The statutes of this state have not altered or modified the common law in this respect.

HUSBAND AND WIFE ARE THE ONLY PERSONS WHO CAN BE TENANTS BY ENTIRETIES. This tenancy must be created or take effect during coverture, and owes its qualities to the unity of the persons of husband and wife.

CONVEYANCE TO HUSBAND AND WIFE CREATES ESTATE IN ENTIRETY; and as such the survivor will own the whole upon the death of the other.

ERROR to the St. Louis circuit court. The opinion states the case.

Gibson, for the plaintiff in error.

Spalding and Shepley, contra.

By Court, RYLAND, J. The only point in this case for our adjudication, is the effect of a conveyance of land in fee to a man and his wife during the coverture. The court below held that such a conveyance vested the entirety in each; that on the death of the husband, the wife surviving was seised of the whole. In other words, that the husband and wife, grantees in a deed in fee, being in law one person, take the estate, not as tenants in common; not as joint tenants; but as tenants in entirety, each having the whole, and each unable, during the life of the other, to affect the estate to the prejudice of the other's right, and that the estate of the survivor is not a survivorship, is not a cumulation to the former estate of the survivor, but merely a continuation of the original estate vested in the *quasi* corporate existence of the man and wife.

The defendant in error contends for the truth and correctness of the following positions, viz.:

1. That at common law, a conveyance to husband and wife in fee, vests the estate in them as one person, the whole of which remains in the survivor of them.

2. That the statutes of this state have not altered or modified the common law in this respect.

I agree with the defendant in error on both propositions—that such was the common law at the time of its adoption in this state (then territory), and that our statutes have not altered or modified it in this particular. In the case of *Doe ex dem. Lucy Freestone v. Edward Parrott and Mary, his Wife*, 5 T. R. 655, Lord Kenyon says: “For though a devise to A. and B., who are strangers to, and have no connection with each other, creates a joint tenancy, the conveyance by one of whom severs the joint tenancy, and passes a moiety; yet it has been settled for ages, that when the devise is to the husband and wife, they take by entirety, and not by moieties, and the husband alone can not by his own conveyance, without joining his wife, divest the estate of the wife.”

Husband and wife are the only persons who can be tenants by entirety. This tenancy must be created or take effect during coverture; and owes its qualities to the unity of the persons of husband and wife. There is no doubt of this principle existing at common law.

I will now see whether our statutes have altered or modified the common law in this particular.

The common law was adopted by our statute as early as June, 1816, for the territory of Missouri: Geyer's Dig. 124. And the

same statute adopting the common law, also declared that the doctrine of survivorship, in cases of joint tenants, shall never be allowed in this territory.

The convention that formed our state constitution, declared that all laws then in force in the territory of Missouri, which are not repugnant to the constitution, then formed, shall remain in force until they expire by their own limitation, or be altered or repealed. This took place in July, 1820. In February, 1825, the legislature, by a statute regulating conveyances, declared, "that no estate in joint tenancy in any lands, tenements, or hereditaments, shall be held or claimed under any grant, devise, or conveyance whatsoever, heretofore or hereafter made, other than to executors or trustees, unless the premises therein mentioned shall expressly be thereby declared to pass, not in tenancy in common, but in joint tenancy; and every such estate, other than to executors and trustees (unless otherwise expressly declared as aforesaid), shall be deemed to be in tenancy in common: See laws of Missouri, digested and revised in 1825, title, Conveyances, sec. 3, p. 216.

In 1835 the legislature enacted, that "every interest in real estate, granted or devised to two or more persons (other than to executors and trustees as such), shall be a tenancy in common, unless expressly declared in such grant or devise, to be in joint tenancy."

In 1845, a similar provision was incorporated into the statute concerning conveyances, and is now in force. It will be easily perceived that all of these statutes have referred to joint tenancy. It was the object to abolish that species of tenure, and no doubt exists with me, that in order to constitute a joint tenancy under our laws, specific and express terms must be used, declaring that such estate shall be held in joint tenancy, and not in tenancy in common.

Does the deed to husband and to his wife in this case make them joint tenants? In the case of *Jackson ex dem. Stevens v. T. Stevens*, 16 Johns. 115, Justice Spencer says: "It appears to be well settled, that if an estate be given to a man and his wife, they take, neither as joint tenants, nor as tenants in common, for being considered as one person in law, they can not take by moieties, but both are seised of the entirety; the consequence of which is, that neither of them can dispose of any part without the assent of the other, but the whole goes to the survivor; the statutory provision, that no estate in joint tenancy in lands, shall be held or claimed under any grant, devise, or conveyance,

unless the premises therein mentioned shall expressly be declared to pass, not in tenancy in common, but in joint tenancy, does not extend to this case, for the estate of the husband and wife is not a joint tenancy. In *Sulliff v. Forgey*, 1 Cow. 95, this doctrine is again repeated. In *Doe d. De Peyster v. Howland*, 8 Id. 283, the court, by Savage, C. J., declared that "husband and wife holding lands by a conveyance to them, are not joint tenants. They are seised *per tout*, but not *per mi*. They are each owner of the whole, but not of the half. They must both join in a conveyance. They are both necessary to make one grantor. In *Shaw v. Hearsey*, 5 Mass. 523, Chief Justice Parsons, speaking of the statute of 1785, chapter 62, which declares that all conveyances and devises which have been or shall be made to two or more persons, shall be adjudged to be tenancies in common, unless it manifestly appears to have been the intent of the parties to the instrument, that joint tenancies were intended." Joint tenancies, when the tenants are not man and wife, may be severed, and the right of survivorship be defeated at the will of either tenant, either by partition or by alienation of his property, which shall be holden by the purchaser as tenant in common. For two joint tenants generally hold by moieties, and not by entireties. As therefore a joint tenancy of this nature may be destroyed at the pleasure of either tenant, the statute very reasonably presumes that such tenancy was not intended in the conveyance, and has enacted, that unless a joint tenancy appear to be intended, the estate shall be holden in common.

But this construction of the statute can not reasonably be extended to a conveyance to husband and wife. Here a severance of the tenancy can not be had either at the will of the husband or the wife. They do not take by moieties but by entireties; and the alienation of the husband of a moiety will not defeat the wife's title to that moiety, if she survive him. The statute speaks of conveyances to "two or more persons," but a conveyance to husband and wife is in legal construction a conveyance but to one person. For if an estate be conveyed expressly in joint tenancies to a husband and wife and to a stranger, the latter shall take one moiety, and the husband and wife, as one person, shall take the other moiety.

And it is difficult to assign any good reason why survivorship between husband and wife is prejudicial to the commonwealth, or repugnant to the genius of republics.

Chancellor Kent says that statutes of a similar nature (to this one of ours) have been passed in most of the states, which,

however, are not applicable to conveyances to husband and wife: 4 Kent's Com. 358.

The only case that I have seen against this doctrine of husband and wife holding by entireties, is the one from Connecticut, *Whittlesey v. Fuller*, 11 Conn. 337; that admits that the common law on this subject is, and agrees with the doctrine above declared as the common-law doctrine of estates per entireties; but the court, in that case, decided that the doctrine of entireties has never been in use in that state, which, therefore, decides nothing on this point, so far as regards our state, in which the common law has been adopted. I therefore declare my opinion to be, that the conveyance to husband and wife is not, strictly speaking, an estate by joint tenancy, nor an estate in tenancy in common, but an estate in entirety; and as such the survivor will own the whole upon the death of the other, and such being the decision of the court below, I find no error in its judgment, and my brother judges concurring in this opinion, the judgment below is affirmed.

HUSBAND AND WIFE ARE TENANTS BY ENTIRETIES, with a right of survivorship, under a conveyance to both of them: *Den ex dem. Wyckoff v. Gardner*, 45 Am. Dec. 388, and note; *Fairchild v. Chustelleux*, 44 Id. 117, and note. The principal case was cited to this point in *Shroyer v. Nickell*, 55 Mo. 268; and to the point that the Missouri statutes had made no change in this common-law rule, in *Hall v. Stephens*, 65 Id. 676.

HEMMAKER v. STATE.

[12 MISSOURI, 453.]

LEGISLATURE MAY PUNISH OFFENSE OF BRINGING STOLEN GOODS INTO THE STATE, and in doing so they merely codify a settled principle of the common law applicable to different countries, and extend it to neighboring states and foreign countries; consequently, the legislature can pass a statute making such an offense punishable the same as if committed in this state, and further providing that the larceny may be charged to have been committed and may be indicted and punished in any county into which the property was brought.

INDICTMENT found by the grand jury of St. Louis county against the defendant, charging him with grand larceny in the county of St. Louis. On the trial it was shown by the testimony of one Nahouse that a watch was stolen from him by defendant on board a steamer going to New Orleans. Both parties subsequently came to St. Louis, where the larceny was discovered. The point of law raised appears from the opinion.

Verdict of guilty, and the defendant appealed from an order denying a motion for a new trial.

A. P. Field, for the appellant.

By Court, NAPRON, J. The principal question presented by the instruction in this case involves the power of the legislature to enact the third section of the ninth article of the act concerning crimes and punishments. That section provides "that every person who shall steal, or obtain by robbery, the property of another, in any other state or country, and shall bring the same into this state, may be convicted and punished for larceny in the same manner as if such property had been feloniously stolen or taken within this state, and in any such cases, the larceny may be charged to have been committed, and may be indicted and punished, in any county into or through which such stolen property may have been brought." The argument which denies to the legislature the power to pass such a law seems to be based upon the assumption that it is designed to execute the criminal laws of another state or country. The cases to which we have been referred arose in states where no such legislative enactment as the above was in force. In Tennessee, in North Carolina, and in New York, previous to the revision of 1830, the courts held that by the common law and in the absence of any statutory enactment, offenses of this character committed in another state or foreign country were not cognizable in their respective courts. These opinions are based upon the doctrine in *Buller's Case*, 3 Co. Inst. 113, and upon the additional fact that the states of this Union do not occupy the same relation to each other which the counties of England did. In Massachusetts a contrary decision was made in the case of *The Commonwealth v. Andrews*, 2 Mass. 14 [3 Am. Dec. 17]. We are not under the necessity of deciding the question which these cases present. Our statute was obviously intended to punish offenses committed against our criminal laws, and not those which were committed without the jurisdiction of the state. If the legislature think it expedient to declare that a person who is guilty of grand larceny in another state or country, and brings within our jurisdiction the stolen goods, shall be considered as guilty of grand larceny here, it is clearly within their constitutional power to make such enactment. In the determination of the character of the offense there is no necessity for inquiring what may be larceny under the laws of the country where the offense was committed. The legislature punish the offense committed

in this state by bringing the stolen property into it, and in doing so they merely codify a settled principle of the common law applicable to different countries, and extend it here to neighboring states and foreign countries. The case of *The People v. Burke*, 11 Wend. 129, is an authority in point upon a statute exactly like our own.

Judgment affirmed.

WHERE PROPERTY STOLEN IN ONE STATE IS BROUGHT INTO ANOTHER, the person is guilty of the offense in the latter state: *State v. Ellis*, 8 Am. Dec. 175; *State v. Seay*, 20 Id. 66; but see *State v. Brown*, 1 Id. 548. The principal case was followed in *State v. Butler*, 67 Mo. 61, and cited in *Commonwealth v. Macloon*, 101 Mass. 6, on the point that if the legislature sees fit to provide that the bringing into the state of goods taken without right from an owner in a foreign country shall be punishable as larceny, it has the constitutional authority to do so.

KNIGHTON v. TUFLI

[12 MISSOURI, 531.]

INSTRUMENT IS ASSIGNABLE which, though very inartificially drawn, purports to give a mortgage on the defendant's half of a saw-mill to secure the payment of a certain sum of money payable in lumber; but the common-law action of debt can not be maintained on the instrument.

APPEAL from the Washington circuit court. The opinion states the case.

Frissell, for the appellant.

Cole, *contra*.

By Court, RYLAND, J. This is an action of debt brought by Lovel Knighton against John Tufli on the following instrument of writing:

"Know all men by these presents, that I, John Tufli, have this day given Ammon Knighton a mortgage on the undivided half of a saw-mill on Fouch and Renault creek, and do by these presents, grant and transfer to said Knighton all my right, title, interest, and claim in and to said mill, and all the tract of land belonging to said mill place, formerly the property of Knighton and Lyon. This lien is given for the purpose of securing payment of the sum of three hundred and twenty-seven dollars and fifty cents, which payment is to be made in plank or lumber made at said mill, to be due one thousand feet each week said mill can saw. Said debt to be discharged by plank delivered at

said mill, at the rate of twelve and one half cents for each quarter of an inch thick for any kind of plank. Witness my hand, this sixth day of September, 1842. JOHN TUPLI.

"I do assign the within bond to Lovel Knighton for value received of him, as witness my hand, January 6, 1843.

"A. KNIGHTON."

The defendant cravedoyer and demurrer to the plaintiff's declaration, setting out the instrument sued on as above.

The court sustained the defendant's demurrer and gave judgment thereon for him. The plaintiff thereupon filed the affidavit and prayed an appeal, which was allowed him.

The only points calling for a decision of this court are: 1. Is this instrument assignable under our statute? 2. Will the common-law action of debt lie on this instrument?

On the first point, I am of the opinion that the instrument is such a one as may be assigned under our statute.

On the second point, I am of the opinion that the common-law action of debt can not be maintained on this instrument: *Watson & McCall v. McNairy*, 1 Bibb, 356, where the doctrine is fully examined. See also *Snell v. Kirby*, 3 Mo. 16 [22 Am. Dec. 456].

Let the judgment be affirmed.

ACTION OF DEBT WILL NOT LIE on a contract for the payment of a stipulated sum in property: *Snell v. Kirby*, 22 Am. Dec. 456.

YOUSE v. NORCOMS.

[12 MISSOURI, 549.]

AT COMMON LAW, A MARRIED WOMAN COULD ALIENATE HER LAND by fine and recovery; but such alienation might be avoided on account of the infancy of the wife. If, however, it was not avoided during infancy, it could not be afterwards avoided; for this conveyance, being by matter of record, must be tried by inspection upon writ of error; but a feoffment or other alienation *in pais* might be avoided by an infant or her heir at any time by entry, whether during nonage or after full age.

CONVEYANCE BY HUSBAND AND WIFE OF WIFE'S LAND, during the minority of the wife, is voidable.

COMMON LAW, AND NOT SPANISH LAW, GOVERNS rights of parties, when, in 1816, a husband and wife convey land belonging to the wife while she is an infant, and afterwards seek to disaffirm the conveyance.

MERE SILENCE AND INACTION WILL NOT AMOUNT TO A RATIFICATION of a deed made by a husband and wife of the wife's land while she was an infant, eighteen and a half years of age; and the deed may be avoided by a subsequent deed made thirty years afterwards, although valuable im-

provements were made, and she was probably aware of it, and made no objection or claim.

ENTRY UPON LAND IS NOT NECESSARY TO AVOID DEED made during infancy, but it may be avoided by a deed executed to another for the same land after arriving at full age.

EJECTMENT. Both parties claim the tract through conveyances made by Vasquez and his wife. The land was the property of Marie Vasquez, the wife, having come to her from her father's estate. On November 4, 1816, Vasquez and Marie, his wife, then an infant, a little over eighteen and a half years of age, conveyed the property to one Hanley, who mortgaged it to one Mullanphy. The mortgage was foreclosed and the property sold, and Mullanphy became the purchaser and erected valuable improvements on it. The defendant is the tenant of Mullanphy's heirs. On the fifth of February, 1846, Vasquez and wife conveyed all their right, title, and interest in the lot to one Labaume, without any covenants for title, and in the same year Labaume conveyed to the plaintiff. Judgment was rendered for the plaintiff, and the defendant appealed.

Spalding and Shepley, for the appellant.

W. L. Williams and Haight, contra.

By Court, NAPTON, J. For the purposes of this case, it does not seem to be material to determine, whether the territorial legislature in 1816 succeeded in introducing the common law, to the exclusion of the Spanish law, or not. In the case of *Lindell v. McNair*, 4 Mo. 380, this court held, that a deed of bargain and sale, executed in 1810 by a husband and wife, and acknowledged according to the forms prescribed for such deeds, when designed to convey the husband's land and the wife's dower, would convey the wife's land, although previous to the act of June 22, 1821, there was no statute of this state or territory expressly authorizing such a conveyance. The court considered the Spanish law to be still in force after the passage of the act of 1816, and as that law authorized a husband to convey his wife's paraphernal property, with her consent, the deed executed in 1820 was upheld. It was also asserted that the deed was good at common law. As this decision was made as early as 1836, and may have formed the basis of many titles acquired upon the faith of it, this court in a late case, *Picotte v. Cooley*, 10 Id. 312, intimated that it ought not to be disturbed.

If the grounds upon which the decision of the case of *Lindell v. McNair*, 4 Mo. 380, was placed are to be adhered to, as well

as the decision itself, it would appear that the act of 1816, which purported to introduce the common law to some extent, was a signal failure. To introduce a system of unwritten law for the purpose of supplying the deficiencies of another system of a similar character, supposed to be equally perfect and comprehensive as the first, making both systems subordinate to the written or statute law, was certainly an act of legislation either entirely nugatory, or if not nugatory, singularly calculated to produce confusion and uncertainty. The Spanish law, supposed to be in force here previous to 1816, was a system complete in itself, embracing all the subjects usually regulated by municipal code, and providing for all the rights and remedies incident to every relation of life. If that code was left in operation by the act of 1816, except where the statute laws of the territory had altered it, the common law could only be applied to supply the defects of that system. Under this construction of the act, the operation of the common law must have been extremely limited, if, indeed, there was any ground at all for it to rest upon.

It is probable that the sudden introduction of the common law in 1816 might have been repugnant to the feelings and interests of the old inhabitants who had been familiar with another code. But the emigrants from the olden states, who regarded the common law as their heritage, and who in 1816 already constituted much the larger portion of our population, were doubtless anxious for the immediate acquisition of this system, and had practically regarded it as the law long before its formal introduction by the legislature. A reference to our territorial laws from the first acquisition of the country down to 1816, will show that the common law furnished our law-givers all their notions of law and equity, as well as all the terms used to express them. The deed from which this controversy has sprung, is a conveyance by bargain and sale, and it would seem that, at the date of its execution, the forms of conveyancing derived from the common law, were practically in vogue, even among the ancient inhabitants.

Assuming the law to be as declared in the case of *Lindell v. McNair*, that in November, 1816, a husband and wife could convey by deed of bargain and sale the wife's land, the question is still to be determined whether the infancy of the wife, at the time of such conveyance, will avoid the deed or render it voidable; and if so, in what mode, or at what length of time it may be avoided.

At the common law, a married woman could alienate her land by fine and recovery; but such alienation might be avoided on account of the infancy of the wife. If, however, it was not avoided during infancy, it could not be afterwards avoided, for this conveyance, being by matter of record, must be tried by inspection upon writ of error: 3 Bac. Abr., Infant, c, 1, sec. 7. A feoffment or other alienation *in pais* might be avoided by an infant or his heir, at any time by entry, whether during his non-age or after his full age: Co. Lit. 380 b. So if the husband and wife aliened the land of the wife, both being infants, the wife, after the death of her husband, was entitled to her writ of *dum fuit infra ætatem*. And if they joined in an alienation, where the wife only was an infant, after the death of her husband, she was entitled to her writ of *dum fuit infra ætatem*, as well as her *cui in vita*: F. N. B. 192 k; Co. Lit. 237 a; Com. Dig., Infant, c; 4 Bac. Abr., Infancy, i, 7. But these writs must be understood as only applicable to alienation by feoffments, or other conveyances *in pais*, and could be brought only after full age, unless brought by an heir of the person entitled: F. N. B. 192 g.

This distinction between conveyances by matter of record, and those made *in pais* as feoffments, bargain, and sale, are important in determining the force of a conveyance by husband and wife, made in 1816, after the passage of the act of the nineteenth of January, upon the supposition that the common law was then in force. As our law now stands, it may be still more important, should a question arise as to the proper construction of a deed purporting to convey the wife's land. Our statute now reads, that "a married woman may convey any of her real estate by any conveyance thereof executed by herself and husband, and acknowledged by such married woman, and certified in the manner hereinafter described by some court having seal, or some judge, justice, or clerk thereof." It is not provided what effect such a conveyance shall have, whether that of fine and recovery, or of a feoffment or bargain and sale. If, however, we recur to the first act passed on this subject, that of June 22, 1821, the question is readily solved. That act provided that "such deed shall be as effectual in law to pass all the right, title, and interest of the wife, as if she had been an unmarried woman." As a deed of bargain and sale made by an unmarried infant was avoidable, it followed that a conveyance by a husband and wife, of the wife's land during the minority of the wife, was also voidable. Our law remained in this condition until the revision

of 1835, when this statute, like many others, was greatly changed in phraseology, and put into a condensed form. The effect of deeds of this character was entirely omitted. I mention this, not with any view to inquire what is the proper construction of the present law. I shall assume that in 1816, before the common law had been changed by any special enactment, no greater effect could with propriety be given to a deed conveying the lands of a married woman, than was subsequently given to it by the act of 1821. In *Lindell v. McNair*, the court do not intimate whether the conveyance was equivalent to a feoffment or a fine and recovery. As there was no statute on the subject, and the form of the conveyance was a bargain and sale, it could hardly have been understood to have the force of a fine and recovery. If the deed, therefore, of Vasquez and wife in 1816, is to be construed by the common law, it was at least a conveyance which could be avoided by reason of the infancy of Madame Vasquez.

By the Spanish law, a husband could convey his wife's paraphernal property with her consent. There is no doubt the land owned by Madame Vasquez was paraphernal. It has not been questioned in the argument of this case, but that the husband's conveyance of his wife's land, she being an infant, could be avoided by the wife by the Spanish law, as well as by the common law. It is laid down in Frebero, 3 Feb., sec. 36, "If the husband sell paraphernal property without the consent of the wife for a full price, she can recover it from the purchaser, for she does not lose its dominion, inasmuch as one man's property is not to be transferred to another without the owner's consent." Now by the Spanish law, a minor above the age of fourteen but under twenty-five, might sell his property, and the sale was translatiue of title *sub modo*, but he had the privilege of subsequently rescinding and suing for the property. So a married woman under age, although her consent to the transfer of her property might be sufficient to pass the title for the time, could dissent after arriving of age. She had the same action for restitution which the Spanish law gave to minors generally. As this action was limited to four years after attaining majority, the question is, whether this limitation affected a minor married woman.

In *Chesneau's Heirs v. Saddler*, 10 Mart. (La.) O. S. 735, Judge Porter said: "The law on this point I understand to be, that if the minor, after he comes to the age of majority, expressly ratifies the alienation, or tacitly approves of it, either by suffering the time prescribed for him to commence his action to expire,

or by doing acts in conformity with the transfer of his property, that he can not afterwards claim it. Because, in the language of the law, the intention which is inferred from the act is more powerful than that which can be ascertained from words."

This action for restitution is given when the minor's estate has been sold according to the forms of law; by it he was enabled to redeem the property, by repaying the price. As the laws of Spain did not permit a minor's estate to be sold except under special circumstances, and then under the direction of a judicial officer, the minor was allowed four years after coming of age to have his action for recovering back the property, where the law was not strictly complied with.

In *O'Connor v. Barre*, 3 Mart. (La.) O. S. 453, it is said: "A tutor has not the power of alienating the real estate of his pupil, except in the cases provided by law, and then only with permission of the judge. If, contrary to this provision, he alienates it, the minor may, within four years after he comes of age, obtain restitution of his property, on proving that the alienation has been injurious to him: Partidas 6, 1 lib. 2. But when he has suffered the four years to elapse, without claiming any restitution, his silence is considered as an approbation of the act of his tutor, and the purchaser of his property is quieted in his possession." This writ, or action for restitution, was also given where the minor himself had made the alienation.

It might be a question, whether this limitation of four years would run against a married woman, whose lands had been sold during her minority; but the very limited examination which I have been enabled to bestow on this subject has led me to the conclusion that it does. It is certain that the prescription of ten years, originating in a just title and good faith, will run against a disposition by the husband of his wife's paraphernal property: 3 Feb., lib. 3, c. 2, 3, 4; and I see no reasons why a similar limitation should not attach to the wife, after the removal of her disability of infancy. In the case of *O'Connor v. Barre*, 3 Mart. (La.) O. S. 453, the point was made, but as the prescription of ten years was proved, the court did not examine the other question, and would not permit the ten years' prescription to apply, because the land of the minor had been sold by the mother, after she had married a second time, and by such marriage forfeited her rights as tutrix.

Admitting that the married woman whose paraphernal property has been conveyed by her husband during her infancy, must, under the Spanish law, bring her action for restitution

four years after she comes of age, notwithstanding she continues married, let us examine the facts of the present case, and see how this limitation will affect the result.

The conveyance of Vasquez and wife to Hanley was executed on the fourth of November, 1816. Madame Vasquez was born on the second of May, 1798, and was, consequently, twenty-one years old on the second of May, 1819.

The act "for the limitation of actions to be brought for the inheritance or possession of real property" was passed on the seventeenth of December, 1818. That act provided that "no person should have any writ of right, or any other real or possessory writ or action," except where the cession or possession, upon which the action was to be maintained, had been within twenty years before the suit; and further, that "any person or persons now having right or title of entry as aforesaid, and the heir or heirs of such persons may within twenty years from this time enter or commence any such action or suit as he, she, or they, or his, or her, or their ancestors, might have done before the passing of this act." This act undoubtedly abolished the prescription of ten years, which prevailed under the Spanish law, and such was held to be the law in *Landes v. Perkins*, 12 Mo. 236. Did it not also abolish the limitation upon the action for a restitution of lands sold by a minor? If the Spanish law was in force in 1818, and by virtue of that code an action could have been maintained at that period for the restitution of lands sold during plaintiff's minority, that action, by whatever name it may have been called, was in substance and effect a real action. It was an action to recover the possession of lands, and therefore came within the letter and spirit of the act of limitations. It will not do to say that the act was intended to apply only to common-law actions; for if the admission be made that such was probably the intention, it only proves that the legislature acted on the presumption that no other kind of actions were known to our courts, or recognized by our laws. The argument would therefore prove too much: it would show that the legislature did not intend to limit the period of commencing a proceeding under the Spanish law, only because they believed the common law to have been introduced two years before, and the Spanish law abolished. But if the Spanish law and common law were both in force in 1818, Madame Vasquez had a right to this action of restitution before some tribunal of the territory, and the action was strictly a possessory action. It can not be supposed for a moment that a party who had a claim for land, designated

by a name known only to the Spanish law, was intended to be barred, and was barred, whilst at the same time he could give his claim another name, and bring his suit in a common-law tribunal.

It surely can not be denied, that in 1818, Madame Vasquez could have maintained a common-law action for the recovery of her land; for those who maintain the continued existence of the Spanish law in this territory after 1816, seem to concede that it existed only for the protection of rights, not to control the remedies, or dictate the forms of action in our judicial tribunals. Our legislative and judicial history conclusively establishes, that no tribunals were constituted here for administering the Spanish law, in its forms, and no suits were ever maintained in any other mode than that known to the common law. Our judges and lawyers were educated in this system, and our legislature was thoroughly imbued with its spirit. If, then, Madame Vasquez could have maintained a common-law action for the restitution of her land in 1818, that right of action, by whatever name it was called, was protected by the act of limitations—that protection extended to 1825, when the common law was beyond all question fully introduced.

We must therefore conclude that the principles of the common law must settle the right involved in this suit.

The deed under which the plaintiff claims was executed by Vasquez and wife in 1846, and the only question is, whether this deed, made thirty years after the first, was effectual to rescind the forms and pass the estate to the plaintiff.

It would be useless, at this day, to examine the much-discussed distinction between the void and voidable acts of an infant. The modern doctrine, which originated in the case of *Zouch v. Parsons*, 1 W. Bl. 575, and which holds the deed of an infant to be merely voidable, is certainly more consonant to natural justice than the harsher rule which was thought to have prevailed previous to that case. The deed of Madame Vasquez in 1816, was then voidable only. Is her silence, her acquiescence during thirty years a bar? Can the mere inaction of a *feme covert*, however long continued, amount to an affirmance of a voidable contract? Such would have been the Spanish law, as we have seen; but under our system, the disabilities of a *feme covert* are greater than those under the civil or Spanish code, and as a consequence, her responsibility is dismissed, and her privileges are more extensive and better protected. No statute of limitation barred Madame Vasquez, and no act was done by her to affirm

or ratify the deed of 1816. She was merely passive. The fact that she lived in the city where the lot in controversy lies—that she was probably aware of the improvements going up—that she made no objections, and put in no claims—these circumstances, whilst they might affect the equitable character of the transaction, can hardly be regarded as an affirmance.

The case of *Wheaton v. East*, 5 Yerg. 59 [26 Am. Dec. 251], is a very strong case upon this point; but it was essentially different from the present. A confirmation was deduced from the conduct of the plaintiff in that case scarcely warranted by the general current of authorities. The plaintiff lived in the neighborhood of the lot he had sold during his infancy—saw the defendant making large expenditures in valuable improvements—said he had sold the lot, had been honorably paid for it, and was satisfied, and made a proposition for its purchase to the defendant. These circumstances were held to preclude him from subsequently setting up title. But Madame Vasquez has been merely inactive, and during the entire period of her silence has been a *feme covert*. The generally received doctrine undoubtedly is, that mere words, much less mere silence or inaction, will not amount to a ratification of a voidable deed: *Clamorgan v. Lane*, 9 Mo. 473.

It seems to be well settled, that an entry upon the land is not necessary to avoid a deed made during infancy, but it may be avoided by a deed executed to another for the same land after arriving at full age.

The other judges concurring, the judgment of the court of common pleas is affirmed.

DEED OF INFANT FEME COVERT is void, though dated after her majority: *Schrader v. Decker*, 49 Am. Dec. 538, and note.

DISAFFIRMANCE OF CONTRACTS BY INFANTS: See *Cresinger v. Welch*, 45 Am. Dec. 565; *Elliott v. Horn*, 44 Id. 488, and notes to these cases. The principal case was affirmed in *Norcum v. Gaty*, 19 Mo. 65, and cited to the point that deeds executed by infants after they attained majority amount to a disaffirmance of a deed of the same land made during infancy, in *Peterson v. Leik*, 25 Mo. 544.

CASES
IN THE
SUPERIOR COURT OF JUDICATURE
OF
NEW HAMPSHIRE.

ELKINS v. BOSTON AND MAINE RAILROAD.

[19 NEW HAMPSHIRE, 337.]

AGENT OF UNDISCLOSED PRINCIPAL MAY MAINTAIN AN ACTION in his own name against a carrier for damages for loss of property he has agreed to carry.

EITHER BAILEE OR BAILOR MAY MAINTAIN AN ACTION against a carrier to whom the goods have been delivered for transportation, for the loss of the property.

ASSUMPSIT. The declaration alleged that plaintiff, Charles D. Elkins, delivered an overcoat to defendants, to be carried to Exeter and delivered to plaintiff; that defendants undertook to deliver it accordingly, but had failed to do so. The evidence is stated in the opinion. Defendants objected to the evidence, because it varied materially from the declaration; but the court ruled it to be sufficient. Verdict for plaintiff, and defendants moved to set it aside. The motion was refused, and defendants appealed.

Wood, for the plaintiff.

Sickney, for the defendants.

By Court, GILCHRIST, C. J. The only question in the case is whether the evidence supports the declaration. It is alleged that the plaintiff delivered to the defendants an overcoat, to be carried from Andover to Exeter, and delivered to the plaintiff. It appeared that two overcoats were rolled up in a bundle, one of which belonged to the plaintiff and the other belonged to Jonathan Elkins; that the bundle was directed to Jonathan Elkins,

and left by him at the depot. The only question properly raised by the case is whether upon these facts the plaintiff may maintain an action against the defendants.

In the case of *Weed v. The Saratoga and Schenectady Railroad*, 19 Wend. 534, cited by the counsel for the defendants, the declaration alleged that the railroad company promised the plaintiffs to carry for the plaintiffs a trunk containing certain goods, etc., and bank bills, but that they carelessly lost the trunk and its contents. The second count alleged an undertaking to carry the trunk and its contents. The evidence showed that the plaintiff's clerk, who was traveling, directed his baggage to be put into the proper car, but on his arrival at the place of his destination, he found that one of his trunks was lost, containing two hundred and eighty-five dollars belonging to the plaintiffs, which he had retained for his traveling expenses. The trunk belonged to one Martin. It was said by Cowen, J., that the variance was material. "The contract, as set forth, was to carry the trunk and money of the plaintiffs. The proof is that the trunk belonged to Martin, a stranger, nor was it shown that the plaintiffs had any connection with it. If the trunk were Barnes' (the clerk's), the variance would be the same, and so I should think if he had hired or borrowed it of Martin for his own use. * * * The proof is at most of a contract with the plaintiffs to carry the money only. The declaration, then, fails in describing correctly a special executory contract, wherein great exactness is always demanded. Where the declaration is on a promise to do several things, and only one is proved, this is a variance. * * * The whole contract in the case at bar was made ostensibly with Barnes. If in legal construction it can be turned in favor of the plaintiffs, it must be in respect to their ownership of the articles undertaken to be conveyed, and there can be no pretense that the trunk of a stranger, Martin, or the trunk of Barnes, in which the plaintiffs had leave to deposit their money, would be comprehended within the principle."

Thus far the decision is not an authority for the defendants. The question of variance was distinctly raised and decided, although it finally turned out not to be very material, inasmuch as the plaintiffs were permitted to amend, by striking out the trunk from the declaration. But the learned judge goes further, and after raising the question whether Barnes was not more than a mere agent, and was not a bailee, having himself an interest in the money for his traveling expenses, says, "It is doubtful,

at least, whether a promise to carry for a bailee can inure to the benefit of the bailor," although that question did not arise in the case. Upon this question there are several decisions worthy of consideration.

In the present case the coat, which is the subject of this action, being in the possession of Jonathan Elkins, the latter must be regarded as the bailee, and the plaintiff as the bailor. It is immaterial for what particular purpose the plaintiff's coat was in the possession of Jonathan Elkins. The purpose probably was that the latter might cause it to be forwarded to the plaintiff. In such a case it is clear that the bailee has such a continuing interest in the goods, until their arrival at the place of destination, as to entitle him to sue the carrier in case they are lost or damaged on their passage. Thus, in the case of *Freeman v. Birch*, 1 Nev. & M. 420, which was an action against a carrier for negligence, it appeared that the plaintiff, a laundress, residing at Hammersmith, was in the habit of sending linen to and from London by the defendant's cart, which traveled from Chiswick to London. A basket of linen belonging to one Spinks was sent by the defendant's cart, and on its way to London, part of its contents was either lost or stolen. Spinks did not pay the carriage of the linen. It was objected on the part of the defendant that the present action was misconceived, and that the action should have been brought by the owner of the linen. But the objection was overruled and a verdict was found for the plaintiff. A motion was made for a new trial, but refused by the court of queen's bench on the ground that under the circumstances the bailee retained a special property in the goods sufficient to support the action.

The property in articles bailed is for some purposes in the bailee, and for some in the bailor. The right of action must partake of the same properties, and must so continue until it is finally fixed and determined by one or the other party appropriating it to himself. The decision in *Freeman v. Birch*, although it clearly establishes the right of a bailee to sue, does not necessarily exclude the bailor from bringing an action, if he chooses to anticipate the bailee in so doing. The rule in such cases is stated by Parke, B., to be, that either the bailor or the bailee may sue, and whichever first obtains damages, it is a full satisfaction: *Nicolls v. Bastard*, 2 Crompt. M. & R. 660.

The principle appears to be well settled, that if it is not expressed that an agent contracts in behalf of another, and the name of the principal is not disclosed by him, a suit may be

maintained in the name of the principal. In the present case, Jonathan Elkins was clearly the agent of the plaintiff, and the name of the plaintiff was not disclosed by him. This principle is recognized in the case of *Sims v. Bond*, 5 Barn. & Adol. 389, where Lord Denman says: "It is a well-established rule of law, that where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party." In the case of *Higgins v. Senior*, 8 Mee. & W. 834, it was held that the suit might be maintained on the contract, either in the name of the principal or of the agent, and that, too, although required to be in writing, by the statute of frauds: *Beebee v. Robert*, 12 Wend. 413 [27 Am. Dec. 132]; *Taintor v. Prendergast*, 3 Hill (N. Y.), 72 [38 Am. Dec. 618]. The same principle was adopted by the supreme court of the United States, in the memorable case of the loss of the steamer *Lexington*, in Long Island sound. In the case of the *New Jersey Steam Navigation Company v. The Merchants' Bank*, 6 How. 344, the bank had delivered to Harnden, an express agent, a large amount of specie for transportation, by whom it was delivered to the Steam Navigation Company, who were then running the *Lexington* between New York and Stonington. It was held that, notwithstanding the contract of affreightment was made by Harnden with the company personally for the transportation of the specie, it was, in contemplation of law, a contract between the bank and the company, and although Harnden made the contract in his own name, and without disclosing the name of his employers at the time, the bank might maintain a suit upon the contract directly against the company. So where the plaintiff agreed with B., a common carrier, for the carriage of goods, and B., without the plaintiff's directions, agreed for the carriage with C., who, without the plaintiff's knowledge, agreed with D., a third carrier, it was held that the plaintiff might maintain an action against D., for not delivering the goods, and that by bringing the action, the plaintiff affirmed the contract made with D., by C., and could not afterwards recover from B.: *Sanderson v. Lamberton*, 6 Binn. 129.

Upon the principles above stated, our opinion is, that the plaintiff may maintain this action.

Judgment on the verdict.

AGENT CAN NOT MAINTAIN ACTION IN HIS OWN NAME EXCEPT in exceptional cases, as where he has rights as a bailee, etc.: *Taintor v. Prendergast*, 33 Am. Dec. 618. As to when agent may sue in his own name, see *Pearce v. Austin*, 34 Id. 523; *Clap v. Day*, 11 Id. 99, and note 100.

MCNEIL ET AL. v. CALL.

[19 NEW HAMPSHIRE, 403.]

AGREEMENT BY MORTGAGEE NOT TO TAKE ADVANTAGE OF FORECLOSURE for a given time is binding, and waives the forfeiture and opens the foreclosure.

COSTS, WHERE CONDUCT IS UNCONSCIENTIOUS AND OPPRESSIVE, will be awarded to the party injured.

INTEREST, AFTER TENDER OF THE DEBT made pursuant to an agreement between the parties, should not be cast on such debt.

IN equity. Hardy owed the Exeter Bank some money, and mortgaged an undivided one-half interest in certain land to secure the debt. After paying part of the indebtedness, he conveyed to Fuller. The bank assigned its interest to Call, the defendant. The debt not being paid, suit to foreclose was brought. One Eaton had been acting as agent for the bank. Fuller went to him, told him he was going to Baltimore, and would like to delay payment until his return. Eaton said it would be satisfactory, and that no advantage would be taken of the expiration of the time. When Fuller returned, Eaton claimed an absolute interest in the property, and refused to convey to Fuller upon payment of the amount of the indebtedness, though tender was made of the amount. This bill was filed to compel him to receive the money and admit plaintiffs to redeem the property.

Perley, for the plaintiffs.

Eaton, for the defendant.

By Court, GILCHRIST, C. J. The agency of Eaton is sufficiently proved. The letter of Farrar, dated on the eighteenth day of July, 1842, shows that he was authorized to sell the property as he should see fit, upon his guaranty that the bank should be paid in full, and that all he should receive beyond the amount of the debt due the bank, should be retained by him for his own benefit. Fletcher says that Eaton acted as agent for the bank, and so says Fuller, until at last Eaton told him that he had bought the equity of redemption. In the case of *Willard v. Henry*, 2 N. H. 120, it was held, that where a grantor remains

in possession of land subject to a condition to be performed by the grantee, and the condition is broken, the forbearance by the grantor to make a claim to retain the possession for the condition broken, is sufficient evidence that the forfeiture is waived. The case of *Bachelor v. Rolinson*, 6 Id. 12, decides that though an entry and possession by a mortgagee may have been sufficient to foreclose the right in equity to redeem, yet if he accept all the money secured by the mortgage, it would be a waiver of his entry for that purpose. In that case, Atkinson entered for breach of condition in the spring of 1828, and accepted the debt on the third of December, 1830. So the receipt of a part of the debt is a waiver of the foreclosure: *Deming v. Comings*, 11 Id. 483.

If an assignment be made of the mortgage just before the expiration of the equity of redemption, to prevent the redemption, that may be regarded as a fraud of which the party shall not take advantage to foreclose the mortgagor or his grantee, until he shall have had a reasonable time to make a tender to the assignee. If the assignment be made without such intent, it may keep the equity open until the mortgagor, or those claiming under him, can find the assignee and offer to perform the condition: *Deming v. Comings*, 11 N. H. 482. An agreement in writing by a mortgagee after an entry for condition broken, that he will reconvey the premises whenever the debt shall be satisfied out of the rents and profits or otherwise, will enable the mortgagor to maintain a bill in equity to redeem, although more than three years have elapsed since the entry: *Quint v. Little*, 4 Greenl. 495. So an entry for condition broken may be waived by a subsequent entry. In *Fay v. Valentine*, 5 Pick. 418 [22 Am. Dec. 397], a mortgagee having recovered a conditional judgment in an action for the possession, entered for condition broken, and afterwards entered for the judgment. It has been decided, also, that it is competent for a court of equity to take away from third persons the benefits which they have derived from the fraud, imposition, or undue influence of others, although the third persons may not have been parties to the fraud: *Huguenin v. Baseley*, 14 Ves. 273. It has also been held in England, that there are certain acts of the mortgagee which will of themselves open a decree of foreclosure. Thus on a suggestion of a gross fraud, the court will, upon an original bill, overrule a plea of a decree of foreclosure, if the suggestion of fraud be not denied: *Loyd v. Mansell*, 2 P. Wms. 74.

In the case of *Hall v. Cushman*, 16 N. H. 462 [43 Am. Dec.

562], decided in the county of Coös at December term, 1843, Cushman, in reply to questions respecting his mortgage, said that "he did not expect to look to his mortgage for indemnity, but if there should be a small balance due him, he would notify Hall or his counsel." It was held that the application was in the nature of a call for an account; and there was an express stipulation that if he relied on the mortgage, he would render an account; that the court did not undertake to enforce this specifically as a contract, but that it would be in bad faith, and fraudulent for the party, after having made this declaration upon which the other party might well rely, to attempt a foreclosure, under the ordinary provisions of law, without notice. The foreclosure was therefore kept open. In the case of *Crane v. The Claremont Iron Foundry Company*, decided in the county of Sullivan some time since, Heywood, who had notes against the company, had made an entry to foreclose. He was afterwards summoned as the trustee of the company, and he brought forward this claim, treating it as an unpaid debt. This was upon the first trial of the case. Afterward, he reviewed the action, and, although a year had expired since his entry, it was held that his bringing forward this claim was a waiver of the foreclosure.

Now we are satisfied from the evidence in this case, that Eaton assented that if the debt due the bank should be paid in the latter part of October, no advantage should be taken of the foreclosure. Eaton had, as has been before stated, sufficient authority to make such an agreement. He had a personal interest in the transaction, because the bank agreed that he should retain for his own benefit all that he should receive beyond the amount due the bank. That he did in fact make such an agreement, is positively stated both by Fuller and by Fletcher, and, although the agreement is denied by Eaton, the weight of evidence is as we have stated, and the effect of the agreement was, according to the authorities, to extend the time of payment, and to keep the foreclosure open until the latter part of October. The tender to the bank of the sum of three hundred and seventy-seven dollars, made by Fuller on the eleventh of November, 1844, was therefore in sufficient season. The plaintiffs are entitled to a decree according to the prayer of the bill.

Another question arises as to the costs. In the case of *Deitlin v. Gale*, 7 Ves. 583, a question arose how far a mortgagee was entitled to costs. It appeared that great delay and expensive litigation had been occasioned by the mortgagee's conduct,

before any account could be procured from him, and it was finally reduced by more than one sixth part. Lord Eldon held, that though a mortgagee acting reasonably as such, was to have his reasonable costs, it did not follow that he could claim his own expenses from other persons with whom he was litigating with regard to those acts which, upon his part, were not only unreasonable, but grossly oppressive. He was therefore compelled to pay the costs of the inquiry, because, as to that, he could not be considered as mortgagee; and it was admitted that there was no precedent for making a mortgagee pay costs; his own costs were given him down to the answer, and no further.

In the case of *Slee v. Manhattan Co.*, 1 Paige, 81, it was held that in general, on a bill to redeem, the plaintiff pays costs to the mortgagee, although he succeeds in obtaining the relief claimed. But where the mortgagee has set up an unconscionable defense, he has not only been refused his costs, but has been compelled to pay costs: *Brockway v. Wells*, Id. 617. Where a party entitled to redeem offers to pay defendant the amount equitably due, before he files his bill to redeem, he will not be charged with the defendant's costs: *Van Buren v. Olmstead*, 5 Id. 9.

These authorities justify us in decreeing that the mortgagee should not recover costs against the plaintiffs, and as this defense is entirely unconscientious, it is equitable that he should pay costs.

The question of costs seems also to be settled by the revised statutes. The first section of chapter 191 provides that costs shall follow the event of every action or petition, unless otherwise directed by law or by the court. The seventh section authorizes the court to limit and allow such costs as they may deem just and reasonable. In the present case, the plaintiffs are substantially the prevailing parties. They have shown their right to redeem and to maintain their bill. By the Massachusetts statute of 1798, chapter 77, the court were authorized, "at their discretion, to award costs to either party, as equity may require." In the case of *Saunders v. Frost*, 5 Pick. 271, 274 [16 Am. Dec. 394], the court refused to award costs to the mortgagee, the defendant in the bill to redeem, and held that the rule that the mortgagee is, under no circumstances, chargeable with costs, is not only unreasonable, but opposed to the statute above cited. It appears to us to be equally opposed to the provisions of the revised statutes of this state. The tender of three hundred and seventy-seven dollars, made by Fuller to the Exeter

Bank, on the eleventh day of November, 1844, and his tender to Call of the sum of two hundred and nine dollars and ten cents, on the sixth of July, 1845, will of course stop the accruing of any interest after those dates respectively.

The judgment of the court is, that the plaintiffs are entitled to costs, and to a decree according to the prayer of the bill.

DEPOSIT OF FUNDS IN BANK TO MEET THE PAYMENT of a bill of exchange payable there amounts to tender, and will prevent interest accruing on the bill: *Miller v. Bank of New Orleans*, 24 Am. Dec. 571, and note.

ALLOWANCE OR DISALLOWANCE OF COSTS in suits in chancery is discretionary with the court: *Cowles v. Whitman*, 25 Am. Dec. 60.

THE PRINCIPAL CASE IS CITED in *Brown v. Simons*, 45 N. H. 213, to the point that tender of money stops interest.

STONE v. CHESHIRE RAILROAD CORPORATION.

[19 NEW HAMPSHIRE, 427.]

CORPORATION LIABLE FOR ACTS OF ITS CONTRACTORS.—Where a railroad corporation contracted with other parties to build part of its road, and while they were blasting rocks a fragment struck plaintiff, injuring him; held, that the corporation was liable for the injury.

CASE. The writ contained two counts. The first alleged that defendants, in blasting rocks upon their railroad, threw a stone on plaintiff, who was on the public highway, thereby injuring him. The second alleged the same injury as having been done by defendants' agents and servants. The evidence showed that the injury was done by S. Dillon & Co., who were contractors, at work pursuant to a contract with defendants. The defendants contended the action was misconceived, and should have been against the contractors, and not against the company. The court, however, declined to rule so, and instructed the jury that the action was properly brought against the company. Verdict for plaintiff, and defendants moved to set it aside for error in the above ruling.

Wheeler, for the defendants.

Chamberlain, for the plaintiff.

By Court, GILCHRIST, C. J. The principle involved in this case is one of sufficient importance to require an investigation into the authorities upon the question now presented. In *Hern v. Nichols*, 1 Salk. 289, in a case for deceit, it was held that a merchant was answerable for the deceit of his factor abroad,

because it was more reasonable that he that puts a trust and confidence in the deceiver should be a loser than a stranger. In *Jones v. Hart*, 2 Id. 441, the servants of A., with his cart, ran against another cart wherein was a pipe of sack, and spoiled the sack; held that an action would lie against A.

These cases illustrate the general principle that, for the negligent conduct of a person's servant, the master is answerable in damages.

The question here is, whether the workmen employed upon the road by whose negligence the accident happened can be considered the servants of the corporation? Cases analogous to this have undergone considerable investigation both in the courts of England and America, and principles have been settled which seem to comprehend the case before us. And the inquiry is, What is the principle upon which the defendants should be charged or discharged?

In *Stone v. Cartwright*, 6 T. R. 411, the action was case for so negligently working a coal mine that the plaintiff's buildings were undermined. The defendant had been appointed manager of the mine by the court of chancery, the mine belonging to an infant ward of that court, and the defendant employed a bailiff, who superintended the work, and hired and dismissed the colliers at his pleasure, but the defendant took no personal concern in the business, and had given no directions as to the manner of working it. It was held that the action would not lie against the defendant, but should have been brought either "against the hand committing the injury or against the owner, for whom the act was done," and the plaintiff was nonsuited.

Here, between the owner and the persons who did the injury, there were two intermediate agents, the defendant and the bailiff, and the case settles that the owner is answerable.

Lord Lonsdale v. Littledale, 2 H. Black. 267, 299, was case for a similar injury, and held rightly brought against the owner of the coal mine.

We come now in the order of time to *Bush v. Steinman*, 1 Bos. & Pul. 404, which is a leading case upon this subject. The defendant bought a house by the roadside, but had never occupied it. He contracted with a surveyor to put it in repair. A carpenter, having a contract under the surveyor to do the whole business, employed a bricklayer under him, and he again contracted for a quantity of lime with a lime-burner, by whose servant the lime was laid in the road. The plaintiff brought case against the defendant, the owner, for injury sustained by

himself, by being overturned in a chaise, by means of the lime. Here, between the owner of the property and him who actually did the wrong, there were four intermediate agents.

Lord Chief Justice Eyre says that he found some difficulty in holding the defendant liable, because he was so far removed from the immediate author of the nuisance, and that he hesitated in carrying the responsibility beyond the immediate master of the person who committed the injury. But he concurs with his brethren that the action will lie, although he says that he finds great difficulty in stating with accuracy the grounds on which it is to be supported. He, however, cites with approbation the cases of *Stone v. Cartwright* and *Lord Lonsdale v. Littledale*, and states that in the latter case the defendant was liable, on the ground that the work, being carried on for his benefit and on his property, all the persons employed must have been considered as his agents; whether he worked the mine by agents, by servants, or by contractors, still it was his work. He concludes that the case can not be distinguished from *Lord Lonsdale v. Littledale*, and, consequently, is of opinion that the action lay. But he somewhat inconsistently goes on to say that he still feels some difficulty in stating the precise principle on which the action is to be supported.

Mr. Justice Heath founds his opinion on this single point, that all the subcontracting parties were in the employ of the defendant.

Mr. Justice Rooke says that he who has work going on for his benefit, and on his own premises, must be civilly answerable for the acts of those whom he employs. The law intends that he has a control over all those persons who work on his own premises, and he shall not be allowed to discharge himself from that intendment by any act or contract of his own. If the employer suffer by the acts of those with whom he has contracted, he must seek his remedy against them.

In *Laugher v. Pointer*, 5 Barn. & Cress. 547, the question of the extent of the liability of the owner of property for the negligence of his servants was much discussed. The owner of a carriage hired of a stable-keeper a pair of horses to draw it for him a day, and the owner of the horses provided a driver, who had no wages from his master, but depended upon receiving a gratuity from the persons whose carriages he drove, and the hirer gave him five shillings for his day's work. Through the negligence of the driver, an injury was done to the plaintiff's horse, and the plaintiff brought case against the owner of the

carriage. There being a difference of opinion upon the bench, the case was argued before all the twelve judges, except the lord chief baron. A nonsuit had been directed, and a rule *nisi* for a new trial was granted. But the judges of the king's bench were still divided equally, and the rule was discharged. Mr. Justice Littledale thought the action would not lie, because the driver could not be considered as the servant of the defendant, not being hired by the defendant, and receiving no wages from him, but only a gratuity, and not being subject to be dismissed by him. He held that the rule can not be carried so far as to establish the doctrine that the only thing to be looked to is, whether, in the end, the principal pays for the employment in the course of which the injury is sustained. He criticises the doctrine of Mr. Justice Heath, in *Bush v. Steinman*, that if a person hires a coach upon a job, and a job coachman is sent with it, and does any injury, the hirer of the coach is answerable. He thinks that *Bush v. Steinman* does not rest upon the same basis as it would had it not been for the doubts expressed by the Lord Chief Justice Eyre. But without impugning the substantial correctness of that decision any further, he admits that the rule of law may be that in all cases where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that, whether his property be managed by his own immediate servants, or by contractors or their servants. The injuries upon land or buildings are in the nature of nuisances, for which the occupier ought to be chargeable when occasioned by any acts of persons whom he brings upon the premises.

The Lord Chief Justice Abbott says that *Stone v. Cartwright*, *Lonsdale v. Littledale*, and *Bush v. Steinman* do not afford a rule by which the present case before him should be governed. "Whatever," he says, "is done for the working of my mine or repair of my house, by persons mediately or immediately employed by me, may be considered as done by me. I have the control and management of all that belongs to my land or my house, and it is my fault if I do not so exercise my authority as to prevent injury to another."

Mr. Justice Holyroyd, one of the most eminent of modern English judges, says the responsibility is not confined to the immediate master of the person who committed the injury, and "that the action may be brought against the person from whom the authority flows to do the act, in the negligent execution of which the injury has arisen, is established in the case of *Bush v.*

Steinman," and Mr. Justice Bayley agreed with him that the action was maintainable.

It is to be noticed that Abbott, C. J., and Littledale, J., did not deny the soundness of the judgment in *Bush v. Steinman*. They denied its applicability to the case then before them, and that was the extent of their criticism upon it, except the remarks of Littledale, J., upon the *dictum* of Mr. Justice Heath.

In the subsequent case of *Randleson v. Murray*, 8 Ad. & El. 109, the defendant, a warehouseman, employed a master porter to remove a barrel from his warehouse. The porter employed his own men and tackle, and through the negligence of his men, or rather through the insufficiency of the tackle, the barrel fell and injured the plaintiff. It was held that the action was maintainable. Mr. Justice Littledale remarked that it made no difference whether the persons whose negligence occasioned the injury be servant of the defendant, paid by daily wages, or be brought to the warehouse by a person employed by the defendant, and that the law was the same in each case: See also *Harris v. Baker*, 4 Mau. & Sel. 27.

We have discussed this question at more length than might seem to be necessary, because it is an important one in itself, and increases in importance as roads of this description increase throughout the country. And it is desirable that their rights and liabilities, and those of individuals in relation to them, should be definitely settled as soon as may be. It appears that the case of *Bush v. Steinman* has sometimes been supposed to be questioned by subsequent decisions.

In the case of *Randleson v. Murray*, the counsel for the defendant so alleges. But we have not been able to find any case where its soundness has been doubted upon the facts of the case. It is said in one of the most scientific of our professional treatises, Hammond on Parties, 92, that the case settles, in effect, that the lime-burner might have sued the owner of the house on the contract made by the latter with the carpenter, and that it is at variance with the decision of the court in *Bramah v. Lord Abington*, 13 East, 66, but this able writer implies no doubt of the decision.

Milligan v. Wedge, 12 Ad. & El. 737, which is cited by the counsel for the defendant, was an action on the case. The facts were, that the buyer of a bullock employed a licensed drover to drive it from Smithfield. By the by-laws of London, no one but a licensed drover could be so employed. The drover employed a boy to drive the bullock, together with others, the

property of different persons, to the owner's slaughter-house. Mischief was occasioned by the bullock through the careless driving of the boy. It was held that the owner was not liable for the injury, the boy not being in point of law his servant. Lord Chief Justice Denman said: "The party sued has not done the act complained of, but has employed another, who is recognized by the law as exercising a distinct calling. The butcher was not bound to drive the beast to the slaughter-house himself; he might not know how to drive it. He employs a drover, who employs a servant, who does the mischief. The drover, therefore, is liable, and not the owner of the beast. I may remark that one might perhaps be reconciled to the distinction between cases of fixed and of movable property, by considering that to hold the owner of land or buildings liable to injury done in respect of that property, will enable the party injured to know more readily from whom he is to seek redress. In *Randleson v. Murray*, 8 Ad. & El. 109, the work was in effect done by the defendant himself at his own warehouse; if he chose, instead of keeping a porter, to hire one by the day, he did not thereby cease to be liable for injury done by the porter while under his control."

Mr. Justice Williams said: "The difficulty always is, to say whose servant the person is that does the injury; when you decide that, the question is solved. To say that that party is liable from whom the act ultimately originates, is indeed a rule of great generality, and one which will solve the greater number of questions; but its applicability fails in one case, for where the person who does the injury exercises an independent employment, the party employing him is clearly not liable. I agree in the decision of *Randleson v. Murray*, for the warehouseman's servant, whether daily or weekly, is equally under the control of the warehouseman. And that is the way in which Mr. Justice Story puts this point; he brings it to the question, Who employed the person that did the injury?" Story on Agency, c. 17, sec. 452 *et seq.*

Now in this case, the soundness of the decision in *Bush v. Steirman*, 1 Bos. & Pul. 404, is not questioned, nor is there any inconsistency between the two cases. If the solution of the question depends upon ascertaining whose servant the person is that does the injury, there can be little doubt in the case before us. The railroad corporation made a contract with certain persons to construct a part of the railroad. The contractors were in the immediate employment of the defendants. It is

entirely immaterial whether the contract were written or verbal. The contractors were none the less the servants of the defendants, that there was a written agreement between the parties, setting forth with precision what each party was to do. Nor is there in this case that "independent employment" exercised by the contractors, which is mentioned in the case of *Milligan v. Wedge*, 12 Ad. & El. 737. The sole object of the corporation was to build a railroad. This they might do either by employing laborers by the day, or by contracting with different persons to construct different sections of the road. The defendants employed the persons that did the injury, and we are not aware that to such a state of facts the case of *Bush v. Steinman*, and the other cases in accordance with it, have been held to be inapplicable, or their doctrine considered as unsound. In the case of *Duncan v. Findlater*, 6 Cl. & Fin. 894, Lord Chancellor Cottonham and Lord Brougham both recognized the case of *Bush v. Steinman* as law.

In the case of *Allen v. Hayward*, 7 Ad. & El., N. S., 960, commissioners were appointed by an act of parliament for improving a navigation. They were not to be personally liable on contracts made, or for damages incurred in relation to anything done in pursuance of the act, but might be sued in the name of their clerk. The contractor, in executing part of the work contracted for, made a drain, which, from a defect in the materials, could not resist water, and without having any authority to do so, he turned in the water, which broke through and flooded the neighboring land. In an action on the case against the commissioners, sued by the clerk, the declaration stated that they made the diversion, and executed the work so negligently that in consequence thereof, and from no other cause, the water broke through and flooded the plaintiff's land. It was held, that on these facts the defendant was not liable. It was said by Lord Denman, in delivering the judgment of the court, that "if the commissioners constructed a weak and dangerous bank, they would be liable for the damage done by water improperly let in, whether by their servant or by a stranger, or by some natural accident. Supposing this to be true, we are then brought to the question, whether the commissioners are responsible for this ill construction; whether the contractor is to be regarded as their servant, so that they may be called the makers of this work by his agency."

After referring to several cases on this subject, his lordship says: "It seems perfectly clear, that in an ordinary case, the

contractor to do works of this description is not to be considered as a servant, but a person carrying on an independent business, such as the commissioners were fully justified in employing to perform works which they could not execute for themselves, and who was known to all the world as performing them. We find here none of the reasons which have prevailed in cases where one person has been held liable for the acts of another, as his servant "

In the case before us, the corporation might have employed an agent to superintend the building of the road, and to hire and contract with workmen, and to pay them on behalf of the corporation. Lord Denman says, in *Allen v. Hayward*, that the opinions delivered by Lord Tenterden and Littledale, J., in *Laugher v. Pointer*, 5 Barn. & Cress. 547, "must be taken to lay down the correct law." Now Mr. Justice Littledale says, in the course of his opinion, "If the owner of a farm has it in his own hand, and he does not personally interfere in the management, but appoints a bailiff or a hirer, who hires other persons under him, all of them being paid out of the funds of the owner, and selected by himself or by a person specially deputed by him, if any damage happen by their default, the owner is answerable, because their neglect or default is his, as they are appointed by and through him." The case of *Allen v. Hayward* is to put upon the ground that the contractor is to be regarded as a person carrying on an independent business. In the present case, if Dillon & Co. make a contract to build a certain section of the road, they are to be regarded as carrying on an independent business, it would seem. But suppose they had merely agreed to work upon the road for an indefinite period, is there any reason for holding the first contract to be an independent business, which would not equally apply to the second? It seems to us, that the effect of making such a very subtle discrimination between the two cases is merely to involve the question of the liability of the owner in greater uncertainty than before, and that the distinction between the two cases is too subtle to be of practical use. It is difficult for us to perceive why, in each case, the contractors would not be equally the servants of the corporation, and the illustration quoted from Mr. Justice Littledale is, we think, pertinent to the case.

In *Quarman v. Burnett*, 6 Mee & W. 499, 510, it is held that where a man is in possession of fixed property, he must take care that his property is so used and managed that other persons are not injured, and that whether his property be managed

by his own immediate servants, or by contractors or their servants.

The case of *Lowell v. The Boston and Lowell Railroad*, 23 Pick. 24 [34 Am. Dec. 33], is also in point. It was case for the negligence of the defendants by leaving open a deep cut into which the plaintiff drove in the night. The ground was taken that the defendants were not liable, because, at the time of the accident, that section of the road had been let out to one Noonan, who had contracted to make it for a stipulated sum, and who employed the workmen. But it was held that this circumstance did not relieve the defendants from responsibility, as the work was done for their benefit, under their authority, and by their direction. And it is said by Mr. Justice Wilde, that this question was very fully discussed and settled in the case of *Bush v. Steinman*.

It is the opinion of the court that there should be judgment on the verdict.

EMPLOYEE NOT GENERALLY LIABLE FOR ACTS OF CONTRACTOR.—It is the general rule, subject to some limitations and exceptions which we will note hereafter, that where a person lets work to another, to be done by him independent of any control by the employer, furnishing his own material and labor, the relation of master and servant is not created, and the employer is not liable for the negligent or improper execution of the work, nor responsible for the negligence or carelessness of the contractor in its performance; in short, employers are not generally liable for the acts of contractors. The reason for this immunity of employers from the acts of those in their service, and for the abrogation of the general rule relating to a master's liability for his servant's acts, is thus stated by Walker, J.: "The reason why the master is rendered liable for the negligent acts of his servant, resulting in injury to others, is because the servant, while he is engaged in the business of his master, is supposed to be acting under and in conformity to his directions, and to hold him to the employment of skillful and prudent servants. The presumption is one of law, and hence can not be rebutted. But in this case, the reason fails, and the presumption must also fail. These contractors, as we have seen, were not working under the direction or control of appellants, but under their contract, and were in no sense servants." *Scammon v. Chicago*, 25 Ill. 424, 438.

Judge Strong, commenting upon the policy of the rule, said: "It is difficult to discover any substantial reason or good policy for holding the present defendants [employers] responsible. The negligence complained of was not theirs. It does not appear that they knew of it. The verdict determines that the fault was on the contractors. Over them the defendants had no more control than the plaintiff's husband had. They were not in a subordinate relation to the defendants, neither were they his agents. They were in an independent employment, and sound policy requires that in such a case the contractor alone should be held liable." *Painter v. Mayor of Pittsburgh*, 46 Pa. St. 213. Though a number of decisions apparently conflict with the rule as above stated, and some are wholly irreconcilable with it,

yet that it is now the generally received doctrine is certain. Thus, where the owner of a piece of land employed a carpenter for a fixed price to alter and repair a building for him, and third parties were injured by reason of boards having been deposited in the highway by the servants of the contractor, it was held that the owner was not responsible: *Hilliard v. Richardson*, 3 Gray, 349; *Potter v. Seymour*, 4 Bosw. (N. Y.) 140; *Allen v. Willard*, 58 Pa. St. 374; *Linton v. Smith*, 8 Gray, 147; *Forsyth v. Hooper*, 11 Allen, 419; *Brackett v. Lubke*, 4 Allen, 138; *Burgess v. Gray*, 1 C. B. 578; *Hunt v. R. R. Co.*, 51 Pa. St. 475; *Brown v. Accrington etc. Co.*, 3 Hop. & C. 511; *Young v. R. R. Co.*, 30 Barb. 229; *Schular v. H. R. R. Co.*, 38 Id. 653; *Eaton v. European R. R. Co.*, 59 Me. 520; *Prairie State Loan & Trust Co. v. Doig et al.*, 70 Ill. 52. And where a public licensed drayman was employed to haul a quantity of salt to a warehouse, and deliver it at a given rate per barrel, and injured a person on the sidewalk in unloading it, it was held that the employer was not liable: *De Forest v. Wright*, 2 Mich. 368. So, too, where the employer contracted with a person to cut and run logs down a stream, he having no control of either the cutting or running of them, it was held that the relation of master and servant did not exist, and that the contractor only was liable for an injury occasioned to others by his conduct in performing the contract: *Moore v. Sanborn*, 2 Mich. 519; *Gourden v. Cormack*, 2 E. D. Smith, 254; *King v. Livermore*, 16 Hun, 298; *Wray v. Evans*, 80 Pa. St. 102; *Hale v. Johnson*, 80 Ill. 185; *West v. St. Louis, Vandalia & Terre Haute R. R. Co.*, 63 Ill. 545.

Indeed, there seems to be little difficulty in the question of liability where the relation which exists between the employer and the employee is established. Where the relation of master and servant exists, the master is liable for the acts of the servant; but where that of employer and contractor exists, the employer is not liable. The important question then is, When is the party employed a contractor? and this will more fully appear under the head of "Limitations upon the Rule," etc., *post*.

CONTRACTOR IS NOT ANSWERABLE FOR ACTS OF SUBCONTRACTOR.—A subcontractor bears the same relation to the contractor that the contractor does to his employer, and since their responsibilities and immunities rest upon the relation they sustain toward one another, the rule governing them will be the same; and so, if work is done under the immediate control and superintendence of a subcontractor, the latter is the party responsible for any injury done in the execution of the work. Thus, a builder had contracted with a committee to make certain alterations in a house, and he in turn made a subcontract with a gas-fitter to do a certain portion of the work. A quantity of gas escaped through the negligence of the workmen, and exploded, injuring the plaintiffs. It was held that the gas-fitter, and not the builder, was liable for the negligence: *Rapson v. Cubitt*, 9 Mees. & W. 710; 1 Car. & M. 64; *McLean v. Russell*, 22 Jur. 394; *Shield v. Edinburgh and Glasgow R. R. Co.*, 28 Id. 539; *Richmond v. Russell*, 22 So. Jur. 394; *Goslin v. Agricultural Hall Co.*, L. R., 1 C. P. Div. 482; *Overton v. Freeman*, 11 C. B. 873; *Knight v. Fox*, 5 Exch. 721; *Hefferman v. Benkard*, 1 Rob. (N. Y.) 432. But see *McCleary v. Kent*, 3 Duer, 27; *Wray v. Evans*, 80 Pa. St. 102; *Pearson v. Cox et al.*, L. R., 2 C. P. Div. 369; *Slater v. Mercereau*, 64 N. Y. 138.

LIMITATIONS UPON THE RULE THAT THE EMPLOYER IS NOT LIABLE FOR THE CONTRACTOR'S ACTS.—Although it is generally true that the employer is not liable or answerable for the acts of the party with whom he has contracted, yet the rule is not universal. The limitations upon it, or the cases in which the employer will be held responsible, are not numerous, and we will now point them out.

1. *Employer is Liable when the Contract is Unlawful* in itself, as where the work necessarily results in the creation of a nuisance or the like. Thus, where the plaintiff was injured by a pile of stones left in a public street by some servants, under a contract made by their master unlawfully to excavate the street, the employers were held liable. Lord Campbell, C. J., said: "It would be monstrous if the party causing another to do a thing were exempted from liability for the act merely because there was a contract between him and the person immediately causing the act:" *Ellis v. Sheffield Gas Cons. Co.*, 2 El. & Bl. 767; *Congreve v. Morgan*, 5 Duer, 495; *Congreve v. Smith*, 18 N. Y. 79; *Creed v. Hartman*, 29 Id. 591; and in reference to creating a nuisance, Nelson, J., said, "where a person (company or corporation included) is engaged in a work, in the ordinary doing of which a nuisance necessarily occurs, the person is liable for any injury that may result to third parties from carelessness and negligence, though the work may be done by a contractor:" *Ware v. St. Paul Water Co.*, 2 Abb. (U. S.) 261; *Darmstadter v. Moynahan*, 27 Mich. 188; *Detroit v. Cary*, 9 Mich. 165; *Pickard v. Smith*, 10 C. B., N. S., 470; *Upton v. Greenlees*, 17 C. B. 71; *Cincinnati v. Stone*, 5 Ohio St. 38; *Chicago v. Robbins*, 2 Black, 418; *Vanderpool v. Huson*, 23 Barb. 196; *Mathews v. West London Waterworks*, 3 Camp. 403.

But in order to fix the liability upon the employer, it is necessary that the nuisance should be necessarily incidental to the performance of the work in the ordinary method. If the nuisance is the exclusive result of the negligence of the contractor in not performing the work in the usual manner in which such work is done, the fault is then imputable to him alone, and the employer is not answerable: *Mathews v. West London Waterworks*, 3 Camp. 403; *Sabin v. Railroad*, 25 Vt. 363; *Outbertain v. Parsons*, 12 C. B. 304; *Kellogg v. Payne*, 21 Iowa, 575; *Carman v. Steubenville & I. R. R.*, 4 Ohio St. 399; *McCafferty v. S. D. & P. M. R. R.*, 61 N. Y. 178; *Hilliard v. Richardson*, 3 Gray, 349; *Storrs v. Utica*, 17 N. Y. 108; *Water Co. v. Ware*, 16 Wall. 566; *Mayor v. Furze*, 3 Hill (N. Y.), 616; *Creed v. Hartman*, 29 N. Y. 591; *Mitford v. Holbrook*, 9 Allen, 21; *Cuff v. Newark & New York R. R. Co. et al.*, 35 N. J. L. 17.

The decisions in these and similar cases are frequently put upon a further and broader ground, and it is declared that where one owes a duty to the public which he is bound to perform, he can not relieve himself of the responsibility by contracting with some one else to perform the labor to which the duty is incident. Read, J., said: "An owner who excavates a cellar and carries the excavation to the curbstone, for the purpose of constructing a coal-vault under the sidewalk, is bound by his duty to the public to have it securely fenced," and he can not put this responsibility upon the contractor: *Homan v. Stanley*, 66 Pa. St. 464; *Matheny v. Wolfe*, 2 Duv. 37; and see *Pfau v. Williamson*, 63 Ill. 16. So the projection of a cornice over a public street can not be justified on the ground that a contractor built it: *Grove v. Fort Wayne*, 45 Ind. 429; nor can the fall of a house by reason of its weakness: *Mullen v. St. John*, 57 N. Y. 567; nor the fall of snow from a pitch-roof: *Shipley v. Fifty Associates*, 106 Mass. 194; nor generally any act that amounts to a nuisance which he has power to abate; and if he assents to the work by adopting and using it, he will be liable for any subsequent injury: *Burgess v. Gray*, 1 C. B. 578; *Boswell v. Laird*, 8 Cal. 469.

2. *Employer is Liable if He Exercises Control*, or retains the right to exercise control, over the work. To throw the responsibility wholly upon the contractor, it is necessary that he have entire command of the work, subject to no interference of the employers. In determining where the responsibility rests, the test is whether the defendant retained the power of controlling the

work: *Sadler v. Henlock*, 4 EL. & BL. 570; *Warburton v. Great West. R. R. Co.*, L. R., 2 Exch. 30; *Murray v. Currie*, L. R., 6 C. P. 25; *Murphy v. Caralli*, 3 Hop. & C. 462; *Butler v. Hunter*, 7 H. & N. 826; *Sprout v. Hemmingway*, 14 Pick. 1. Sharswood, J., says: "If I employ a well-known and reputable machinist to construct a steam-engine, and it blows up from bad material or unskillful work, I am not responsible for any injury which may result, whether to my own servant or to a third person. The rule is different if the machine is made according to my own plan, or if I interfere and give directions as to the manner of its construction. The machinist then becomes my servant, and *respondent superior* is the rule:" *Ardesco Oil Co. v. Gilson*, 63 Pa. St. 163; *Godley v. Hagerty*, 20 Id. 387; *Carson v. Godley*, 26 Id. 111; *Du Pratt v. Lick*, 38 Cal. 691; *Overton v. Freeman*, 11 C. B. 867. But it is not every reservation of power of control that will fix the liability upon the employer. The liability for the contractor's acts will not rest upon him because of the fact that he reserves the right to dismiss the contractor if he sees fit: *Reedie v. L. & N. W. R. R.*, 4 Exch. 244; *Blake v. Ferris*, 5 N. Y. 48; *Cuff v. N. & N. Y. R. R.*, 35 N. J. L. 17; *Robinson v. Webb*, 11 Bush, 466; *Wray v. Evans*, 80 Pa. St. 102; nor because he has the right to suspend or reorganize the work: *Id.*; nor because he may refuse to pay unless satisfied with the work: *Allen v. Willard*, 57 Pa. St. 374; nor because he employs a clerk to supervise the work, he not interfering in the manner of its construction: *Brown v. Cotton Co.*, 3 Hop. & C. 511; *Steele v. Southeastern R'y Co.*, 32 Eng. L. & Eq. 366; *Wray v. Evans*, *supra*; nor because he reserves the right to retain in his hands money sufficient to pay all damages that are not adjusted within thirty days from the time they are inflicted: *Tibbets v. Knox & Lincoln R. R. Co.*, 62 Me. 437; and see *Corbin v. Mills*, 27 Conn. 274; nor because he retains the right to discharge any of the contractor's men: *Reedie v. L. & N. W. R. R. Co.*, *supra*. These reservations of partial control do not transform the contractor into a servant; but it will be observed that in the above cases the right is not reserved to direct the *mode* in which the work is to be done.

The employer may reserve the right to say *what* shall be done, but the contractor must have the right to say *how* it shall be done to relieve the employer from liability. Whenever the employer exercises any control over the *mode* of working, he is in fact a principal, and the parties performing the labor are his agents. Selden, J., referring to this distinction, says: "The object of the clause relied on was not to give the commissioner of repairs and officers named the right to interfere with the workmen, and direct them in detail *how* they should proceed, but to enable them to see that every part of the work was satisfactorily completed. It authorized them to prescribe *what* was to be done, but not *how* it was to be done nor *who* should do it," and the contractor only was held answerable: *Kelly v. Mayor etc.*, 11 N. Y. 432. So, too, in *Pack v. Mayor etc.*, 8 Id. 222, the court held, that the reservation of power in the officers to give further directions regarding the grading of a street was not such a reservation of control over the *manner* of performing the work as rendered the contractor and his workmen the servants of the corporation. The authority reserved by the employer was only as to the results of the work to be done, the contractor still having control over the method of doing it; and the reservation of that authority did not change the relation between them to that of master and servant.

But when the right to direct the mode of working is reserved in the employer, the relation is then that of master and servant: *Schwartz v. Gilmore*, 45 Ill. 455; *Luttrell v. Hazen*, 3 Sneed, 20; *Chicago v. Dermody*, 61 Ill. 431; *Chicago v. Joney*, 60 Id. 383; *Kimball v. Cushman*, 103 Mass. 194; *Stone v.*

Codman, 15 Pick. 297; *Allen v. Willard*, 57 Pa. St. 374; *Murphy v. Caralli*, 3 Hop. & C. 402; *Quarman v. Burnett*, 6 Me. & W. 499; *Murray v. Currie*, L. R., 6 C. P. 24; *Eaton v. E. & N. R. R. Co.*, 59 Me. 520; *Chambers v. Ohio Life Ins. and Trust Co.*, 1 Disney (Ohio), 327; *Forsyth v. Hooper*, 11 Allen, 419; *Hunt v. Penn. R. R. Co.*, 61 Pa. St. 475; *Callahan v. Burlington R. R. Co.*, 23 Iowa, 562. The fact that the contractor is paid by the employer is not sufficient to divest him of the character of a contractor: *Corbin v. American Mills Co.*, 27 Conn. 274; and it would seem that if the injury arises out of the particular matter over which the employer has reserved the control, he would be chargeable as master: *Allen v. Hayward*, 7 Q. B. 975.

3. *Employer is Liable if the Acts Authorized Necessarily Work Injury.*—Appleton, J., laid down the rule in these words: "If the injury was the natural result of the work contracted to be done, and it could not be accomplished without causing the injury, the person contracting for doing it would be held responsible:" *Eaton v. E. & N. R. R. Co.*, 59 Me. 520; S. C., 8 Am. Rep. 430. So where a railroad company authorized the blasting of rocks by their contractors upon their road, and one of the pieces of rock struck a house near by, damaging it thereby, the company was held liable. There was no want of care in the manner in which the work was done, and the court predicated its decision upon the fact that the injury was a necessary result of the work. Having authorized the work, they authorized all acts necessary or incident thereto, and therefore became liable for the injury: *Carman v. L. & Ind. R. R. Co.*, 4 Ohio St. 399; *Tiffin v. McCormack*, 34 Ohio St. 638; *Hay v. Cohoes*, 2 Comst. 159. The same result is arrived at from the consideration of the contractor's liabilities. He has no voice in what the work shall be; the employer determines that; but he has a voice in how the work shall be done; for injuries arising out of that over which he had control he would be liable, and only for such. The injury here arose out of the doing the work itself, and not out of the manner of doing it, which was all the contractor was responsible for. The contractor was therefore relieved of responsibility, and the employer properly made liable. But the contrary doctrine, based upon the opposite ground, was taken in another case. A building was injured in the vicinity of a railroad, by blasting done by those who had contracted to grade the road. The company was held not liable, the court refusing to assume that injury was a necessary consequence of blasting rocks in grading a railroad: *Tibbetts v. Knox & Lincoln R. R. Co.*, 62 Me. 437. And where such damage arose from an overcharge in the blast, the contractor only was held responsible: *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 N. Y. 178.

"The general rule is, that he who directs an act to which a tort is incidental is liable for the torts which are incidental to the act. 'Common justice,' said Clifford, J., * * * 'requires the enforcement of this rule, as if the contractor does the thing which he is employed to do, the employer is as responsible for the thing as if he had done it himself; but if the act, which is the subject of the complaint, is purely collateral to the matter contracted to be done, and arises indirectly in the course of the performance of the work, the employer is not liable, because he never authorized the thing to be done;'" Whart. on Neg., sec. 186; Whart. on Agency, sec. 474; *Caswell v. Cross*, 120 Mass. 545; *Water Co. v. Ware*, 16 Wall. 566; and see *Hale v. Sittingbourne R. R. Co.*, 6 H. & N. 488; *Ellis v. Gas Co.*, 2 El. & Bl. 770; *Newton v. Ellis*, 5 Id. 770; *Robbins v. Chicago*, 4 Wall. 679; *Chicago v. Robbins*, 2 Black, 418. So, too, for the contractor's negligence, if such negligence is incidental to the act, the principal is liable in case: *Gregory v. Piper*, 9 Barn. & Cres. 591;

Seymour v. Greenwood, 6 H. & N. 359; and see *Lesper v. Nav. Co.*, 14 Ill. 83; *Palmer v. Lincoln*, 5 Neb. 136; *Batty v. Duxbury*, 24 Vt. 155; *Willard v. Newbury*, 22 Id. 458.

4. *Employer is Liable in Matters He is Bound to Take Charge of Himself*, whether he contracts for the work to be done or not. This may arise from his having contracted or agreed to take charge of the work himself, or from the law implying such agreement or imposing on him a public duty. In such a case, he can not shift the responsibility from himself by employing a contractor to do the work for him. Thus, where an incorporated water company undertook to lay water-pipes in a city, agreeing to "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which may occur by reason of their employees on the premises," it was held that although the company had let the work out to a subcontractor, through the negligence of whose servants injury accrued to a person passing over the street, the company could be properly sued for damages: *Water Company v. Ware*, 16 Wall. 566. So, too, in an English case, plaintiff and defendant were the respective owners of two adjoining houses, plaintiff being entitled to the support for his house of defendant's soil. Defendant hired a contractor to pull down his house, excavate foundations, and rebuild the house; the contractor undertook the risk of supporting plaintiff's house, as far as might be necessary during the work, and to make good any damage and satisfy any claim arising therefrom. Plaintiff's house was injured in the progress of the work, owing to the insufficiency of the means taken by the contractor to support it. Plaintiff sued defendant for the damage. It was held that defendant was liable on the ground that, where one orders work to be executed on his own premises which, though lawful in itself, would naturally produce injury to others unless means were adopted to prevent it, he is bound to see to the doing of that which is necessary to prevent the mischief. The plaintiff had a right to the support by the soil excavated. The law allowed the defendant to remove it: *Backhouse v. Bonomi*, 9 H. L. C. 503; S. C., 34 L. J., Q. B., 181; but imposed on him the obligation—made him enter into an implied agreement—to protect his neighbor in so doing, and he could not relieve himself from the responsibility by employing some one else to do the work for him: *Bower v. Peato*, L. R., 1 Q. B., 321; *Gray v. Pullen*, 5 B. & S. 970, 981; S. C., 32 L. J., Q. B., 169; S. C., 34 Id. 265; *Tarry v. Ashton*, L. R., 1 Q. B., 314; *Pickard v. Smith*, 10 C. B., N. S., 470; *Fletcher v. Rylands*, L. R., 3 H. L., 330.

Where privileges are granted by the legislature, in the acceptance of them the body or individual accepts at the same time the liability for all injurious consequences which result from a failure to see that the privileges are exercised in strict conformity with the spirit and letter of the act conferring them. In *Hale v. Sittingbourne R'y Co.*, 6 H. & N. 488; S. C., 30 L. J., N. S., Exch., 81, the defendants, a railway corporation, were empowered to construct a draw-bridge across a navigable river, and were forbidden to detain any vessel longer than it was necessary to allow a train to cross and for the bridge to be opened; and for any detention longer than ten minutes the company were to be liable in damages. Contractors built the bridge, and while in their hands, by reason of some defect in the machinery, it could not be opened, and vessels were detained. The company was held liable. The court held, that by the act there was a duty cast upon the defendants which could not be shifted to a contractor, and besides, the mischief arose from the presence of the bridge itself, in consequence of the imperfectly doing the thing ordered to be done, and the person giving the order was responsible: *Storrs v. The City of Utica*.

17 N. Y. 104; *Creed v. Hartman*, 29 Id. 960; *Mullen v. St. John*, 57 Id. 567; *Clark v. Fry*, 8 Ohio St. 358; *Congreve v. Morgan*, 18 N. Y. 84; *Congreve v. Smith*, Id. 79; *Shipley v. Fifty Associates*, 106 Mass. 194; *Milford v. Holbrook*, 9 Allen, 21.

FARNSWORTH ET AL. v. CHASE.

[19 NEW HAMPSHIRE, 834.]

USAGE AND CUSTOM A DEFENSE.—In *assumpsit* for goods sold defendants may show that the bills were not marked, and that in such cases six months' credit was the custom among like dealers, and that the action was prematurely brought.

UNIFORM, KNOWN, AND ESTABLISHED USAGE IS BINDING on the parties if proved, and is presumed to be part of the contract.

EXISTENCE OF CUSTOM OR USAGE IS A QUESTION OF FACT for the jury.

DEPOSITION OF WITNESS RESIDING IN THE TOWN WHERE THE TRIAL takes place is admissible if taken to be used in a town more than ten miles distant; and the case is continued to the next term at the place where the witness resides.

ASSUMPSIT for goods sold. The defense was that the goods were purchased on six months' credit, and that the suit was prematurely brought. Six months had not elapsed between the purchase of the goods and the filing of the writ. The defense introduced witnesses to show that by the custom of jobbers in Boston (to which class plaintiffs belonged) goods not purchased for cash were purchased on six months' credit where the bills were not marked. The bills for these goods were not marked. Plaintiffs objected to the admission of this evidence and to the competency of the answers, and afterwards introduced evidence tending to show that such was not the usage. Defendant introduced the deposition of Isaac Tompkins of Manchester, to which plaintiff objected, but it was admitted by the court. The opinion states the other facts necessary to understand the case. Under the instructions of the court, the jury found a verdict for the defendants, and plaintiffs appealed.

Perley, Foster, and Farley, for the plaintiffs.

D. Clark, Cross, and C. G. Atherton, for the defendant.

By Court, GILCHRIST, C. J. Upon proof of the delivery of the goods, the plaintiff would be entitled to recover in this case, unless the evidence offered by the defendant be sufficient to take the case out of the ordinary principles of law.

He alleges that the usage among the dry-goods jobbers is to give a credit of six months where the goods are not paid for on delivery.

The first question is, What evidence is sufficient to prove the existence of such a usage? And what is the effect of the usage?

A bill was drawn in the East Indies, payable to Campbell, or order, and by him indorsed to Ogilby, who indorsed it to the plaintiff. The defendant contended that the omission of the words "or order," was equivalent to restrictive words, limiting the payment, and that they must have been originally inserted by the indorser. The plaintiff contended that a bill was in its nature assignable. The defendant offered evidence that, by the custom of merchants, the acceptor was not liable upon such an indorsement.

It was held that the evidence was inadmissible, because the law was already settled for the plaintiff; that the custom of merchants was part of the common law of England, and that two cases (referred to in the opinion) settled that there was no such custom of merchants as the defendants allege: *Edie v. East India Co.*, 2 Burr. 1216. But it was not held that the parties might not make the indorsement restrictive by special agreement, or by the customary course of some particular business, make an exception in their own case, leaving the general law to take its course: *Cowen, J., Gibson v. Culver*, 17 Wend. 309 [31 Am. Dec. 297]. In accordance with what was supposed to be the law in *Edie v. East India Co.*, it was held in *Frith v. Barker*, 2 Johns. 335, that usage could not be received to contradict a settled rule of commercial law. So, also, is the case of *Homer v. Dorr*, 10 Mass. 26, although a different doctrine was held in *Jones v. Fules*, 4 Id. 245, and in the *City Bank v. Cutter*, 3 Pick. 414; and Mr. Rand thinks the decision of *Homer v. Dorr*, is "unaccountable:" *Eager v. Atlas Ins. Co.*, 14 Id. 145 [25 Am. Dec. 363]. In *Rushforth v. Hadfield*, 6 East, 519, the question was as to the existence of a custom that carriers should have a lien on goods for their general balance. Six witnesses testified to particular instances where the custom had been applied. It was held that if a usage were so general as to furnish an inference that the party who dealt with a carrier had knowledge of it, and to warrant a conclusion that he contracted with the carrier on that ground, it would be sufficient, although it gave individuals a special privilege against the general body of creditors, in case of bankruptcy. Upon another trial of the same case, 7 East, 224, it was held that such a lien might be implied from a usage of trade so general that the jury must reasonably presume that the parties knew it, and adapted it to their dealings. In *Richmond v. Smith*, 8 Barn. & Cress. 9, the question

arose as to the effect of a custom of an innkeeper, to put luggage into his guests' rooms upon his liability for it. It was held that if the innkeeper did not mean to be liable for goods thus placed, he should have said so. Cowen, J., says, in *Gibson v. Culver*, 17 Wend. 311 [31 Am. Dec. 297], that if the guest had come to a full knowledge of the landlord's practice, either by its general notoriety, or in any other way, it would be equivalent to notice. In this case, it was held that a custom of such age, uniformity, and notoriety, that a jury would feel clear in saying it was known to the plaintiff, would be sufficient.

Courts take no notice of these local and particular usages. They are to be proved, like other facts, and necessarily by parol evidence.

It must appear to be so well settled and of so long continuance as to raise a fair presumption that it was known to both contracting parties, and that the contract was made in reference to it: *Eager v. Atlas Ins. Co.*, 14 Pick. 141 [25 Am. Dec. 363].

The question is, whether the parties contracted in reference to the usage, and, in this view, the fact of its being well established so as to be generally known to persons engaged in this course of business, is of importance, but not its antiquity: *Thompson v. Hamilton*, 12 Pick. 425 [23 Am. Dec. 619]. So also is *Williams v. Gilman*, 3 Greenl. 276, in which case there was some contradictory evidence as to whether a certain usage existed at Hallowell. So, also, *Heald v. Cooper*, 8 Id. 32.

In action of *assumpsit* for goods sold, the defense was that they were sold on a credit which had not expired when the action was brought. But it was held that the usage of an individual, known to persons with whom he deals, binds them: *Loring v. Gurney*, 5 Pick. 15.

To prove a usage to tranship goods from one packet to another, it is not enough that a few instances can be produced where it has been done without objection. The course of the trade must be uniform and general, and should be so well settled that persons engaged in the trade must be considered as contracting with reference to the usage: *Trott v. Wood*, 1 Gall. 443.

In *Van Ness v. Pacard*, 2 Pet. 137, evidence was offered both to prove and disprove the existence of a usage that, in Washington, a tenant may remove buildings erected by him on the premises, if done before the expiration of the term. It was held that the evidence was competent; that whether it was such as ought to have satisfied the minds of the jury on the matter of fact,

was solely for their consideration; open, indeed, to such commentary and observation as the court might think proper to make. "We can not say that they were not at liberty, by the principles of law, to infer from the evidence the existence of the usage. The evidence might be somewhat loose and indeterminate, and so be urged with more or less effect upon their judgment; but in a legal sense, it was within their own province to weigh it as proof or as usage:" *Renner v. Bank of Columbia*, 9 Wheat. 581; *Furniss v. Hone*, 8 Wend. 247.

In the case of *Wood v. Hickok*, 2 Wend. 504, it was held that evidence that it is the uniform practice of grocers to charge interest on goods sold after ninety days, does not amount to proof of the usage of a particular trade, of which all dealers in that line are bound to take notice, and are presumed to be informed. But if knowledge were brought home to the defendants of the usage of the plaintiffs, *semble* they would be bound by it.

The usage must be proved as a fact, and like any other fact. It is not one of those matters which may be proved by hearsay. Reputation is not evidence of it. It is a part of the contract which the parties made at the time, or it is nothing. If it be proved to be so generally known that the parties must fairly be presumed to have contracted in reference to it, it will bind them. Contradictory evidence may exist in relation to it, and the jury must weigh all the evidence, and come to a conclusion upon it. Such are the results which the authorities warrant.

The defendant's evidence tended to prove that, by the usage, goods not bought for cash are bought on a credit of six months, where the bills are not marked. These bills were not marked. Some witnesses stated that the usual time of credit was six months where bills were not marked. Others, that they always bought on six months, and their bills were not marked.

The plaintiff offered evidence that there was no such usage. This evidence the jury are to weigh.

The instruction of the court as to the usage was sufficiently favorable to the plaintiff. It was that the usage must "be uniform, known, and established." If it were so generally known that the parties may be considered as having contracted in reference to it, that is enough.

As to the admissibility of the deposition, it was taken at Manchester, where the witness resided, to be used at Amherst, a distance of more than ten miles. The trial was had at Manchester, at the October term of the court of common pleas. The practice has been, in such cases, to admit the deposition,

as it was properly taken to be used at Amherst. The mere fact that the term where the trial was actually had was held at Manchester, has not been held sufficient to exclude the deposition, unless the witnesses, as in other cases, were produced in court, as is often done by the party who objects to a deposition. The place of trial, at the time the deposition was taken, was, by law, at Amherst, and the fact that the case was not tried there, but was continued to the next term at Manchester, is not sufficient to render the deposition incompetent.

Judgment on the verdict.

USAGES AND CUSTOMS, VALIDITY OF: See *Governor v. Withers*, 50 Am. Dec. 95, and note, where the subject is discussed at length.

CUSTOM, TO BE BINDING, MUST BE GENERAL, FREQUENT, AND ANCIENT: *Leach v. Perkins*, 35 Am. Dec. 268, and note, where other cases are collected.

DEPOSITION IS NOT ADMISSIBLE without proof that the witness can not attend: *Jackson v. Rice*, 20 Am. Dec. 683.

BOODY v. DAVIS.

[20 NEW HAMPSHIRE, 140.]

DELIVERY OF DEED, WHAT CONSTITUTES.—Where a grantor executes a deed, delivers it to be recorded with the intent that title shall pass to grantee, and the grantee assents, the delivery is sufficient.

GRANTEE'S POSSESSION OF DEED IS EVIDENCE OF DELIVERY, for things shall be presumed legally and properly in their present state unless the contrary be shown.

GRANTEE IS PRESUMED TO ASSENT TO DEED MADE FOR HIS BENEFIT.

SUFFICIENT DESCRIPTION OF NOTE SECURED BY MORTGAGE.—The omission of the sum, date, or name of one of the signers of a note is not fatal if it can be identified.

IN CONDITION TO SAVE HARMLESS AGAINST NOTE OWED, any description identifying the note is sufficient.

WRIT of entry upon a mortgage. The mortgage was duly executed, and was recorded at the tenant's request, and he afterwards declared he had mortgaged the premises to the demandants. It appeared that a note similar to the one described in the condition of the mortgage, except it had also Dudley Pike's name on it, had been discounted at the bank, and no other similar note had been. It was also shown that the bank sued on the note, and Hayes, one of the signers, paid it. Defendant's counsel excepted to the evidence, as incompetent to prove the delivery of the deed, and contended the note produced did not

substantially correspond with the one described in the mortgage. The court overruled the exceptions, and instructed the jury that if Davis in his acts intended to pass title to the grantees, they being willing, they would amount to a delivery of the deed; and if the note produced was the one intended to be described by Davis in the mortgage, the description was sufficient, though Pike's name was omitted. Defendant excepted to these instructions. Verdict for demandants, and tenant moved to set aside the verdict and for a new trial, for the supposed errors alleged.

Hobbs, for the tenant.

Christie, for the demandants.

By Court, WILCOX, J. The evidence was competent to show a delivery of the deed. It was duly executed and acknowledged, and was sent to the office of the register of deeds to be recorded. This was all done by the tenant, and it was his intent that the title and the deed should pass to the grantees. The demandants have assented to the delivery. They have received the deed, have brought their action upon it, and upon the trial have produced the deed in court.

Possession held by the grantee of a deed duly executed, is alone competent evidence of a delivery, for things shall be presumed legally and properly in their present state unless the contrary be shown: 1 Cow. Phil. 1284; *Canning v. Pinkham*, 1 N. H. 353; *Buffum v. Green*, 5 Id. 71 [20 Am. Dec. 562].

Indeed, when a deed is delivered to a third party, with an intent on the part of the grantor that it shall take effect for the benefit of the grantee, the assent of the latter is presumed, and the deed takes effect from the act of delivery: *Townson v. Tickell*, 3 Barn. & Ald. 36; *Peavey v. Tilton*, 18 N. H. 151, Strafford county, July term, 1846; so that there is no occasion to resort to presumptions to enable us to conclude that the deed has come into the hands of the demandants by means of a regular delivery by the tenant. There has been a regular delivery of the deed by the tenant to the recording officer, with the intent that it should pass to the grantees, and should in fact inure for their benefit from that moment. It was, in short, delivered to that officer for their benefit. Their assent to it, which is a legal presumption at that moment, has been established as a fact, by their subsequent acts that have been adverted to.

But the defense upon which the tenant relies more fully is founded upon the statute of July 3, 1829, N. H. Laws. 448.

This statute provides that "no title or estate in fee simple, etc., shall be defeated or incumbered by any agreement whatever, unless such agreement or writing of defeasance shall be inserted in the condition of such conveyance, and become a part thereof, stating the sum or sums of money to be secured, or other thing or things to be performed."

The condition of the mortgage in controversy is, that if the tenant, his heirs, etc., "shall pay unto the savings bank, in Dover, known by the name of the Strafford Savings Bank, or the president and directors, their heirs and assigns, the full one-half part of a note, signed by David Davis, John Chadwick, Solomon Hayes, and Joseph Boody, and keep the said Boody and Hayes harmless from the one full half part, and John Chadwick is in for the other half, then the foregoing deed is to be void," etc.

The note produced is dated January 30, 1836, and is payable to the Strafford Savings Bank, in Dover, or their order, for one thousand dollars, payable on demand, with interest after six months, and is signed by all the persons named in the condition of the mortgage, as signers, and by Dudley Pike in addition.

The condition of the deed, therefore, does not specify the date of the note, nor its amount, nor to whom payable, unless by implication, and omits the name of one of the signers.

If this case comes within the statute of 1829, and the condition of the deed does not sufficiently set forth the thing to be done, then, by the express provision of the statute, the result is that the demandant's title to the land conveyed is absolute. The statute enacts that no title in fee simple shall be incumbered, or defeated by any agreement, unless inserted in the condition, etc. The deed is sufficient in all its parts to pass a fee simple to the demandants, and that estate can not be defeated at all, unless there is something in this condition that is sufficient to defeat it. The demandants are therefore entitled to recover, unless they have in their declaration counted specially upon a mortgage; and in that case, by amending their declaration and counting generally upon their own seisin in fee simple, they would be entitled to recover at all events, and the tenant would be without any remedy at law.

This is not the result that the tenant desires. He asks that the deed itself may be held void, because the condition is not sufficiently certain, and is not what he supposes the statute to require; whereas the statute provides, not that the deed should be void, but that it should be absolute in the supposed case of

an insufficient condition. The statute provides that the condition should be void and the conveyance absolute.

In *Bassett v. Bassett*, 10 N. H. 64, it was decided that a deed containing a proviso that "if the grantor should comply with the condition of a certain bond, executed by him to the grantee at the same time, then the deed to be void," is valid as a mortgage, notwithstanding that the sum to be paid, or the matters to be performed, are not particularly set forth in the deed itself. In that case the date of the bond and the parties to it were correctly set forth; and so far that case differs from the one before us. The fact that the deed and bond were executed at the same time was referred to as a ground upon which it might be held that the case was not within the statute. But the main ground of that decision was, that it appeared upon the face of the deed that it was intended to be conditional and not absolute, and the statute did not require the condition to be more particularly set forth.

It is indeed true in such a case, that although the record informs the purchaser that the conveyance is attended with a condition, yet the particulars of that condition can be determined only by reference to a private paper in the possession of the party, which he is not bound to produce. But it was never expected that everything affecting the operation and extent of a deed should appear upon the record. A deed refers to a pine-tree as a monument; yet that pine-tree can not be shown by the record, and its identity is liable to become a matter of controversy and doubt, and must always be the subject of extraneous proof. So where a conveyance is made of all the lands in the occupation of A. B., or of A. B.'s home farm; and indeed if the condition of a mortgage were to specify with the utmost degree of minuteness the thing to be done, yet what at any particular time has been performed, and what remains to be performed, are matters material to a purchaser, but resting ever in the private knowledge of the parties alone. A creditor, attaching an equity of redemption, may require the mortgagee to render an account under oath of the amount due him: R. S. 368; and if a purchaser, who is put upon inquiry by the record, chooses to purchase without seeing the papers referred to, and without other reliable information, it is his own folly.

It is true, there must be in the deed a certain description, and one of such a character as to enable a person upon the evidence to determine what was intended. But that description need not embrace every particular; and although it may in some respects

be erroneous, yet if the description be sufficient, after rejecting the erroneous part, such erroneous part may be rejected, when the facts shown *aliunde* require it, and effect given to the residue.

Thus, in *Johns v. Church*, 12 Pick. 560 [23 Am. Dec. 651], a note was described in a mortgage as being for two hundred and thirty-six dollars, but the note produced was for two hundred and fifty-six dollars, corresponding in other respects with the description in the mortgage. This was held sufficient, upon evidence being given that the note produced was the only one which the plaintiff had signed as surety.

So, when the note was described in the mortgage as dated in the year one thousand seventeen hundred and ninety-eight, and the note produced was dated in the year 1798, showing a mistake of one thousand years, yet, as the note agreed with the other terms of the description, and as there was so manifestly a mistake in the mortgage, it was held sufficient: *Hall v. Tufts*, 18 Pick. 460; see also *Troubridge v. Cushman*, 24 Id. 314.

The case of *Robertson v. Stark*, 15 N. H. 109, was trover for chattels claimed under a mortgage. The condition described the contract secured as signed by Jeremiah Eastman, jun., while it was in fact signed by a firm of which he was a member; and it was held a sufficient description. The remarks of the chief justice upon that occasion appear to contain sound and reasonable doctrine, and the decision would be conclusive of the question at present discussed if the case had arisen upon a mortgage of real estate, and demanded the construction of the statute of July 3, 1829, upon which the question before us is founded. It was said in that case, "where the description is accurate as far as it goes, the paper offered in evidence merely containing other particulars consistent with those set down in the condition, it seems to be quite clear that the possession and production of the instrument is *prima facie* evidence that it is the same mentioned in the condition."

Those remarks are directly in point, and the case to which they refer is not perhaps distinguished from the present by any feature that ought to be regarded as material, or which could furnish occasion for the application of a different rule.

A different rule from that which prevailed in *Johns v. Church*, was adopted in *Edgell v. Stanfords*, 3 Vt. 204, where the amount of the sum secured by the note was misstated in the mortgage. The court founded their opinion, in part, upon the doctrine of variance between pleadings and evidence in similar cases, and in part upon the inadmissibility of parol evidence to show a

mistake in a written contract, and upon the want of power in courts of law to correct such mistakes.

But we do not think that the rules as to variance in pleadings apply to a case like the present, nor is it a mere question of correcting a mistake in a written contract that is presented by the facts. If the amount of the note was the only description given of it, and that was mistaken, the doctrine of *Edgell v. Stanfords* would apply.

It is also said in that case that the plaintiff offered parol evidence to show that the note produced was the one intended to be described. We do not think such evidence of intention, as an independent fact, could properly be received. But when it is said that the note produced corresponded with that described in the mortgage, except as to the amount, then the question is whether the points of coincidence are sufficient to afford a reasonable assurance that the note produced was the one intended; in which case the erroneous part of the description may be rejected, in conformity with the maxim, *Falsa demonstratio non nocet*: 3 Cow. Phil. 1424.

The statute that has been referred to enacts that the agreement or writing of defeasance shall be inserted in the condition of the conveyance, "stating the sum or sums of money to be paid, or other thing or things to be performed." Now it is true in the present case, that the sum of money secured is not stated except by reference to the note; and as we have no power to dispense with the express provision of a statute, if this deed is to be regarded as intended to secure the payment of money, an important question would arise, whether it is sufficient to state the sum by a mere reference to a private paper not placed upon the record. This question we leave untouched, for it is manifest that the payment of money was not the essential matter secured by this mortgage.

The demandants had no interest in the money; but being holden to pay it, as sureties to the defendant, they were only interested to be indemnified against that liability; and if they were saved harmless, the condition would be satisfied, whether the money was paid or not. The question then is, whether the deed states "the other thing or things to be performed."

Now it is clearly not necessary that the agreement, the performance of which is secured by the mortgage, and is a compliance with the condition of defeasance, should be inserted *verbatim* in the mortgage. It is enough if it be substantially inserted or described. The condition in this case is to indem-

nify the demandants against a note signed by certain persons. A note is produced signed by those persons, and it is shown that no other note ever existed signed by those persons. Can there be any reasonable doubt of the intent? or would the case have been stronger if the condition had also stated the amount and date of the note? If indeed it had appeared that other notes existed, answering to the description given, then the question would arise, whether parol evidence was admissible to show which was intended, or whether the whole would be void for uncertainty. But only one note existing of the kind described, the presumption must necessarily be that it is the one intended.

Suppose a deed refers to a pine-tree as a boundary: if you find a pine-tree in a place to which the general description in the deed directs your attention and search, and you find no other pine-tree that could be mistaken for the one referred to, is the description bad because it does not guard against an impossible error, by giving a more accurate description of the pine, defining its size and proportions, and the like? The same course of reasoning will apply to the omission of the name of one of the signers of the note in describing it. The purpose of describing is to identify it. A description which points out obvious features which it possesses, and which no other paper whatever possesses, fully answers that purpose.

The note produced is signed by all the persons named in the condition, and by another person. Upon the strict rules of pleading, this would be no variance in description. If all the signers named in the deed had been sued as joint promisors, they could not have set up as a defense a variance between the promise alleged and the one proved. They could only have taken advantage by a plea in abatement, and upon the general issue the note would have been evidence. It is impossible, then, in the present case, to say that there is a variance between the description in the condition and the note.

It has been held by this court, that a mortgage given to secure all notes due and owing from the mortgagor to the mortgagee, embraces a debt due from the mortgagor and another to the mortgagee: *Reed v. Fay*, Coös, 1839; *New Hampshire Bank v. Willard*, 10 N. H. 213.

We are, therefore, of the opinion, that as it appears from the condition of the mortgage deed that the tenant was to indemnify the demandants against one half the amount of a certain note, which note is sufficiently described to identify it as the one pro-

duced, the demandants are entitled to have judgment as of mortgage.

Judgment on the verdict.

RECORDING DEED PRIMA FACIE EVIDENCE OF ITS DELIVERY: *Snider v. Lackenour*, 38 Am. Dec. 685; *Gilbert v. N. A. F. I. Co.*, 35 Id. 543, and note 546, where other cases are collected; *Schrugan v. Wood*, 30 Id. 75, and note 77.

DELIVERY OF DEED, WHAT CONSTITUTES: See *Wood v. Ingraham*, *post*.

THE PRINCIPAL CASE IS CITED to the point in reference to the description of a note in *Somersworth Savings Bank v. Roberts*, 38 N. H. 25; *Gilman v. Moody*, 43 Id. 245.

PISCATAQUA EXCHANGE BANK v. CARTER.

[20 NEW HAMPSHIRE, 246.]

PLACARD NOTICE THAT INDORSERS WILL BE REQUIRED TO WAIVE DEMAND AND NOTICE by a bank does not obviate the necessity of such waiver appearing upon the face of the note.

AGREEMENT TO WAIVE DEMAND AND NOTICE by an indorser can not be shown by parol evidence.

INDORSER'S RIGHT TO DEMAND AND NOTICE CAN NOT BE WAIVED BY A CUSTOM OR USAGE established by a bank for its own convenience.

CUSTOM OF INDORSERS TO WAIVE DEMAND AND NOTICE can not be shown to change the contract implied in law from the indorsement.

ASSUMPSIT against defendant as the indorser of a certain promissory note. Defendant was the payee, and indorsed the note to plaintiffs. The maker failed before the note was due. The note was due August 4, 1848. Notice was not given defendant till August 5th, and was then, upon refusal of defendant to pay, protested. At the time of the discount of the note, and for a year prior thereto, there was a notice posted at the desk and on the counters of the bank, in these words:

"NOTICE.—On all notes offered for discount at this bank, and payable in Portsmouth, the indorser will be required to waive demand and notice.

SAMUEL LORD, Cashier."

Upon these facts the case came to this court to determine whether the defendant is liable as indorser.

W. H. Y. Hackett, for the plaintiffs.

J. W. Emery, for the defendant.

By Court, BELL, J. It is unnecessary to discuss the power of banks or other business companies to establish usages at variance with the law which governs the rest of the community, or

the question how far those who deal with them are to be assumed to know and to be bound by such usages in the present case.

It seems by no means expedient for courts to give countenance to such usages, inasmuch as they are calculated to destroy the uniformity of the law in the different parts of the state, and as our largest towns are but inconsiderable places of business, to allow a different law in every village; and in the language of Chief Justice Richardson, in *Leavitt v. Simes*, 3 N. H. 17, it deserves serious consideration whether the admission of testimony to show the usage and his assent to it, is not to admit parol evidence to vary the terms of a written contract.

If the usage set up in the present case, that indorsers of notes offered for discount should be required to waive demand and notice, is assumed to be valid, and to be binding upon all who had occasion to transact business with the plaintiffs; yet it was a rule established by the plaintiffs for their own convenience and security, and which they were at liberty to waive, and in this instance the usage was neglected, and what the bank was accustomed to require to be done was not in fact done. Demand and notice were not in fact waived.

The utmost effect which could be claimed for the usage set up in this case would be to constitute an agreement on the part of the defendant that he would waive the demand and notice which the law ordinarily requires, in order to his being bound as indorser—a parol agreement made at the time of the indorsement. Now, the question whether a parol agreement to waive demand and notice made at the time of indorsement can be given in evidence, was made a question in the case of *Barry v. Morse*, 3 N. H. 132; and it was held that the case came within the general prohibition of the law, that parol evidence should not be admitted to vary the effect of a written contract. The contract between the indorser and the indorsees of negotiable paper, proved by the signature of the indorser on the back of the note, is a written contract; and it can not be varied by evidence of a verbal agreement between the parties at the time of the indorsement. Giving, then, to the supposed usage all the effect of which it is capable, it can not affect the rights of the parties in this case.

Allusion is made in the argument to some supposed usage relating to the demand on the maker, or some previous notice as a substitute for a demand, but none such is stated, nor any facts from which any could be inferred.

The liability of the defendant, then, depends not on the

usages of the bank, but upon the general rules of the common law; and upon the case as stated, it does not appear that there was any demand upon the maker of the note on the third day of grace, which is held to be necessary, in the case of *Leavitt v. Simes*, before cited: *Dennie v. Walker*, 7 N. H. 199. The note became due August 1-4. There is no evidence of any demand of the maker on the fourth, nor of any notice to the maker that it would become due on that day, if that were of any importance. The statement goes no further than that Lowd told Carter that he had, within a few days, given notice to Wing of a note becoming due from him to the Piscataqua Exchange Bank. Such a statement was not evidence of anything; but if it were, it proved nothing as to the time at which the maker was called upon to pay. There is no evidence that proper notice was given to the indorser that such demand had been made, and that the note had not been paid by him, and the holder would look to the indorser for payment. The indorser is consequently discharged from liability, and there must be judgment for the defendant.

PAROL EVIDENCE OF WAIVER OF DEMAND AND NOTICE by an indorser is admissible: *Fuller v. McDonald*, 23 Am. Dec. 499; and the waiver need not be direct and positive, but may be implied from usage or from any understanding between the parties showing satisfactorily that a waiver was intended: *Id.*, and note.

ADAMS v. ADAMS.

[20 NEW HAMPSHIRE, 299.]

PROOF OF ADULTERY AT A DIFFERENT PLACE FROM THE ONE ALLEGED IS INSUFFICIENT in an action for divorce.

LIBEL FOR DIVORCE MAY BE AMENDED SO AS TO MEET THE PROOF if the act charged is sufficiently proved but at a different place from the one alleged.

CHARGE OF ADULTERY WITH PERSONS UNKNOWN to the libellant is sufficient to admit evidence concerning the act.

FRESH ACTS OF ADULTERY MAY BE PLEADED SUPPLEMENTARILY, and sentence be obtained on facts not existing at the commencement of the suit.

LIBEL for divorce, on the ground of adultery with Orville M. Cooper in December, 1845, and with divers other persons to the libellant unknown. There was evidence of adultery with one Marble, at Nashua, in October, 1847, which counsel for the libelee moved to suppress. The libel was filed in August, 1847.

Penley and Farley, for the libelee.

J. U. Parker, for the libellant.

By Court, GILCHRIST, C. J. The libel alleges that in the month of December, 1845, and at divers other times, as well before as since that time, at Hollis, Mrs. A. committed adultery with Orville M. Cooper, and with divers other persons to the libellant unknown.

The adultery with Cooper is well enough alleged, but the evidence is insufficient. Cooper was very sick; had pulmonary complaint, of which he subsequently died, in January, 1847. He was extremely feeble. It was necessary to carry him in a chair out of his room. He had hemorrhage of the lungs. He required constant care, and his physicians directed that he should be kept quiet, and that company should be kept from him. Mrs. A. took care of him for a part of the time, and of course was in his room often and late at night. Mrs. Hardy says that Barton said, when Mrs. A. asked him to go out once, that it was more proper for her to go out while Cooper's clothes were changed, than for him. But Barton denies this positively. Her attentions to him are perfectly reconcilable with her innocence, considering all the circumstances; and we are not called upon to believe that in his condition, and while her attentions were necessary, adultery was committed.

Another question arises as to the admissibility of the evidence of adultery with Marble, under the present allegations in the libel. In this particular the allegation is, that in the month of December, 1845, and at divers other times, as well before as since that time, at Hollis, she committed adultery with divers persons to the libellant unknown.

The libel was filed August 26, 1847. Hurlbut's testimony fixes the adultery with Marble in the month of October, 1847.

In *Church v. Church*, 3 Mass. 157, it was held, that an allegation that the respondent had within five years past committed adultery, was too loose. The *particeps criminis* must be named, or there must be an averment that he is unknown to the libellant. That averment is made here. In *Choate v. Choate*, Id. 391, it was held that, if the persons are unknown to the libellant, an averment to that effect is necessary. In *Adams v. Adams*, 16 Pick. 254, the libel alleged adultery with persons unknown. Motion that it be quashed for uncertainty, or that the libellant be required to file a bill of particulars at a reasonable time before trial, and be confined on the hearing to the cases thus specified. Ordered that a bill of particulars be so filed. If a libel charges adultery on one day, it may be amended by charg-

ing it on another day: *Tourtelot v. Tourtelot*, 4 Mass. 506. The time is here made material. A libel alleging that the respondent committed adultery with a particular person, is not sustained by proof of adultery with any other person: *Washburn v. Washburn*, 5 N. H. 195. In *Germond v. Germond*, 6 Johns. Ch. 347 [10 Am. Dec. 335], there is an examination of the authorities upon the question of the sufficiency of the allegation that the adultery was committed with persons unknown to the plaintiff. Kent, chancellor, says that "probably the better opinion is, that a charge of adultery need not specify the names of the persons with whom it was committed, and certainly it can not and need not be required, if the persons are unknown when the bill is filed."

The allegation here is well enough, but the evidence proves adultery with Marble at Nashua, if at all, and not at Hollis. This is probably insufficient. Although Hurlbut swears directly to the fact, there is not evidence enough tending to prove adultery before the filing the libel, to warrant a decree. Until October, there is nothing inconsistent with the presumption of innocence. Adultery afterwards in October would tend to show that the intercourse before was adulterous, but whether it has a sufficiently strong tendency is doubtful. All that Marble is shown to have done is sitting up late in the dining-room. He explains this by evidence that he was a member of a brass band, and had music to copy. The evidence about cording the bed does not amount to much. There must be evidence sufficient to warrant a decree at the filing of the libel. Here it is insufficient. But the libelant may have leave to amend the libel, so as to meet his proofs. In suits for adultery the party is not bound to the contents of his original libel, but it has been constantly held that fresh acts of adultery may be pleaded supplementarily, and that a sentence may be obtained on facts not existing at the commencement of the suit: *Shelford on Marriage*, 399; *Middleton v. Middleton*, 2 Hag. Ec., Sup., 136.

Leave to amend granted.

PETITION FOR DIVORCE ON THE GROUND OF ADULTERY ought to state the time and place of its commission: *Christianberry v. Christianberry*, 25 Am. Dec. 96; but it is sufficient as to persons to charge the offense as having been committed with one or more persons unknown to plaintiff: *Germond v. Germond*, 10 Id. 335.

WHEN SUPPLEMENTAL BILL MAY BE FILED: See *Chandler v. Pettit*, 18 Am. Dec. 399, and note 401.

BRECK v. BLANCHARD.

[20 NEW HAMPSHIRE, 323.]

TRESPASS LIES AGAINST AN OFFICER FOR ABUSE OF PROCESS, where he assumes to act under a process which does not authorize the acts done. He is liable as if he had acted without any process at all.

CASE LIES FOR ABUSE OF PROCESS where it is regularly sued out and valid in form, but sued out from improper motives and applied to improper purposes.

OFFICER LEVYING EXECUTION A SECOND TIME IS LIABLE, if he knew of its having been satisfied.

OFFICER LEVYING EXECUTION A SECOND TIME would be protected, if he had no knowledge of the first payment.

CREDITOR TAKING OUT EXECUTION ON A SATISFIED JUDGMENT, though ignorant of the truth, does so at his peril, and is liable if he enforces a collection.

DENIAL OF MATERIAL ALLEGATIONS ONLY IS NECESSARY.—Defendant justified an arrest under an execution. Plaintiff replied payment before arrest, and traversed that the judgment was in full force. *Held*: That the traverse was to an immaterial matter, and the rejoinder of payment was good.

TRESPASS for assaulting and imprisoning plaintiff, compelling him to pay certain sums to procure his release. Defendant pleaded: 1. The general issue. 2. That one Sabin had recovered judgment against plaintiff and others; that by assignment it came into the hands of defendant, and while in full force and not satisfied he caused the arrest of plaintiff by a deputy sheriff, who detained him till he paid the money, whereupon he was set at large. To the special plea, plaintiff replied, that his co-defendants had satisfied the execution "without this, that at the time when the said trespasses were committed the said judgment was in full force, and in no part paid or satisfied, as alleged in said plea," etc. Defendant rejoined, that plaintiff's former co-defendants had not satisfied the judgment and writ of execution. Plaintiff demurred: 1. Because the rejoinder did not put in issue a material matter traversed by the plaintiff in his replication. 2. Because the rejoinder is a departure from his second plea, in not affirming a matter by him alleged which is traversed by the plaintiff in his replication.

Cushing, for the defendant.

P. C. Freeman and Morse, for the plaintiff.

By Court, WILCOX, J. The plaintiff in this case declares in trespass for false imprisonment. The defendant justifies under an execution issued upon a judgment recovered against the

plaintiff and two others; which at the time of the issuing of the execution was in full force, not reversed or annulled, or in any part satisfied. The plaintiff replies that after the execution was issued, and before the arrest, two, who with him were the judgment debtors, paid the judgment to H. Hubbard, and concludes the replication with a formal traverse, "without this, that at the time when the arrest was made, the said judgment was in full force and in no part satisfied." The rejoinder, passing over the traverse, denies the matter of the inducement contained in the replication; namely, the payment of the judgment, as therein alleged.

The plaintiff demurs to this, and assigns causes, the consideration of which may be postponed for the examination of a question raised as to the materiality of the allegation that the judgment had been paid before the arrest of the plaintiff upon the execution.

It is said that the allegation of the payment of the judgment to H. Hubbard is immaterial, because that trespass will not lie for a wrongful use of legal process; and that where the process of a court is regular upon its face, it will protect all acting under it until it has been vacated, or set aside by the court, or abandoned absolutely by the party suing it out.

This objection goes merely to the form of the action; for surely it can not be contended that the second collection of an execution is just or legal; and if the party suffering from such a wrong is without remedy, there is a defect somewhere in the retributive powers of the law. We certainly have no reason to believe that the party in such a case is without redress, and the tendency of the argument, as well as of the authorities in the main, has been to show that case should have been brought instead of trespass, or that no action should have been brought till the execution had been set aside or vacated.

It has, indeed, been said that the defendants, having purchased an execution, good upon its face, are not liable unless they knew of the first payment, and have acted maliciously. That is a point which we will consider hereafter. The principal objection, then, is to the form of the action; and upon this point it is well settled that the court will not turn a party round upon the form of his remedy, where he is clearly entitled to some redress, unless compelled to do so by the established rules and principles of law. Let us then examine the authorities cited, and see how far they control the case before us.

Various cases are cited to show that trespass will not lie for

the wrongful use of legal process. In *Plummer v. Dennett*, 6 Greenl. 421 [20 Am. Dec. 316], one was arrested upon a writ sued out for a pretended and groundless cause of action, with a view to compel the party to do certain things. It was held, that case for a malicious prosecution, and not trespass, was the proper remedy. There the arrest was legal and the process valid.

In *Hayden v. Shed*, 11 Mass. 500, the writ had been abated upon a plea of another action pending for the same cause; yet it was held that case and not trespass was the proper form of action for one whose goods had been attached on the writ. Case would lie if the last suit were malicious, but it is questionable if it would otherwise.

In *Beatty v. Perkins*, 6 Wend. 382, it was held that trespass would not lie against a party who acted under a search-warrant duly granted; but case for a malicious prosecution, if the warrant were obtained for improper purposes. *Else v. Smith*, 2 Chitty, 304, is to the same point.

All these cases show a process regularly sued out, valid in all its forms, but sued out from improper motives and applied to improper purposes. The remedy, therefore, is by case for malicious prosecution. The act done is legal, and authorized by the process, but the purpose for which it is done is wrong, and its result is an injury.

In *Blanchard v. Goss*, 2 N. H. 491, a *capias* was sued out upon a contract under thirteen dollars and thirty-three cents, and it was alleged that the contract was made after the first day of January, 1819, and the body was not, therefore, liable to arrest. Trespass was brought for the arrest. The court held that the validity and legality of the process could not be decided collaterally, and that no action of trespass could be maintained till the process was quashed or set aside. If in this case the contract was alleged in the writ to have been made prior to the first of January, 1819, so that the process was upon its face valid, then it was properly sued out; it authorized the arrest, and its validity could not be determined but in the suit itself. Nor even in case the defendant in the original suit had prevailed, and abated or set aside the writ, on the ground that the contract was in fact made after the first of January, 1819, do we see how the creditor would be liable to an action, unless he acted maliciously. An unsuccessful party is liable to costs as of course, but where he sues out the process adapted to what he alleges as the cause of action, he is not liable to an action for

damages, even if he fails to make out his case as alleged, unless he has acted maliciously.

But if it had appeared on the face of the process that the contract was made after the first of January, 1819, then, upon the principles laid down in the case, it would not protect the party, even if not set aside. The case of *Blanchard v. Goss* is, therefore, the case of a writ sued out, regular in all its forms, and authorizing the acts done; and the acts were proper to be done in the case alleged or set up.

How far do these authorities apply to the case under consideration? Where the process of the court has been abused, trespass against the sheriff, or other ministerial officer committing the abuse, is the proper action, if the conduct of the officer was in the first instance illegal, and an immediate injury to the body, personal or real property: 1 Ch. Pl. 170. And there is no occasion to set aside the process; that is well enough; and the injury results from the abuse of the process, as if the officer arrest one out of his bailiwick, or after the return day of the writ, or take what can not be lawfully seized. So though his conduct in the first instance be lawful, yet if he abuse his authority, he thereby becomes a trespasser *ab initio*: Id.

If J. S., who has distrained a beast *damage feasant*, after kill or use the beast, he becomes a trespasser *ab initio*. These acts are an abuse of his authority. So if a man who goes lawfully into an inn, be after guilty of an injurious act therein, he becomes a trespasser *ab initio*: *The Six Carpenters' Case*, 8 Co. 146.

A constable, who had the warrant of a justice of the peace to search the house of J. S. for stolen goods, pulled down the clothes of a bed where was a woman, and attempted to search under her clothes. Held, that by this indecent abuse of his authority he became a trespasser: 4 Bac. Abr. 161.

This class of cases, of which there are many in the books, differ altogether in principle from those cited by the defendants' counsel. They go upon the ground that although the parties were assuming to act under process of the court, yet that process did not authorize the acts that were done, and the parties were held liable precisely as if they had acted without any process at all. And these cases, in our judgment, control the case before us.

An execution had issued in favor of Sabin against the plaintiff and others. That execution, according to the allegation in the plea, was paid and satisfied; and after this the defendants

caused the plaintiff to be arrested upon the same execution, and imprisoned till he paid the debt a second time.

Now, what does an execution authorize the party or officer to do? Simply to levy a certain amount of money, debt, damages, and costs, with the officer's fees. We speak of the common form of execution. All directions or commands given to the officer are subscribing to this purpose. He is commanded, of the goods, etc., of the debtor, to cause to be levied and paid to the creditor the aforesaid sums, with lawful interest thereon, and seventeen cents more for the writ and his own fees. If he is authorized to take the goods, lands, or the body, it is only to enforce the payment of these precise sums.

If the officer does more than this, he abuses his authority and becomes a trespasser. He ceases to act under and by virtue of the process, and proceeds in abuse of it. If the debtor tender the sums due, the officer can not touch the property nor the hem of the debtor's garment. "The direct and sole object of the execution is to raise the money and satisfy the judgment creditor. That object having been attained, the power conferred by the writ is spent:" *Sherman v. Boyce*, 15 Johns. 443; *Rogers v. McDearmid*, 7 N. H. 506.

The law indeed goes beyond this. If a sheriff voluntarily permit a debtor, arrested upon an execution, to go at large, even without payment, he can not retake him; and if he does, he is subject to an action for false imprisonment. The creditor, however, may arrest him, if discharged without his consent: *Jones v. Pope*, 1 Saund. 35, note 1; *Atkinson v. Jameson*, 5 T. R. 25; *Cheever v. Mirrick*, 2 N. H. 376; *Lathrop v. Briggs*, 8 Cow. 171; *Ransom v. Keyes*, 9 Id. 128; *Brown v. Getchell*, 11 Mass. 15; *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.), 247.

So where a party was arrested, and he at whose suit the arrest had been made, ordered the sheriff to discharge him and to release him from the action, notwithstanding which the sheriff detained him, false imprisonment was held to lie: *Wilthers v. Henley*, Cro. Jac. 379. And if the creditor discharges a debtor so arrested, without payment, he can not arrest him again, nor proceed against any other joint debtor; and if he does, he is liable to trespass: *Gould v. Gould*, 4 N. H. 174.

A *ca. sa.* issued upon a judgment which has been previously paid, will protect the officer, but not the party nor the attorney who issues it; and false imprisonment lies, though the process be not set aside: *Deyo v. Van Valkenburgh*, 5 Hill (N. Y.), 242; and in *Wood v. Colvin*, 2 Id. 566 [38 Am. Dec. 598], it was held, that if

a judgment be satisfied, the power to sell under it ceases; and should a sale take place, even a *bona fide* purchaser under the judgment without notice, it is said, will gain no title. But see *Jackson ex dem. Saunders v. Cadwell*, 1 Cow. 622.

There are various other authorities to show that where a judgment has been paid or satisfied, no execution can properly issue upon it; and if one be issued, it will afford no protection to the party who sues it out: *Ladd v. Blunt*, 4 Mass. 402; *Hammatt v. Wyman*, 9 Id. 138; *Little v. Newburyport Bank*, 14 Id. 443; *Lewis v. Palmer*, 6 Wend. 367; *McGuinty v. Herrick*, 5 Id. 240; *Kuhn v. North*, 10 Serg. & R. 399; *Smith v. McGowan*, 3 Barb. 410; *Sherman v. Boyce*, 15 Johns. 443; *Jackson d. Anderson v. Anderson*, 4 Wend. 474; *Swan v. Saddlemire*, 8 Id. 676; *Gould v. Gould*, 4 N. H. 173; *Thrower v. Vaughan*, 1 Rich. 18.

The case of *Luddington v. Peck*, 2 Conn. 700, is adverse to all these authorities, and can not be sustained.

It was indeed admitted by the defendants' counsel, that if the first payment had been made to an officer, the judgment would have been satisfied and extinguished; but it was argued that such was not the effect of a payment to the creditor, not indorsed upon the execution. The authorities, however, do not sustain, but repudiate any such distinction.

In the following cases the first payment was not to an officer: *Jackson d. Anderson v. Anderson*, 4 Wend. 476; *Swan v. Saddlemire*, 8 Id. 681; *Wood v. Colvin*, 2 Hill (N. Y.), 566 [38 Am. Dec. 598]. In *Deyo v. Van Valkenburgh*, 5 Id. 242, there was no payment, but a discharge under an insolvent law, of which the creditor had notice. In *Thrower v. Vaughan*, 1 Rich. 18, it was held, that a sheriff had no authority to sell under an execution satisfied in fact, though appearing upon its face to be unsatisfied. If, however, he has no notice of the satisfaction, he will not be liable in trespass to the debtor for acting under it.

And there is no difference in principle between payment to an officer and to a creditor. The officer acts wholly for the creditor. He is, by the express command and exigency of the writ, to cause to be levied and paid to the creditor the sums named. It can make no difference whether payment be made to the creditor directly, or circuitously through the agency of the officer.

If a judgment or execution has been satisfied, and that fact does not appear upon the execution or of record, the officer who levies the execution a second time would undoubtedly be protected, if he had no knowledge of the first payment; for he is bound to execute all process, regular in its forms, which is deliv-

ered to him, and has ordinarily no means of determining whether an execution has been paid or not: *Pierson v. Gale*, 8 Vt. 511 [30 Am. Dec. 487]; *McGuinty v. Herrick*, 5 Wend. 240; and this, even if first paid to an officer. If the officer had knowledge, he would be liable; but notice when about to levy is not knowledge.

But the party stands in a different position; and if he wantonly takes out an execution on a satisfied judgment, he can derive no protection from it. If the judgment has been paid, it must have been paid to him, or to some one authorized by him to receive it. In such case it is easy for him to ascertain whether it has been paid or not; and if he enforces its collection in ignorance of the truth, he necessarily does so at his peril. There is no necessity for a discharge upon the execution. The debtor has no power to cause such discharge to be entered, and is as effectually protected and discharged by a tender of payment refused, as by actual payment. An officer, indeed, holding the process without knowledge of the payment or tender, would be protected, for the reasons that have been assigned, but nobody else.

Again, it is said, that these defendants are not the judgment creditors; nor was payment made to them, nor had they knowledge that payment had been made. But an execution is not negotiable; and though it is capable of being assigned, and the rights of the assignee will be recognized and protected, yet these rights are not greater nor other than those of the assignor. They do not become changed or enlarged by the assignment. If a promissory note has been negotiated before due, a *bona fide* holder will not be affected by the want or failure of consideration that would render it fruitless in the hands of the payee. But this is the exception to the ordinary rule applicable to a transfer of property, whether real or personal, and to things in action. Usually, the purchaser acquires no better title than his vendor had. And the exception, if it could be extended so as to embrace the transfer of this execution, and to give it the character and effect of a transfer of negotiable paper, would not help the defendants, since they purchased the judgment when it was overdue, and, in fact, after it had been regularly paid and extinguished. They purchased nothing.

What they did, they did voluntarily. They voluntarily put the process of the court in motion. They were not bound to act as the sheriff was, and they acted at their peril. Standing in the place of the judgment creditor as the owners of the writ.

they were affected likewise with his responsibilities in venturing to make use of it.

The rule that process, regular on its face, must be set aside before an action will lie for acts done under it, can not be applied to this case. This execution can never be set aside. It issued duly and properly. It was paid, and the party again attempted to levy money upon it. There was no renewal as in the case cited from 8 Vt. 511, and in the case from Connecticut. If, therefore, the plaintiff is without remedy till the execution be set aside, he is without remedy forever. But, in our opinion, he may well maintain trespass for the abuse of the process practiced by the defendants, in attempting to enforce it after it had been already paid.

The allegation of the payment of the judgment, which is contained in the plaintiff's replication, is not an immaterial allegation, but one which goes to the merits of the case, and that objection taken by the defendants upon the plaintiff's demurrer is not sustained.

We are now to consider the pleadings in another aspect. The defendant here justifies by virtue of an execution issued upon a judgment obtained against the plaintiff and others. The plaintiff replies that the judgment had been paid without this, that at the time of the arrest it was in full force, etc. The defendant rejoins that it was not paid as averred, and takes no notice of the formal traverse offered in the replication; and the demurrer raises the question whether the omission to take issue upon that traverse is a fault in the pleading, which depends upon another question, Was the traverse well taken?

For, when the first traverse is good, and taken to a material point, and when it goes to the substance and point of the action, there shall be no other traverse taken after. But where the first traverse is idle, or not well taken, or not pertinent to the matter, but is of that which is sufficiently confessed and avoided before, the opposite party may pass it by, and tender another traverse. So where the traverse is too narrow: *Bennet v. Filkins*, 1 Saund. 22, note 2; 1 Ch. Pl. 539; Steph. Pl. 211.

Green v. Ackland, 2 Saund. 49, was *assumpsit* against an administratrix, who pleaded in bar another judgment obtained against her in that capacity, and averred that the debts at the time of the recovery were just and true debts, and the amount due. The plaintiff replied that the judgment had been obtained by fraud, and traversed that the sum recovered was due at the time. The defendant demurred. It was argued that

the plaintiff should have relied upon the fraud which he had alleged, and not upon his denial that the debt for which the judgment was rendered was due; for if a part appeared not due, the issue would be against the defendant. The replication was held good. The case is cited and acquiesced in: Com. Dig., Pl., 7 D. 9; but held bad by Williams, note 3, for, 1. The averment that the sum was due, was unnecessary; the traverse of course was as to an immaterial matter. 2. The traverse was after a confession and avoidance, and therefore bad. Judgment was confessed and avoided by a plea of fraud.

The rules thus stated and illustrated may be applied to the present case.

The plaintiff confesses, and avoids the judgment and execution by which the defendants justify, by replying that it had been previously paid; and then concludes with a formal traverse, "without this, that at the time when the arrest was made, the judgment was in full force and in no part paid or satisfied."

1. Now, in the first place, this traverse was of a matter which is not alleged in the plea. The plea alleges only that the judgment was in full force, etc., when the execution was sued out; but it does not so allege respecting it at the time of the arrest, nor was it necessary that it should have so alleged. All that is matter of legal inference, from the admitted fact of the rendition of the judgment, and the contrary should come from the other side: 2 Ch. Pl. 483, note p; *Hancocke v. Proud*, 1 Saund. 330, note 4.

2. The traverse tendered was too narrow—that the judgment was in full force, and in no part satisfied; for if a part remained unpaid, the arrest would have been justified.

For these two reasons, then, the traverse was not taken of a material point, going to the substance of the action.

3. The traverse was after a confession and avoidance. The judgment was confessed, and by the allegation of payment avoided.

4. The true issue to be taken in this case is, whether the plaintiff paid the judgment, as alleged in his replication.

The traverse of the allegation, that the judgment was in no part paid, is an attempt to make an issue upon a negative allegation. That the judgment remained in full force is a mere inference of law. The plaintiff must show how it is otherwise, if he would avoid it. If payment is relied on, the more usual form is to allege it, saying nothing of the reception of the money.

The conclusion, therefore, is, that the rejoinder was well taken, and that there must be judgment for the defendants on the demurrer.

JUSTIFICATION OF OFFICERS BY THEIR PROCESS: See note to *Savacool v. Boughton*, 21 Am. Dec. 190, where the subject is discussed at length: *Watson v. Watson*, 23 Id. 324.

ABUSE OF PROCESS CONSTITUTES THE OFFICER A TRESPASSER AB INITIO. For a full discussion of this subject, see note to *Barrett v. White*, 14 Am. Dec. 365; *Barrett v. Lightfoot*, 15 Id. 110; *Wendell v. Jackson*, 29 Id. 648; and see *Waterbury v. Lockwood*, 4 Id. 215.

CASE IS THE PROPER REMEDY FOR ACTS DONE IN ABUSE OF PROCESS regular upon its face: *Pierson v. Gale*, 30 Am. Dec. 487. The remedy is at law, and not in equity, for illegal and oppressive acts by an officer in executing process: *Beaird v. Foreman*, 12 Id. 197.

EXECUTION ISSUED ON A JUDGMENT PAID, but not released of record, where such issue has been obtained by third parties without the concurrence of the judgment creditors, will render those persons liable in trespass for the acts done under the process: *Pierson v. Gale*, 30 Am. Dec. 487.

LORD v. THE STATE.

[20 NEW HAMPSHIRE, 404.]

DESCRIPTION OF MONEY STOLEN.—"Three dollars in divers pieces of silver current in this state" is not a sufficient description of the money in an indictment for larceny.

INDICTMENT for stealing money. The indictment described the things stolen as "three dollars in divers pieces of silver current in this state."

Hale and Wiggins, for the prisoner.

Walker, attorney general, for the state.

By Court, GILCHRIST, J. The indictment should contain a description of the pieces of silver stolen. In *Rex v. Fry*, cited in Russell on Crimes, 109, it was held that "ten pounds in moneys numbered," was bad upon a motion in arrest of judgment.

In this state, in the county of Carroll, it has lately been held that "sundry pieces of silver coin, current by law within this state, amounting together to the sum of twelve dollars, of the goods, chattels, and moneys of," etc., was an insufficient description of property alleged to have been stolen.

The authorities show that a defect of this kind is not cured by a verdict, and by reason of it the judgment must be reversed; and it is unnecessary to inquire into the other ground of error.

Judgment reversed.

DESCRIPTION OF MONEY IN AN INDICTMENT.—There is a difference between the allegations necessary in an indictment where the grand jury know the material facts, and also know or can ascertain the identifying circumstances and descriptions, and those where they do not have and can not obtain this knowledge. If they are informed as to the facts, they must set them out in proper form; but if not, they may set them out so far as known, and excuse further and more definite allegations by an averment that they are to the jurors unknown. Descriptions of money, therefore, will vary somewhat according to the knowledge of the grand jurors. We will therefore first consider descriptions of money where details are or may be known, and afterwards the averments necessary where they are unknown.

DESCRIPTION SHOULD FOLLOW THE WORDS OF THE STATUTE.—An indictment for larceny of money should describe the property by following some description given in the statute; and the description given by the statute must be used in the substantial averment in the indictment, and not by way of a *videlicet*; for a *videlicet* will not remedy a previous imperfect averment. Thus the statute of 52 Geo. III., c. 143, sec. 2, provided that if any person shall steal, etc., "any bank book, bank post bill," etc., he shall be punished, etc. Under this statute an indictment was found against the prisoner for stealing a note of the Bank of England out of a letter. The note was described as a "bank note," though that term was not used in the statute. It was objected that the description was insufficient, and the court so held: *Rex v. Newman*, Gloucester Spr. Ass., 1832, MS., cited in 2 Arch. Cr. Pr. & Pl., 8th ed., 1147. In Craven's case, upon the authority of which Newman's case was decided, the prisoner was indicted for larceny under a similar statute, though in it "bank notes" were named. The indictment described the bank note stolen as "a certain note commonly called a bank note." It was objected that the description was not sufficient to bring the case under the statute, and it was referred to the judges. They held the description insufficient, "the words of the act being 'bank note,'" etc.; and that the addition "commonly called a bank note," did not aid such original wrong description: *Rex v. Craven*, Russ. & Ry. 14; S. C., 2 East P. C. 601. So, too, an indictment for stealing "ten pounds in money numbered" is not sufficient under a statute against stealing coins or bank notes. Some of the pieces of which the money consisted should be specified: *Rex v. Fry*, Russ. & Ry. 482; though Lord Hale uses "forty shillings *pecuniis numeratis*," as a description of money in an indictment for larceny, and Starkie has followed him: 1 Hale's P. C. 537; 1 Stark. 187. But in New York, where the statute made "bank notes," and not "bank bills," the subject of larceny, and where the property stolen was called in the indictment "bank bills," it was held sufficient, bank notes being commonly called and known as bank bills: *Low v. The People*, 2 Park. Cr. 37; and so in Massachusetts: *Eastman v. Commonwealth*, 4 Gray, 416; S. C., 2 Id. 76.

These cases were decided upon the principle that "bank notes" and "bank bills" were interchangeable terms, and that therefore the description was practically in the language of the statute under which the indictment was framed. If the indictment follows the statute in language, it is sufficient: *People v. Kent*, 1 Doug. 42; *State v. Cassele*, 2 Har. & G. 407; *People v. Taylor*, 3 Denio, 93. But see *State v. Stimson*, 4 Zab. 9, where it was held that in an indictment for embezzlement it is not sufficient to describe the offense simply in the words of the statute.

NUMBER OF THE PIECES OF MONEY SHOULD BE STATED.—The number of the bills stolen seems to be an essential element of description, and so it was

held not sufficient to describe the property stolen as "sixty dollars in bank bills, current money, of the value of sixty dollars," or "bank bills, being current money of the state of New York, of the value of sixty dollars." The court said: "In an indictment for stealing bank notes, it is not necessary to set out the instruments *verbatim*. They may be described in a general manner as a bank note; nor is it necessary to state the value of each note; *but the number must be stated*, and then it is sufficient to state the value in the aggregate. In respect to number, the indictment should be certain:" *Low v. The People*, 2 Park. Cr. 37.

Where the indictment charged the defendant with stealing "divers bank notes amounting in the whole to the sum of five hundred dollars and of the value of five hundred dollars," the court held that such an allegation was insufficient: *State of Minnesota v. Hinckley*, 4 Minn. 345; *Stewart v. Commonwealth*, 4 Serg. & R. 194; *State v. Donnell*, 3 Gill & J. 310; *State v. Murphy*, 6 Ala. 845; *People v. Jackson*, 8 Pa. St. 637; *State v. Stimson*, 4 Zab. 9. And see *Commonwealth v. Maxwell*, 2 Pick. 143; *State v. Smith*, 33 Ind. 159; *State v. Longbottom*, 11 Humph. 39; *Martinez v. State*, 41 Tex. 164; *Ridgeway v. State*, Id. 231; *People v. Bogart*, 36 Cal. 245. But in *McKane v. State*, 11 Ind. 195, "sixty dollars of the current gold coin of the United States" was held enough, the court assuming the highly improbable fact that the indictment intended to charge the prisoner with the stealing of sixty pieces of gold coin of the value of sixty dollars, or sixty pieces of gold coin of the value of one dollar each. In Virginia, too, but under a special statute, the opposite rule prevails, and an indictment for the larceny of "divers notes of the national currency of the United States," stating the value, is sufficient: *Dull v. Commonwealth*, 25 Gratt. 965. It does not seem to be necessary to particularly describe any particular note which has been the subject of larceny. In *Rex v. Johnson*, 3 Mau. & Sel. 540, the indictment charged the prisoner with embezzling "divers, to wit, nine bank notes for the payment of divers sums of money amounting in the whole to a certain sum of money, to wit, the sum of nine pounds of lawful money of Great Britain and of the value of nine pounds of like lawful money." There was no description of any particular note whatever, but the court held the indictment sufficient.

VALUE OF THE COIN OR BILLS SHOULD BE STATED.—In an indictment for stealing money, the value of the pieces stolen should be stated, at least in the aggregate: *Commonwealth v. Smith*, 1 Mass. 245. This is conformable to the general rule of criminal pleading that an indictment for larceny must state the value of the articles alleged to have been stolen. The reason for requiring this allegation is that a distinction may be made between the offenses of grand and petit larceny, partly to fix the jurisdiction of courts and partly to determine the extent of the punishment. The aggregate or collective value of the pieces is sufficient for this purpose, and is therefore all that need be alleged. The separate value of each piece need not be, and usually is not, stated. Thus the following allegations in indictments, so far as value is concerned, were held good: "One twenty-dollar bank note on the State Bank of North Carolina, of the value of twenty dollars:" *State v. Rout*, 3 Hawks, 618; "ten promissory notes called bank notes, issued by the Chickopee Bank for the payment of divers sums of money, amounting in the whole to the sum of fifty dollars, and of the value of fifty dollars:" *People v. Jackson*, 8 Barb. 637; "fifteen twenty-dollar pieces, and twenty-five ten-dollar pieces, and ten five-dollar pieces, of the gold coin of the United States of the value of five hundred and fifty dollars:" *People v. Green*, 15 Cal. 512; and see *People v. Vice*, 21 Id. 344, where a like description seems to have been con-

ceded to be good. And this seems to be the general doctrine: *Bell v. State*, 41 Ga. 589.

And while it is not necessary to state the value of each bill or coin stolen, yet if the value of each is stated, and also the number, it seems the aggregate amount need not be alleged, the statement of the separate value of each and the number being sufficient. Thus the description, "thirteen bills against the Hartford Bank, each for the payment and of the value of ten dollars, issued by such bank, being an incorporated bank," was held sufficiently certain: *Salisbury v. State*, 6 Conn. 101; *State v. Mahanna*, 48 N. H. 377; *State v. Thomason*, 71 N. C. 146; *State v. Fulford*, Phill. L. 563. In California it was held to be a sufficient allegation of value to allege that the property stolen was a given number of "twenty-dollar gold pieces:" *People v. Green*, 15 Cal. 512. But in Texas the opposite view is taken: *Boyle v. State*, 37 Tex. 359. Less particularity is required in regard to allegations of value in Indiana and Georgia. Where an indictment was found for stealing a bank note of the State Bank of Ohio, for the payment of ten dollars—the value not being stated—it was held not necessary that the note should be described with greater particularity: *Crawford v. State*, 2 Cart. 132; and see to same effect, *Engleman v. State*, 2 Id. 91; *Bullock v. State*, 10 Ga. 46. And in Virginia no value whatever need be stated. But this is under their code, which greatly relaxes the general rule: *Adams v. Commonwealth*, 23 Gratt. 949.

KIND OF BILLS OR SPECIES OF COIN SHOULD BE SPECIFIED.—Where the jury can, they should describe the bills so that they can be identified; the name of the bank by which issued should be set out, and their denomination given, though less definite descriptions are sometimes allowed; and in the case of larceny of coin, the species should be set out by its appropriate name. In *Leftwich v. The Commonwealth*, 20 Gratt. 716, the indictment described the money as "ninety dollars in United States currency." The court held the description insufficient, and said: "'United States currency' may be gold or silver, or treasury notes, or bank notes. Proof that any of these subjects were obtained by the false pretense alleged would be perfectly consistent with the indictment; which, therefore, is too vague. It ought to show what kind of United States currency was obtained." The same position was taken by the court in Mississippi. The indictment charged the prisoner with stealing "\$150 in United States currency." It was held void for uncertainty, after verdict, and judgment was arrested: *Merrill v. State of Mississippi*, 45 Miss. 651; *Crocker v. The State*, 47 Ala. 53. In these cases there was insufficient description, from failure of an attempt to describe the bills or notes. In Tennessee, a defective description arose from an opposite cause. In the indictment the articles stolen were described: "One five and one two dollar greenback bill, United States currency, national bank bills, and money." It was held bad, for being indefinite and uncertain: *Lewis v. State*, 3 Heisk. 333. In Iowa, North Carolina, and South Carolina the rule is somewhat relaxed, and "one hundred and eighty dollars in bank notes, usually known and described as greenbacks," was held a sufficient description: *The State v. Hackberry*, 30 Iowa, 504; *State v. Fulford*, Phill. L. 563; *State v. Evans*, 15 Rich. 31. And in Ohio and Louisiana, by force of their statutes, it is sufficient to describe the subject of the larceny as so many dollars, or so many dollars in money, without further particularization: *McDivit v. State*, 20 Ohio St. 231; *State v. Walker*, 22 La. Ann. 425; *State v. Shonhausen*, 26 Id. 421; *State v. Green*, 27 Id. 598; *State v. Carro*, 26 Id. 377; and see *Merwin v. People*, 28 Mich. 296; *Grant v. State*, 55 Ala. 201; *Jones v. Commonwealth*, 13 Bush, 356; *McEntee v. The State*, 24 Wis. 43.

In *People v. Ball*, 14 Cal. 101, the defendant was indicted for larceny, and the property was described as "three thousand dollars lawful money of the United States." The court said: "This description is not sufficient. In an indictment for larceny, money should be described as so many pieces of the current gold or silver coin of the country of a particular denomination, according to the facts. 'The species of coin must be specified.' Arch. Cr. Pr. & Pl. 61; Whart. Cr. L. 132." In the case of *The State v. Longbottom*, 11 Humph. 39, the supreme court of Tennessee decided that an indictment charging the defendant with stealing "ten thousand dollars good and lawful money of the state of Tennessee," was bad for want of description: *People v. Bogart*, 36 Cal. 245; *Ridgeway v. The State*, 41 Tex. 231; *Lavarre v. The State*, 1 Tex. App. 685.

DESCRIPTION OF COIN OR BILLS WHERE THE DETAILS ARE UNKNOWN.—It often happens that persons suffering from a theft are unable particularly to describe the stolen coin or bank bills. Then within limits not well defined the grand jury may transfer to the indictment such a description as the witness can furnish, and allege that the further particulars are to them unknown. Thus it has been adjudged good to say "sundry gold coins current as money in this commonwealth, of the aggregate value of twenty-nine dollars, but a more particular description of which the jurors can not give, as they have no means of knowledge;" 2 Bish. Cr. Pr., sec. 705; *Brown v. People*, 29 Mich. 232; *Hamilton v. State*, 60 Ind. 193; *Commonwealth v. Grimes*, 10 Gray, 470; *Lavarre v. The State*, 1 Tex. App. 685; *Ware v. The State*, 2 Id. 547; *People v. Bogart*, 36 Cal. 245; *Cook v. State*, 4 Tex. App. 265; *Dubois v. The State*, 60 Ala. 139; *State v. Tassut*, 16 Minn. 109; *Hart v. State*, 55 Ind. 599; *Commonwealth v. Sawtelle*, 11 Cush. 142.

HAM v. BOODY.

[20 NEW HAMPSHIRE, 411.]

CONTRACT WITH FEME COVERT IS BINDING ON OPPOSITE PARTY where she has paid the consideration or performed her part of the agreement.
HUSBAND MAY JOIN WIFE AS CO-PLAINTIFF in an action on a contract made by her.

AGENT'S AUTHORITY TO MAKE A DEMAND IS ESTABLISHED by the principal founding a suit on the demand.

AUTHORITY OF AGENT TO MAKE DEMAND CAN BE QUESTIONED only at the time demand is made.

ASSUMPSIT. Mrs. Ham agreed with defendant to deliver, and did deliver to him, two sheep, her property, and he agreed to deliver to her therefor four sheep on the expiration of four years. At the end of four years Mrs. Ham sent to Mary Watson, asking her to obtain the sheep and sell them. She demanded them, but defendant said the time had not expired, and would not for a year. At the end of a year she again demanded the sheep; was refused, and demanded a second time through one Tasker. Defendant objected to the authority of either Mary Watson or Tasker to demand the sheep, but submitted a propo-

sition to keep them another year, or to pay for the sheep at nine shillings a head. The offer was declined. It appeared that the two sheep had been given to Mrs. Ham, and that her husband had said they were hers, and that he never had and never would have anything to do with them. He never assumed any ownership of or control over them. Verdict for plaintiff; defendant appealed.

James Bell, for the defendant.

Hale and Wiggins, for the plaintiff.

By Court, GILCHRIST, J. It is unnecessary to settle, in this case, whether, where personal chattels become the property of a woman during coverture, and the husband, upon the ground that they have been given to her, refuses to exercise any control over them, and expressly authorizes her to dispose of them as she sees fit, she may, as a general rule, dispose of them as a *feme sole*, and make valid contracts relating to them, which may be enforced against all the parties.

The defendant in this case actually received the property of the wife, and, without disturbance from any source, retained the possession, and enjoyed the use of it to the full extent of the stipulation which she assumed to make in that respect. In short, he has received the entire consideration for the promise and undertaking which he made to deliver the four sheep at the time specified. It would be manifestly unjust that he should now be permitted to set up, as a valid defense, that the wife had no power to make the contract of which he has enjoyed the benefit. Nor does the law admit of such a defense, "for it has been decided that if a contract be made with the wife on good consideration, during the marriage, the husband may, if he please, take advantage of it and recover in an action on it, in which action he may join his wife as a co-plaintiff." And where the wife had, in pursuance of her undertaking, cured a wound, the two were permitted to join in an action for the stipulated reward: *Brashford v. Buckingham*, Cro. Jac. 77; *Smith on Contracts*, 221.

When Mary Watson made the first demand upon the defendant for the sheep, he did not question her authority to do so; but upon her second application he objected that if he complied with the requisition, Ham might call on him again. But he did not appear to insist upon this exception, and submitted a proposition to keep the sheep four years more; and when Tasker called on him, he did not object his want of authority, or express any

doubt on that head, but pleaded the inconvenience of a present compliance with the demand, and submitted further propositions.

It was held, in *Payne v. Smith*, 12 N. H. 34, that where a party served with a demand through an agent, does not at the time except to his authority to act as such, then a subsequent commencement of a suit by the party in whose behalf the agent assumed to act, claiming under such demand, is *prima facie* evidence at least that the agent acted with authority.

The demand required in this case is designed for the benefit of the party charged thereby, and to protect him against surprise, and to enable him to acquit himself of his obligation with safety and convenience. These objects would fail, if he had not a right to require some reasonable evidence of the authority of the agent, making the demand, at the time he is served with it. But it is no part of the agent's duty to urge this evidence unsolicited upon his notice. He is entitled to it only upon request. And that request must be persisted in: that is, it must not be followed or attended by such acts and sayings as afford reasonable ground for supposing that it is waived, or that the doubts that occasioned it have been allayed; otherwise, it will be taken to have been waived. Now, although the authority of the agent was, upon one of the several occasions mentioned in the case, called in question, yet even then the objection was tacitly abandoned by the defendant, who almost recognized that authority by submitting a proposition for keeping the property another term.

The commencement of this suit, therefore, by the present plaintiffs, is a ratification of the act which they prove as the preliminary to the action; and the objection taken by the defendant, that the evidence was not competent to prove the authority of Mrs. Watson and of Tasker, is fully answered. The same evidence exists of the authority of the wife to write the letter, to which, likewise, objection was interposed.

These several objections must, therefore, be overruled, and there must be judgment on the verdict.

JOINDER OF HUSBAND AND WIFE IN AN ACTION on contract made by her for a good consideration is incidentally discussed in note to *Boozier v. Addison*, 46 Am. Dec. 48.

RATIFICATION OF A DEMAND MADE by one purporting to act for another may be made by the latter by adopting the action founded upon such demand: *Town of Grafton v. Follansbee*, 41 Am. Dec. 736.

BELLOWS v. RUSSELL.

[20 NEW HAMPSHIRE, 427.]

AGREEMENT THAT ONE SHALL BID FOR SEVERAL FOR MAIL CONTRACT is not void unless made for some illegal purpose, affecting public policy.

WHETHER CONTRACT WAS MADE FOR ILLEGAL PURPOSE is a question of fact for the jury.

ASSUMPSIT on the following contract: "It is agreed that the subscribers shall on their joint account endeavor to procure the mail contract on route No. 169, from Haverhill to Lancaster, New Hampshire, from July 1, 1837, to June 30, 1841; and in case they succeed, it shall be divided at Littleton, the north half to belong to the subscriber, George Bellows, and the south half to the subscribers, the Littleton Stage Company; and in case of disagreement between the parties in relation to the division and apportionment of the mail money, it shall be submitted to the decision of some competent person. In case the contract shall be obtained by either of the parties, or by a third person for the benefit of either party, it shall be in trust for the purpose aforesaid.

GEORGE BELLOWS,
LITTLETON STAGE CO.,

"May 2, 1837.

By L. A. RUSSELL, Agent."

When the contract was made the parties met, and learning that each intended to bid for the mail route named, and had made some preparation for that purpose, entered into the written contract above. The case was submitted to auditors who made their report, presenting the question as to the legality of the contract, which was transferred to this court.

Bellows, for the defendant.

Wells, for the plaintiff.

By Court, GILCHRIST, J. Fraudulent practices at auctions, either on the part of vendors employing by-bidders or puffers, as they have been termed, "to screw up the price," or on the part of purchasers, combining to prevent competition at the bidding, and thus to buy in the property at a smaller price than such a competition would probably secure, have been held illegal at common law, and there are many decisions to that effect.

A leading case is *Beawell v. Christie*, 1 Cowp. 395, in which Lord Mansfield, announcing the doctrine of the court, declared that the bidding at the sale by the owner of the goods, or another on his behalf, was a fraud upon the contract involved in the offer of the article at auction, that it should go to the highest

bidder. This was in an action by the owner against the auctioneer, for selling the chattel at a price below that at which he had been directed to sell.

The doctrine was confirmed in *Howard v. Castle*, 6 T. R. 542, and has frequently been recognized as law.

In *Doolin v. Ward*, 6 Johns. 194, the action was upon a contract between the parties, that one of them should buy certain articles about to be sold at the navy-yard, at Brooklyn, and that the parties should share the purchase equally, it was held by the court, that the contract declared on was void; that it was against public policy, and tended injuriously to affect the character and value of sales at auction.

Wilbur v. How, 8 Johns. 444, was on a like contract for bidding off a job upon a certain road. The contract was, upon the authority of *Doolin v. Ward*, held to be "a nudum pactum, and a fraud upon the vendor."

Mr. Justice Story, Story's Eq. Jur., sec. 293, asserts the doctrine to be that "agreements, whereby parties engage not to bid against each other at a public auction, especially where such auctions are directed or required by law, as in sales of chattels or other property, by execution, are held void, for they are unconscientious and against the public policy, and have a tendency injuriously to affect the character and value of sales at public auction, and mislead public confidence. They operate virtually as a fraud upon the sale."

It is, therefore, a well-settled doctrine, and is undoubtedly a reasonable one, that holds to be illegal and fraudulent a combination of parties for the express purpose of preventing competition among bidders at an auction, with a view to take advantage of such a state of things for their own benefit.

It is, however, a different thing entirely to hold that where several parties desire, for any reasonable and just purpose, to become the joint purchasers of property exposed at auction, or to become interested together in a contract so exposed for the competition of bidders, they may not lawfully employ one of their number to act in behalf of the whole, and to bid off for their benefit the property, job, or contract so offered.

Accordingly, it has been held in Massachusetts, *Phippen v. Stickney*, 3 Metc. 384, upon a thorough examination of the cases, that the question as to the legality of such associations depended upon the circumstances in which they are formed. Mr. Justice Dewey, in delivering the opinion of the court, observes: "It seems to us, after some consideration of this question, and an

examination of the adjudged cases bearing upon it, that we can not judicially declare that every contract between two or more individuals, in which it may be stipulated that one is to be the purchaser for the joint benefit of himself and another, and that the other is not to interfere with his bidding, shall, when attempted to be enforced for the benefit of the associates, be held void, as a fraud upon the rights of the vendor, and as against public policy, merely because he who seeks to enforce the contract, may have been thereby induced to abstain from bidding. Cases may readily be imagined, and indeed are of frequent occurrence, in sales of large magnitude, where persons do thus unite, and are thereby enabled to become purchasers, when neither of them could otherwise have participated in the bidding."

The conclusion of the court in that case was that fraud could not be presumed, and that the party who would avail himself of such a defense must first establish the fact by a verdict of the jury.

We are of the opinion that such is the only just and tenable doctrine on the subject. The intent, and other circumstances attending the consent of the parties to the arrangement disclosed in this case, must settle its legal character.

The act of congress relating to the subject, and to which our attention has been directed, seems to contain nothing relating to the question between these parties, more than is comprised in the general principles of the common law. It prohibits the postmaster general from granting contracts to such as shall have entered into "any combination to prevent the making of any bid," or who shall have given or promised to give any consideration to induce others not to bid.

The fair construction of this statute seems not to require us to consider as such a combination, an agreement in good faith between several, that one should bid for the whole.

The case must, therefore, stand for trial upon the question of the alleged fraud.

Remanded for trial.

WELD v. SABIN.

[20 NEW HAMPSHIRE, 533.]

MORTGAGEE DISCHARGING AN ELDER MORTGAGE IS SUBSTITUTED in the place of the incumbrancer, and may treat the mortgage as if assigned to him, and enforce the lien.

THE opinion states the facts.

Leland, for the petitioner.

Cushing, for the defendant.

By Court, GILCHRIST, J. It appears that proceedings were commenced by Sabin against the petitioner and another, under the revised statutes, chapter 209, providing an "action against tenants." It also appears that the defendants in the process suffered default through the omission of one of them, Daniel Weld, jun., to give the attention to the matter which he had promised the petitioner to give. The consequence has been that Sabin has taken out his writ of possession, and taken possession of the land by means of it. The petitioner having thus, through misfortune, failed to have a hearing of his cause, brings his petition to this court for a review, according to the provisions of the revised statutes, chapter 192.

Without pausing to inquire whether this is such a case as would admit of relief in the form of a review, to which form of remedy the court seem to be limited in the statute referred to: *Dickinson v. Davis*, 4 Mass. 520; *Borden v. Borden*, 7 Id. 93 [4 Am. Dec. 32]; *Stone v. Davis*, 14 Id. 360; *Pope v. Pope*, 4 Pick. 129; *Smith v. McDaniel*, 15 N. H. 474; we shall consider the petitioner's case as if no such technical difficulty intervened.

The estate in regard to which the controversy has arisen was at one time the property of Moses Weld and Daniel Weld, jun., subject to a mortgage which had been made to the petitioner and his wife, to secure their support for life. Daniel Weld, jun., and Moses Weld, having that interest in the farm on the tenth day of January, 1835, mortgaged it to Chase to secure a sum of money which he advanced to them, and the petitioner joined in that mortgage. Moses Weld soon after released his interest to Daniel Weld, jun., who, on the sixth day of April, 1836, mortgaged the same to Sabin.

On the eighth of March, 1845, Sabin paid the mortgage which Chase held, at the same time requesting Chase to assign it to him, which Chase declined to do, and executed a release of the premises, as advised by counsel. A question is made as to what right Sabin acquired by the act of paying the mortgage.

It is perfectly well settled that when a mortgagee, for his own protection, discharges an elder mortgage, or other incumbrance, he becomes entitled to treat such mortgage as if it were assigned to him, and that he becomes substituted in the place of such in-

cumbrancer, and may enforce the lien accordingly: *Robinson v. Leavitt*, 7 N. H. 100; *Page v. Foster*, Id. 392.

An attempt is made in the argument to distinguish this from ordinary cases in which the rule is applicable, by the fact, that although the petitioner joined in the mortgage, he owed no part of the debt. But we think this not to be a material feature. The mortgage made to secure the debt attends it, into whose hands soever the debt passes, whether by assignment in fact, by intestacy, or by force of the equitable principle of substitution which has been referred to; and by this is meant the mortgage that was made, and not a mortgage of a less estate.

The rule extends as well to mortgages made to secure debts other than those of the mortgagor, as to those which individuals make to secure debts contracted by themselves; and there is no difference between the two kinds, nor is the distinction which has been taken by counsel sustained by any authority to which we have been referred.

Sabin, therefore, having, by paying the debt due to Chase, acquired his rights under the mortgage, had the right of a mortgagee to immediate possession of the premises mortgaged; and this seems to be all that he has acquired by the default of the petitioner, or of the party to whom he intrusted the conduct of his defense.

The petition does not suggest that he had a defense to the process; much less does it point out what that defense is. It states, indeed, that the mortgage to Chase had been paid, and that the petitioner's title was better than that which Sabin acquired under the mortgage of Daniel Weld, jun., to him; but the payment of Chase's mortgage has been seen to be merely equivalent to an assignment of it to Sabin.

Nothing could possibly be gained, in the promotion of justice, by granting to the petitioner a review upon the case made. It would, perhaps, afford him the means of retaining possession of the land for a little longer time; but the possession clearly belongs to Sabin, who, without violence, fraud, or other misconduct that has been made to appear, has gained the possession.

Petition dismissed.

BARTLETT v. PEASLEE.

[20 NEW HAMPSHIRE, 547.]

GRANT OF PRIVILEGE TO GRIND CORN DOES NOT BIND THE GRANTOR to keep the mill in repair to enable the grantee to do so, but the grantor can not destroy the mill.

THE opinion states the facts.

H. F. French, for the plaintiff.

Amos Tuck, for the defendant.

By Court, GILCHRIST, J. On the thirteenth day of September, 1822, Jacob Peaslee, deceased, conveyed to the plaintiff certain lands, in the description of which a certain corn-mill was named in the deed, and after the description, the following clause is added: "Also, a privilege for the said Jonathan Bartlett to grind all his own corn in the above-mentioned corn-mill."

The deceased owned the mill at the date of the deed, and the defendant holds it under a title acquired from the deceased since the execution of the deed.

The plaintiff enjoyed his right to grind at the mill till the year 1841. Since that time the mill has not been in a fit condition for use, and was taken down by the defendant in 1845, without the plaintiff's consent.

The plaintiff has brought case against the defendant, alleging that on the first day of January, 1843, and since, the defendant was bound to keep the mill in good and sufficient repair for grinding corn, but neglected to do so; by reason of which the plaintiff lost the benefit of his privilege to grind his corn.

The court instructed the jury that if the mill, when it was taken down by the defendant, was ruinous through his neglect to make ordinary and proper repairs, he was liable for the damage suffered by the plaintiff in the loss of his right during the period mentioned in the declaration.

The grant to the plaintiff was of a right to grind at the mill. The grantor had no right, therefore, to destroy the mill. He could not, nor could the defendant, claiming under him, do anything that would obstruct the plaintiff in the enjoyment of the right or servitude thus created upon the soil. For any act of that nature, or attended with such necessary consequences, an action on the case would lie at the suit of the party disturbed.

But he who has granted an easement upon his own land is not bound to do more than to abstain from acts inconsistent with its proper enjoyment, unless there is a covenant either by express terms, or by implication from the language of the grant. If I grant a right to take water from a spring upon my land, I am not at liberty to disturb or pollute the water, but I am not bound to keep it clear and in a condition most convenient for the grantee to use it. So, if I grant a way, I can not obstruct it, but am not bound to keep it in repair. So the grant of a

watercourse implies a covenant by the grantor not to disturb the grantee in the enjoyment of it: Co. Lit. 384 a, n. 1; *Vanderkarr v. Vanderkarr*, 11 Johns. 122; 4 Kent's Com. 473.

It does not appear that the plaintiff has not enjoyed his grant to the full extent in which it was made to him. The right to grind corn in a mill is in its nature determinable with the existence of the mill itself. It is like a right to enter upon the soil for a purpose not requiring its exercise after a limited time. The grantor is not bound to preserve the mill in order that the grantee may have the utmost benefit from his grant.

Even supposing such a duty to rest upon the grantor, by reason of a covenant implied or expressed, many questions might be presented before it could be determined that the present action might be maintained. One would relate to the form of the remedy; another would be whether the covenant ran with the land.

The verdict must be set aside, and a new trial granted.

WETHERBEE v. MARSH.

[20 NEW HAMPSHIRE, 561.]

PLAINTIFF'S BAD REPUTATION MAY BE SHOWN IN AN ACTION FOR SLANDER in mitigation of damages.

MITIGATION OF DAMAGES FOR SLANDEROUS WORDS.—Defendant may prove that when the slanderous words were spoken there was a general report current to the same effect as the words spoken.

CASE for slander. The declaration alleged that defendant had charged plaintiff with having burned his own barns for the insurance on them, and with burning the barns of defendant. Plea, general issue. Defendant offered to prove, in mitigation of damages, that there was a general report immediately after the barns were burned that plaintiff had set fire to them himself; and further, that plaintiff's general character was bad, and that his reputation was that of an incendiary before the buildings were burned. The evidence was admitted against plaintiff's objections. The jury found for the defendant on the counts founded upon the words charging the plaintiff with having set fire to his own buildings, and for the plaintiff upon the other counts. Plaintiff appealed.

Foster, for the plaintiff.

Handerson, for the defendant.

By Court, GILCHRIST, J. In action on the case for slander, the plaintiff seeks to recover damages for the wrong inflicted upon his character by the defendant's words. It is customary, in declarations for slander, to allege the general good character of the plaintiff, but this allegation is not traversable.

It is, however, well settled, that the defendant may, in mitigation of damages, show that the plaintiff's character was previously bad, because "a person of disparaged fame is not entitled to the same measure of damages for any particular charge calculated to affect reputation, as a person whose character was previously unblemished; and because a character of the first description is not susceptible of the same degree of injury as the other, or may perhaps be so bad as to be incapable of receiving injury." *Lemos v. Snell*, 6 N. H. 413 [25 Am. Dec. 468].

And the evidence may tend either to establish that the plaintiff's character is generally bad, or that he has a bad reputation with reference to the kind of vice imputed in the alleged slander. This was in substance remarked in the case cited, and the remark appears to be sustained by the authorities referred to.

In *Knobell v. Fuller*, Starkie on Slander, cited also in Peake's Ev., App. xcii., Eyre, C. J., said that he had always understood that in actions for words, the defendant might, in mitigation of damages, give any evidence short of such as would be a complete defense to the action, had a justification been pleaded; and he admitted evidence to show the existence of strong grounds of suspicion against the plaintiff. The libel charged him with having procured money from the friends of persons convicted of capital offenses, under pretense of being able to procure their pardon.

In *Newsam v. Carr*, 2 Stark. 69, Mr. Baron Wood said that in actions for slander, evidence that the plaintiff was a person of suspicious character, was admissible in mitigation of damages. This was in 1817. General reports have been admitted in mitigation of damages: *Mills v. Spencer*, Holt N. P. 533.

In *Williams v. Callender*, cited in a note to *Wyatt v. Gove*, Holt, 299, Lord Ellenborough said that the defendant might give in evidence somewhat of the real character of the plaintiff, to show that it was not unblemished.

In — v. *Moor*, 1 Mau. & Sel. 284, reports that the plaintiff has been guilty of practices similar to those charged, were admitted, to contradict the plaintiff's allegation that he was of good fame, and in mitigation of damages. This was upon the authority of *Earl of Leicester v. Waller*, 2 Camp. 251, reported also in Stark.

408. The point there decided was nearly the same involved in the present case, and the reasoning of the chief justice appears to conclude the question. It was an action for a libel, which stated that the plaintiff had been charged by his lady with the same offense for which Lord Audley had been executed in the reign of Charles I.

The defendant's counsel, at the trial upon the general issue, offered, in mitigation of damages, to prove that before and at the time of the publication of the libel it was generally rumored that such a charge had been brought against the plaintiff; that there was a general suspicion of his character and habits, and that his relations and former acquaintances had, in consequence, ceased to visit him.

Sir James Mansfield, chief justice, said that "as it seems to have been decided in several cases that if you do not justify, you may give in evidence anything to mitigate the damages, though not to prove the crime which is charged in the libel. I do not know how to reject these witnesses. Besides, the plaintiff's declaration says that he had always preserved a good character in society, from which he had been driven by the insinuations in the libel. Now the question for the jury is, whether the plaintiff actually suffered this *gravamen* or not. Evidence to prove that his character was in as bad a situation before as after the libel, must, therefore, be admitted."

The judge instructed the jury accordingly, and among other things, said, that "it did not matter whether the reports were well or ill founded, provided they got into many men's mouths." This case seems to have been followed by the English decisions: — *v. Moor*, 1 Mau. & Sel. 284; *East v. Chapman*, 2 Car. & P. 570; *Stevens N. P.* 2578.

The principle, however, has not been acknowledged in its full extent by the decisions in this country, and its application has in various cases been denied: *Matson v. Buck*, 5 Cow. 499; *Wolcott v. Hall*, 6 Mass. 514 [4 Am. Dec. 173]. And while evidence of the plaintiff's general bad character is admitted in extenuation of the injury, evidence that he has been generally believed guilty of the offense imputed by the slander, has been rejected. The reason assigned is, that the object of the prosecution is to silence such slanders; and it would be impossible to accomplish the purpose if the suit could be defeated by merely proving their existence.

But the evidence is admitted only in mitigation of damages; and if in point of fact the reputation of the plaintiff has become

fixed in respect to the crime imputed by the common speech of men, before the utterance of the words complained of, it is obvious that the mischief occasioned by them is less than if they had been the first cause of the general suspicion, and had in any just sense given birth to the infamy under which the plaintiff suffers.

There is certainly a distinction between the two cases which ought to be recognized in favor of the party who has committed only the minor offense of charging a crime that the accused has been so generally believed guilty of, that he has suffered but little by the slander. The jury alone can appreciate that difference by determining, upon the evidence, how far the plaintiff had been sunk in infamy before the weight of the slander complained of was added, and how far the aspersions cast by the defendant have deepened the infamy, if at all.

We conclude, therefore, in the conflict of opinion, which has undoubtedly existed on this question, that the better reason is with those who admit the evidence to go to the jury, to show that however unable the defendant has been to prove the truth of the words uttered, yet the calumny they contain is one under which the plaintiff so unquestionably lay before they were spoken, that less damage has resulted from them than if the reputation which they aspersed had been previously pure.

The defendant had spoken words charging the plaintiff with having burned his buildings and the buildings of others. Now, if before these words were spoken, it had been generally reported and believed that the plaintiff had committed those acts, still, if the words were untrue, they were unjustifiable. But to say that they did the plaintiff as much damage as if they had first caused the belief or suspicion of his guilt, would seem to confound a plain and recognized distinction.

How generally this belief prevailed, how firmly it was founded in the common mind, and to what extent it excused or palliated the conduct of the defendant, were questions for the jury to entertain, and were proper subjects for their consideration in assessing damages, or determining whether any had been sustained.

We think, therefore, that the evidence was properly admitted, and that there must be judgment on the verdict.

EVIDENCE OF PLAINTIFF'S GENERAL BAD CHARACTER IN LIBEL is admissible in mitigation of damages under the general issue, though justification is pleaded: *Stone v. Varney*, 30 Am. Dec. 762; *Sanders v. Johnson*, 36 Id. 564, and note 569; *Morehead v. Jones*, Id. 600.

EVIDENCE OF PRIOR REPORTS OF SIMILAR NATURE to words spoken are admissible in mitigation of damages: See *Sanders v. Johnson*, 36 Am. Dec. 564, and note 569, where prior cases are collected.

CASES
IN THE
SUPREME COURT OF JUDICATURE
OF
NEW JERSEY.

STATE *v.* COOPER.

[2 ZABEDKIE, 52.]

PROCURING ABORTION WITH CONSENT OF THE MOTHER of the child is not an indictable offense at the common law, unless at the time the mother is quick with child.

ATTEMPT TO PROCURE ABORTION, where the woman is not quick with child, is not indictable if made with her consent.

ATTEMPT TO PROCURE ABORTION, MADE WITHOUT CONSENT of the woman, is indictable as an aggravated assault, although she be not at the time quick with child. The assault is against the person of the mother, and is presumed to be without her consent.

EXPRESSIONS "QUICK WITH CHILD" AND "WITH QUICK CHILD" ARE SYNONYMOUS, and there is no foundation in law for any distinction between them.

FOR PURPOSE OF PUNISHING DESTRUCTION OF CHILD, the law recognizes it as a living being only after it quickens or stirs in the womb.

INDICTMENT The facts appear from the opinion.

Scotfield and the attorney general, for the state.

Whelpley, for the defendant.

By Court, GREEN, C. J. The only point reserved, and submitted for the opinion of this court, is whether an attempt to procure an abortion, the mother not being quick with child, is an indictable offense at the common law. It may simplify the inquiry to consider whether the procuring an abortion under such circumstances constitutes a crime. If the character of the act itself, when accomplished, be clearly ascertained, we shall be enabled with more certainty to decide upon the character of a mere attempt to commit the act.

Is, then, the procuring of an abortion, either by means of potions or of an operation used by the mother herself, or by another with her consent, an indictable offense at the common law, unless the mother be quick with child?

Undoubtedly the commission of such an act without the consent of the mother is indictable, as an assault upon the mother. The indictment in this case, charging, as it does in one count, that the defendant assaulted the mother and administered the potions, and in the other, that he made the assault and used violence to procure an abortion, is clearly good, and the court were right in refusing to quash. The indictment charges an assault with circumstances of aggravation. The offense charged is against the person of the mother, and is presumed to be, as in all other cases of assault, without her consent.

But when no assault is alleged or proved, where the act is done by the mother herself or with her assent, a very different question is presented. It was insisted, indeed, upon the argument, that the assent of the mother was null; that the offense was of so high a nature that no assent of hers could purge its criminality. But this, it is obvious, is begging the question. The charge of assault, of an offense against the person of the mother, is clearly purged of criminality by her assent. The ingredient which, according to the argument, gives character to the offense, and takes away the power of the mother to consent, is the attempt to procure abortion, which it is alleged is an offense against the person of the child. But the very point of inquiry is, whether that be at all an offense or not, and whether the child be *in esse*, so that any crime can be committed against its person.

In regard to offenses against the person of the child, a distinction is well settled between its condition before and after its birth. Thus, it is not murder to kill a child before it be born, even though it be killed in the very process of delivery: Hale's P. C. 433.

There appears to be at the common law a distinction equally well settled between the condition of the child before and after the mother is quick. "Life," says Blackstone, "begins, in contemplation of law, as soon as an infant is able to stir in the mother's womb:" 1 Bla. Com. 129.

It is not material whether, speaking with physiological accuracy, life may be said to commence at the moment of quickening, or at the moment of conception, or at some intervening period. In contemplation of law, life commences at the mo-

ment of quickening, at that moment when the embryo gives the first physical proof of life, no matter when it first received it.

The offense of procuring an abortion seems, by the ancient common-law writers, to be treated only as an offense against life. Thus Coke says: "If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if a man beat her whereby the child dieth in her body, and she is delivered, this is a great misprision, but no murder:" 3 Inst. 50. It was anciently holden that the causing of an abortion by giving a potion to, or striking a woman big with child, was murder; but at this day it is said to be a great misprision only, and not murder, unless the child be born alive, and die thereof: 1 Hawk., b. 1, c. 31, sec. 16.

If a woman be quick or great with child, if she take, or another give her any potion to make an abortion, or if a man strike her, whereby the child within her is killed, it is not murder nor manslaughter by the law of England, because it is not yet in *rerum nature*, though it be a great crime: 1 Hale's P. C. 433. If a woman be quick with child, and by a potion or otherwise killeth it in her womb, or if any one beat her whereby the child died in her body, and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offense in quite so atrocious a light, but merely as a heinous misdemeanor: 1 Bla. Com. 129.

In two of these authorities (Hale and Hawkins) the term "big" or "great" is obviously used as tantamount to "quick." In all of them, the authors are treating of the crime of murder, of the offense against human life; and they distinguish between the destruction of the life of the infant before and after birth. There is in none of them a reference to the mere procuring of an abortion by the destruction of a *fœtus* unquickened, as a crime against the person or against God and religion. Abortion, as a crime, is to be found only in modern treatises and in modern statutes. No trace of it is to be found in the ancient common-law writers. Bracton, indeed, uses language which at first view might seem to favor a different conclusion. He says: "*Si aliquis, mulierem pregnantem percusserit, vel ei venenum dederit, per quod fecerit abortionem, si puerperiem jam formatum fuerit, et maxime si animatum, facit homicidium.*" Brac., lib. 3, c. 21.

He is treating, however, of the crime of homicide, and it is perfectly certain, by the unanimous concurrence of all the au-

thorities, that that offense could not be committed unless the child had quickened.

So far as my researches have gone, I have found no precedent, no authority, nor even a *dictum* (prior to Lord Ellenborough's act, 43 Geo. III., c. 58), which recognizes the mere procuring of an abortion as a crime known to the law.

There is a precedent in 3 Ch. Cr. L. 557, which has been frequently referred to in support of the principle, that an attempt to procure an abortion was a crime at the common law. Properly considered, however, it is rather an authority the other way. It charges, in each of its counts, an assault by the defendant upon the mother; it is, indeed, a mere indictment for an assault with circumstances of aggravation. It contains no count for the mere procuring of an abortion, or for an attempt to commit the offense; thus affording a strong indication that the pleader deemed some other ingredient necessary to constitute a crime. It has been well observed, moreover, that the indictment contains averments, which if not directly, yet by necessary or fair implication, show that the child had quickened. It is remarkable, too, that this indictment was drawn at trinity term, 42 Geo. III. The next year Lord Ellenborough's act was passed, declaring the procuring of an abortion, though the mother be not quick with child, a felony. It seems not improbable that a supposed defect in the law, in the very particular now under consideration, led to the passing of the act.

The distinction, thus clearly recognized in the ancient law, between the condition of the child, and the consequent criminality of an act tending to its destruction, before and after quickening, has been fully recognized by the earlier legislation upon the subject. Thus the statute of 43 Geo. III., makes it a capital offense to cause the miscarriage of a woman quick with child, and a felony of a mitigated character to cause a miscarriage before the quickening.

The earlier legislation in this country upon the subject recognizes the same distinction: 2 R. S., N. Y., 1829, 661, 38, 9; 694, sec. 21; R. S., Ohio, 1804, 252; R. S., Conn., 1838, 145, sec. 15. It is only in very recent statutes that the distinction has been abolished.

By the laws of most countries, this crime is punished with more severity if committed after the quickening, than before. The Roman penal code made the same distinction: *Male's Jur. Med.* 113.

It is true that, for certain civil purposes, the law regards an

infant as in being from the time of conception, yet it seems nowhere to regard it as in life, or to have respect to its preservation as a living being. So, if the mother be convicted of a capital offense, the mere fact of pregnancy is of no avail to stay execution of the sentence of death. It is only when the mother is found "quick with child" that the sentence is respited till after delivery: 4 Bla. Com. 395.

In a modern case, a distinction was taken by a learned judge upon the circuit, between the terms "quick with child" and "with quick child," and it was said that the former term means simply having conceived: *Regina v. Wycherley*, 8 Car. & P. 262. There is no foundation whatever in law for this distinction. The ancient authorities show clearly that the terms are synonymous, both importing that the child had quickened in the womb, and that the period had arrived when the life of the infant, in contemplation of law, had commenced: *Sarah Baynton's Case*, 14 St. Tr. 634; 1 Hale's P. C. 368; 4 Bla. Com. 395.

In England there does not appear to have been any adjudication upon the point now under consideration. But the supreme court of Massachusetts have decided that the procuring of an abortion, unless the mother be quick with child, is not an indictable offense at the common law: *Commonwealth v. Parker*, 9 Metc. 263 [43 Am. Dec. 396]; *Commonwealth v. Bangs*, 9 Mass. 388.

Two modern elementary writers upon criminal law, of acknowledged reputation, have given some countenance to the idea, that the mere attempt to procure an abortion is an indictable offense at the common law: 1 Russ. on Cr. 540; Rosc. Cr. Ev. 190. Neither of them, however, states the principle with confidence, nor distinguishes between the condition of the child before and after quickening. Both refer to the precedent in Chitty's Criminal Law as the only authority for the proposition. That precedent, as has been seen, does not support the doctrine: See, also, 1 Lewis' Cr. L. 1, note b.

In a recent American treatise upon criminal law, the proposition that the procuring of an abortion was indictable at the common law, had been stated, and advocated with much learning: Whart. Cr. L. 308; Whart. Prec. 108. The only direct authority cited in support of the doctrine, is the case of *The Commonwealth v. Demain*, decided by the supreme court of Pennsylvania, at January term, 1846, and reported in 6 Pa. L. J. 29. Although in that case the point appears to have been elaborately argued by counsel, it does not appear to have been

decided by the court. On the contrary, the court are reported as declaring that the indictment before them sufficiently averred that the party injured was pregnant and quick with child, which was destroyed and killed. The obvious inference would seem to be, that the court regarded the fact that the child was quick (either by direct averment or necessary implication) as essential to the validity of the indictment. It is difficult to perceive how the court could, in any aspect of that case, have sustained the demurrer. The indictment (like the precedent in *Chitty*) charged that the defendant committed an assault upon the woman, and was clearly a good indictment at common law.

We are of the opinion that the procuring of an abortion by the mother, or by another with her assent, unless the mother be quick with child, is not an indictable offense at the common law, and consequently that the mere attempt to commit the act is not indictable. There is neither precedent nor authority to support it. If the good of society requires that the evil should be suppressed by penal inflictions, it is far better that it should be done by legislative enactments than that courts should, by judicial construction, extend the penal code or multiply the objects of criminal punishment. We deem it unwise upon this subject to occupy debatable ground. A reasonable doubt should be resolved in favor of the accused.

This indictment is valid; but if upon the trial it appears that the means used to procure the abortion were used with the consent of the mother, the defendant must be acquitted.

RANDOLPH and OGDEN, JJ., concurred.

ABORTION, PERFORMING OPERATION TO PRODUCE, IS NOT INDICTABLE at common law, if done with the woman's consent, unless she is quick with child: *Commonwealth v. Parker*, 43 Am. Dec. 396.

THE PRINCIPAL CASE IS REFERRED TO in *State v. Geddicke*, 14 Vroom, 89, where it is said that the act of March 1, 1849, was passed to remedy an adjudged defect in the law of New Jersey, that to cause or procure an abortion before the child is quick was not a criminal offense at common law or by any statute of that state.

DEN EX DEM. TRUMBULL v. GIBBONS.

[2 ZABRINGER, 117.]

WILL CAN NOT BE SET ASIDE BY COURT, because of its disapprobation of the motive that actuated the testator, or of the disposition that he makes of his property, unless there is, not merely in the motives, but in the actual disposition, something which is against good morals or against public policy.

WHERE CONDITION SUBSEQUENT IN DEVISE OF LANDS IS BAD, the estate devised is discharged of the condition, and is absolute in the first taker. INSANITY OF TESTATOR, IF RELIED UPON TO DEFEAT WILL, must be proved. PARTIAL INSANITY OF TESTATOR MAY INVALIDATE WILL which is proved to have been the direct result of such insanity. But where the facts of the case are sufficient to account for the motives of the testator in making the disposition of his property that he does, there is no reason for resorting to the explanation of monomania or any other form of insanity. INFLUENCE ACQUIRED OVER TESTATOR BY KIND OFFICES, or even by persuasion unconnected with fraud or contrivance, is not such undue influence as will invalidate a will.

EJECTMENT to recover certain lands. The lessors of the plaintiff claimed title as the heirs at law of Thomas Gibbons. The defendant, William Gibbons, claimed title under the will of said Thomas Gibbons. The jury rendered a verdict for the defendant, and a rule *nisi* was obtained to set aside the verdict and for a new trial. The other facts appear from the opinion.

W. Pennington and Hornblower, for the plaintiff.

Vroom and Wood, for the defendant.

By Court, CARPENTER, J. The amount, directly or indirectly, involved in the present controversy, rather than any intrinsic difficulty in the questions raised, has given importance to the argument of this cause. A new trial is sought, chiefly on the ground of misdirection, partly in regard to matters apparent on the face of the will, and partly matters extrinsic, arising in the course of the trial.

1. I shall first make some remarks upon the construction of the will, remarks which I intend to apply only to the character and validity of the disposition of the real estate in this state. I shall look for the legal character of that disposition, not in the motives and feelings which actuated the testator, but in the nature of the disposition itself. That the will was the offspring of an immoral and irreligious state of feeling; that the motives which led to it were uncharitable, antichristian, or even impious, according to my judgment, can have no effect on this branch of the inquiry. What, then, was the disposition made by the testator?

In the first place, he devises certain enumerated estates, among them the premises in controversy, to William Gibbons, his heirs and assigns forever, and adds, that in case William Gibbons should die without lawful issue, the said estates should go over to certain specified religious and charitable institutions. It is not necessary to inquire whether these words, standing

alone, would or would not create an estate tail. They do not stand alone, but are qualified and controlled by subsequent dispositions in the will. The testator then adds these words to the clause already referred to:

"I do hereby mean and intend that all the property, real and personal, given, devised, and bequeathed to my said son, shall by no casualty in this life go to John M. Trumbull, or all or any of his children, or one or more of their or either of their descendants." And in the subsequent clauses he attempts to carry this declared intention into effect. In a succeeding clause, other estates are also given to William Gibbons, his heirs and assigns forever, with a limitation over in case of his death without issue or without such will as would exclude Trumbull and his family from the enjoyment of any part of his estate. But the conditions attempted to be imposed are all to be found in a subsequent clause of the will, which, therefore, it will only be necessary for me further to recite: "And my said estates, in the states of Georgia, New Jersey, South Carolina, and New York, are given, devised, and bequeathed to my said son, William Gibbons, upon the following further conditions, that is to say: if he should die without any lawful issue and without making a last will and testament, or if he should make a last will and testament, and thereby devise and bequeath any part of my estate devised and bequeathed to him, etc., to John M. Trumbull or to his children, etc., or their or either of their descendants, or to any person in trust for all or either of them, or any part of the proceeds, or as a part of his estate while in my possession; or if it shall appear after his death that my said son, William Gibbons, had, in any period of his life after this date, given any property of any kind, or money arising from what funds or source it may (even if it should be from property I have already given my said son), to the said John M. Trumbull, or either of his children or descendants, then and in any such case the estate, by this, my will, devised and given to my said son, shall go to the public uses hereinbefore expressed, and not pass by any such deeds or testamentary dispositions." To which clause the testator added a most extraordinary prayer for success in this unnatural exclusion.

These limitations and conditions, so attempted to be imposed on the principal devisee, and which are drawn in question in the present controversy, stripped of the peculiar phraseology with which the testator has chosen to invest them, I think will be found to be substantially the following: If William Gibbons

should die without lawful issue and without will, or if he should make a last will, and give or devise any part of the estate derived from the testator to John M. Trumbull, or any of his descendants, or if it should appear, after the death of William Gibbons, that he had ever so given any of such estate, or any part of the proceeds thereof (or indeed funds arising from any source), that then the estate should go over to the charities specified in the will. It is to be seen whether this devise gives any estate known in the law, whether the conditions annexed are unlawful, and, if so, whether they avoid the primary estate, or whether the whole disposition is void, because against sound morals and against sound policy.

The position taken by the defendant's counsel is clearly sound, that no court will attempt to set aside a will on account of its disapprobation, however strong, of the motives that actuated the testator, or of the disposition made by him. The power of disposition belongs equally to the good and to the bad, and wills can not be set aside merely because unequal or unjust. If capacity, formal execution, and volition appear, the will of the most impious man must stand, unless there is something, not in the motives which led to the disposition, but in the actual disposition, against good morals or against public policy. It may be harsh and severe, it may be extremely cruel, under some circumstances, to disinherit one child, and to bestow the whole estate upon another, but if the testator be of disposing mind and memory, and duly execute such will in the forms prescribed by law, no court can interfere. If this will, or any of the devises contained in the will, be void, it must be on other grounds than those to which I have referred.

When a devise over depends upon a definite failure of issue, an estate in fee with an executory devise over is created, but when such devise over is made to depend upon an indefinite failure of issue, it becomes a contingent remainder limited on an estate tail. That a definite failure of issue is here meant is very clear, the dying without issue being connected with the further contingency of dying without making a last will. There is a strong analogy between this limitation and one lately under the consideration of this court, in the case of *Armstrong v. Kent*, 1 Zab. 509. In that case, after words of disposition, which, standing alone, would have carried a fee, the testator added a limitation over, in case the first taker died without heirs and intestate. The court held that a power of disposition by will was implied; that such power of disposition was inconsistent

with, and defeated the limitation over, and that consequently the estate was absolute in the first taker. See, also, *Cuthbert v. Purrier*, 1 Jac. 415; *Green v. Harvey*, 1 Hare, 428; 4 Kent's Com. 270 *et seq.* If the language of this will comes within the case of *Armstrong v. Kent*, the limitation over in such case will not be good by way of executory devise. If it were simply a case of dying without issue and without will, in such case, the limitation over not being good, the first estate would become absolute. But this phraseology is coupled with the further conditions which are attempted to be imposed. The power of disposition by will is not absolute; but there is this further condition annexed, that if the devisee should in any way give any part of any property derived from the testator to Trumbull, or to any of his family, the estate should be forfeited and go over. Whether good or bad, this is a condition subsequent in its very nature. It is a condition to defeat the estate given, and not one upon which the estate was to vest. If a conditional limitation because an estate is limited over on the breach of the condition, still the limitation over was intended to take effect only on a contingency, which must happen, if at all, subsequently to the vesting of the primary estate. If, then, the condition be bad, the estate is discharged of the condition, and is absolute in the first taker.

It has, however, been urged by the defendant's counsel that the condition is one simply in restraint of alienation to a particular person and to his heirs, and that such condition is good. It is not necessary for the present purpose to settle whether the condition be good or bad. The present case, perhaps, goes much further than any case cited on the argument, being an attempt, not merely to restrain alienation by grant or devise to Trumbull or his heirs, but to shut out one branch of the testator's descendants from the possibility of receiving aid from the devisee, whatever might be their necessity or the urgency of their distress. The testator makes it a condition that if the devisee should give any property of any kind, or money arising from any source, to Trumbull or any of his descendants, then the estates should go over. Such condition might well be held bad without infringing the generally received rule as to partial restraints or alienation; but, as I have already said, it is not necessary to consider or to settle the question. Suppose the conditions to be declared bad as *contra bonos mores*, as an attempt to impose an uncharitable, unchristian restraint upon the devisee, still the primary devise would not fail; it would be simply dis-

charged of the condition, and rendered absolute. The authorities are clear, and further discussion on this point seems unnecessary.

2. But it has been urged with great earnestness, on the side of the lessors of the plaintiff, that there was hallucination of mind on the part of the testator towards Trumbull and his family, a causeless and unwarrantable dislike amounting to monomania, and that this state of feeling was caused, or at any rate practiced on by the son, who thus obtained the disposition in his own favor.

Every person is presumed to be of sound mind until the contrary is proved; it is therefore incumbent on the party attempting to defeat a will on the ground of the testator's insanity, to prove the existence of such disability. The rule is well established by authority, and it is one which is in accordance with sound reason. He who wishes to impeach a will for such cause must support his allegation by proof before he can overcome the presumption which the law raises of the sanity of the testator: Shelf. on Lun. 274; *Sloan v. Maxwell*, 2 Green's Ch. 581.

This is not one of those cases in which it is a question what amount of capacity will enable a testator to dispose of his estate, or what weakness of understanding will disable him from so doing. It was not contended in the argument that there was anything in the case to show general insanity or a general want of testamentary capacity on the part of the testator. He was a man of unusual powers of mind, and, as the evidence shows, he retained those powers nearly or quite to the close of his life, certainly down to the period of making this will. But while it is admitted that he was a man of more than ordinary vigor of intellect, yet it is said that he labored under a morbid state of mind, of the character already mentioned, and that the will was the offspring of such feelings.

When delusion exists in the mind of a person on one or more subjects only, it is termed partial insanity. I do not question but that partial insanity will invalidate a will which appears to have been the direct result of such insanity, though the testator, at the time of making it, may have been sane in other respects upon ordinary topics. The great case of *Dew v. Clark*, 2 Add. E. R. 102, may be considered as establishing this doctrine. The testator in that case harbored the most unfounded and unreasonable impressions in regard to the character of an only daughter, against whom, in consequence, he entertained an unnatural dislike. He imagined that the daughter was vile, profli-

gate, and depraved in the highest degree, and treated her accordingly with the utmost severity, and even cruelty, and finally cut her off in his will with an inadequate provision. It was a dislike founded purely on delusion. It was satisfactorily shown, that while this delusion had gained such possession of his mind that nothing could shake his belief, yet, in point of fact, she was amiable in disposition, engaging in her manners, of superior natural talents, diligent, dutiful, affectionate, modest, and virtuous, and giving no occasion for the extraordinary feelings exhibited by the father. The will, being proved to be the direct offspring of this delusion, was set aside and declared void by the distinguished judge before whom the cause was first heard; and his judgment was subsequently sustained by the courts before which, by appeal or otherwise, it was brought for review. The case turned on the fact of a remarkable delusion, the only clear test of insanity, unquestionably proved, and it has since received the unqualified approbation of the profession: See *S. C. sub nom. Clark v. Dew*, on application for commission of review: 1 Russ. & M. 103; Shelf. on Lun. 297.

In what does the alleged delusion consist, or how has it been exhibited in the present case? I have carefully looked through the testimony to be found in the case prepared, and in the documents, including the diary and the libels, which evidence I am not disposed to recapitulate or record. It is sufficiently referred to and stated in the charge of the chief justice for the present purpose, and it undoubtedly exhibits a sad instance of the extent to which family feuds may be carried. There seems to have been, on the one side, an imperious and haughty temper sustained by wealth and power, and restrained by no softening influences from moral or religious principles. On the other, as I take it, there was great imprudence on the part of a daughter and son-in-law in dealing with the errors of an uncontrollable and violent parent, upon whom they were dependent. But I can find nothing like delusion or insanity. The first dissatisfaction and incipient dislike were heightened, by continued disputes and irritation, into settled aversion and enmity; but this was the result of obvious causes having an actual existence, and not the consequence of imaginary difficulties. The rebukes for alleged licentiousness, the disputes, and difficulties with regard to property, threatened divorce, the libel suit, all these matters which embittered the feelings of the testator in the highest degree, were not mere imaginary causes of offense. These and other successive bitter quarrels between the testator and his sou-

in-law, daughter, and family, certainly occurred, and they account for the provisions of the will, by which the latter were disinherited, without any necessity to resort for explanation to monomania or any other form of insanity. No one witness produced, not even Mr. Trumbull himself, towards whom this hallucination was said chiefly to exist, has expressed the opinion that the testator was in the slightest degree insane.

The idea of undue influence need not be resorted to in order to account for a result which might naturally flow from causes such as have been merely alluded to; certainly it must be clearly proved, and can not be inferred under such circumstances. It has been said, that the influence to vitiate a testamentary act must amount to force and coercion destroying free agency, importunity which could not be resisted, and which was yielded to for the sake of peace, so that the motive was tantamount to force or fear.

It is not the influence acquired by kind offices, or even by persuasion unconnected with fraud or contrivance; though if persuasion or other means of influence be connected with fraud, it may admit of a far different consideration. Fraud may be employed as a means of influencing, and may afford ground for impugning a testamentary act no less than force, and the peculiar relation between the testator and the party benefited, as client and attorney, etc., when the former was weak and liable to imposition, has been held to furnish strong presumptions in regard to undue influences. But I can see no such evidence in this case as will support the charge. No direct coercion can be pretended; but the relation between the testator and his son, in connection with the circumstances under which the alienation in the family took place, and in connection with the circumstances under which the will was made, and the character of the dispositions for the benefit of the son, are relied on as proving or authorizing the inference that the prejudices and feelings of the father were practiced upon. These circumstances were recapitulated by the judge in his charge, and submitted to the jury as grounds for a vigorous examination, and they would, as stated, go far to raise suspicion, if the father had been a man likely to be controlled or influenced, if the disposition had not been in accordance with intentions long previously expressed. The employment and payment of the scrivener by the son, the aid he gave in drafting the will, his conduct towards Trumbull, his connection with the printing of the libel, and the part taken in drawing and signing the cove-

nant, undoubtedly deserved attention at the trial, and under some circumstances might have weighed much in the investigation. Yet still they are but mere grounds of suspicion, while the character and conduct of the testator repel the idea that he was operated on by any such extrinsic influence as could be effective to set aside his will.

The father was a man who, according to the testimony, could not be controlled, "a man of strong mind, strong passions, strong prejudices, and strong self-will." He had quarreled with Trumbull years before: additional causes of irritation had from time to time sprung up, in regard to which there is no proof that they were stimulated or aggravated by the son; and even if such had been the case, it could scarcely have been urged as a ground for impugning a will made so long subsequent. He had repeatedly declared that in a certain event he would cut off Trumbull and his children from all further benefit of his estate; and when that event occurred, which depended on the action of Trumbull himself, he reiterated his determination, to which he unalterably adhered. In 1819 he made a will, in which he carried that determination into effect, and in two or three subsequent codicils, all, as well as the will just referred to, his own handwriting, his continued action was in perfect accordance with his previously declared intentions. These former wills and his antecedent declarations and conduct were all in entire accordance with the actual disposition finally made, and leave no other conclusion on my mind but that the last will was the result of a deliberate determination on the part of the testator, and not of any extrinsic influence. In my judgment, the jury rightly responded to the inquiry, so emphatically and so properly put to them in the charge, that they were to inquire, not whether the will was a fair will, a just will, an equitable will, the will of a kind-hearted and right-thinking man, but whether it was the will of Thomas Gibbons. The judge properly put the case to the jury with a directness and an emphasis suitable to the occasion. No other verdict could have stood, and it was right that the jury should not be permitted to err from feelings which possibly may have been excited by the harshness of the will, when the evidence was clear and the case free from doubt.

I have not thought it necessary to notice some of the minor points argued by counsel, because in the view I take of the case they become immaterial. I have come to the conclusion, after a careful examination of the case, and after an anxious attention

given to the argument of the respective counsel, that there was no misdirection by the judge; that the verdict is in accordance with the evidence, and that the rule should be discharged.

GREEN, C. J., and RANDOLPH, J., concurred.

Rule discharged.

EXECUTORY DEVISES: See *Downing v. Wherrin*, 49 Am. Dec. 139, note 147, where other cases are collected.

TESTAMENTARY CAPACITY, WHEN MUST BE PROVED: See *Gerrish v. Nason*, 39 Am. Dec. 589, note 592, where other cases are collected.

INSANITY AFFECTING TESTAMENTARY CAPACITY: See *Clark v. Fisher*, 19 Am. Dec. 402, note 408, where other cases are collected.

UNDUE INFLUENCE, WHAT CONSTITUTES: See *Floyd v. Floyd*, 49 Am. Dec. 626, note 638, where other cases are collected.

THE PRINCIPAL CASE IS CITED in *McDonough v. Murdock*, 15 How. 412, to the point that conditions subsequent, if bad, do not divest the estate. It is also distinguished in *Boylan v. Meeker*, 4 Dutch. 291.

VANDEGRIFT *v.* REDIKER.

[2 ZABRISKIE, 185.]

ENGINEER IN CHARGE OF LOCOMOTIVE IS NOT LIABLE for injury to cattle trespassing upon a railroad track, unless he willfully causes such injury, or is guilty of such gross negligence as would amount to willfulness.

OWNER OF CATTLE, WHO ALLOWS THEM TO TRESPASS ON RAILROAD, does so at his peril.

TRESPASS for killing plaintiff's cow by running against her with a locomotive then in charge of the defendant. Judgment was rendered for the plaintiff below. The other facts appear from the opinion.

Bradley and Wall, for the plaintiff in *certiorari*.

Vroom, contra.

By Court, CARPENTER, J. When the act charged as a trespass was committed, whether that act was accidental or otherwise, the defendant, an engineer having charge of a locomotive, was engaged in the regular performance of his duty. This duty was a lawful one, and the company, in running the engine on its railroad, was clearly within the powers granted by its charter. The road had been built, and engines and cars placed thereon, for the purpose of transporting passengers and merchandise by means of steam-power, in exact conformity with the object of the act of incorporation: *Bordentown etc. T. Co. v. Camden & Amboy Railroad Co.*, 2 HARR. (N. J.) 314.

The duty, then, in which the defendant was engaged being lawful, neither he nor the company could be liable for any accidental injury which might occur in consequence of the passage of the train, unless there was a want of diligence and precaution, or the right was exercised in an unlawful and unreasonable manner. Undoubtedly, a company, intrusted with an agent of such dangerous character for its private and particular advantage, must use all reasonable diligence to prevent damage to the property of third persons. If negligent, of course the company would be liable for all consequent injury to any one who had not deprived himself of his remedy by some default or misconduct on his own part: *Burroughs v. Housatonic Railroad Co.*, 15 Conn. 124 [38 Am. Dec. 64]; *Garris v. Portsmouth etc. Railroad Co.*, 2 Ired. 324; *Piggot v. Eastern Counties Railway Co.*, 3 C. B. 229.

But the case shows that the cow was unlawfully at large, straying without control in a public thoroughfare, when killed by the locomotive. At the common law it is well settled, that a man is not obliged to fence against any cattle, unless indeed it be against cattle rightfully in an adjoining close; but the owner is obliged to keep them in his own close at his peril. The statutes of this state which prescribe the regulations as to fences, extend only to owners of adjoining closes, and owners of land are not compelled to protect themselves against trespasses committed by cattle suffered to wander at large and pasture upon the public roads. The rule, it seems to me, must apply to a lawfully authorized railroad as well as to other property. In this case it does not appear that the cow had escaped from the owner without any fault on his part, or that he had made fresh pursuit. Any injury that might occur in case of such accidental escape, or that might occur to cattle being driven along the public highway, in consequence of the unfenced railroad, might admit of a different consideration. But in this instance the cow, when struck, was trespassing, so far as appears, without excuse, upon the property of the company: *Coxe v. Robbins*, 4 Halst. 384; *Chambers v. Matthews*, 3 Harr. (N. J.) 368; *Rust v. Low*, 6 Mass. 90; *Stackpole v. Healy*, 16 Id. 33 [8 Am. Dec. 121]; *Stafford v. Ingersol*, 3 Hill, 38.

Under such a state of facts nothing but willfulness on the part of the engineer, or such negligence as would amount to willfulness, would make him liable for the loss of the cow so exposed by the fault of the owner. It was properly admitted by one of the counsel on the argument, that had the injury been

willful, the defendant would have been liable, and undoubtedly such is the rule: See *Brownell v. Flagler*, 5 Hill, 282; Lord Denman, in *Lynch v. Nurdin*, 1 Ad. & El., N. S., 29; *Davies v. Mann*, 10 Mee. & W. 546; *Butterfield v. Forrester*, 11 East, 60. But in case of mere negligence, not so gross as to evince recklessness or design, an action can not be maintained by one, himself clearly in the wrong. It has been so held in cases arising upon the collision of carriages and vessels, as well as in other cases which present a strong analogy. There must be wrong as well as damage, and there is no legal injury where the loss is the result of the common fault of both parties: *Rathbun v. Payne*, 19 Wend. 399; *Barnes v. Cole*, 21 Id. 188; *Butterfield v. Forrester*, *supra*; *Sarch v. Blackburn*, 4 Car. & P. 297; *Vanderplank v. Miller*, 1 Moo. & M. 169.

It does not appear that there was any culpable negligence on the part of the engineer in the present instance. It is said in the evidence, as stated, that he was a careful man. According to the testimony of a passenger in the train, the bell was twice tapped, and the engine twice reversed, though the whole occurrence being sudden, the collision almost immediately succeeded the notice thus given. We can not presume that a careful man, charged as was this defendant, with the safety of the numerous passengers in the train, would have periled their lives by willfully running against a cow previously seen. The only circumstance which can give the least color to such a charge, is that the line of road, at the point where the accident occurred, could have been seen by the engineer from the distance of one fourth of a mile, perhaps farther. But the train was in rapid motion. The exigencies of the business to which railroads at this day are applied require as much speed as is consistent with safety. The cow, alarmed by the approach of the engine, may, at the moment, have darted on the road, so that the view of the danger by the engineer and the collision may have been almost simultaneous. We do not think, therefore, that this circumstance will authorize us to infer such gross negligence as will make the defendant liable.

We are of opinion that the judgment below must be reversed.

CATTLE TRESPASSING ON RAILROAD, LIABILITY FOR INJURY TO: See *Tonawanda R. R. Co. v. Munger*, 49 Am. Dec. 239, note 261, where this subject is fully discussed. In *Maynard v. Boston & Maine R. R.*, 115 Mass. 460, the principal case is cited to the point that where animals are injured while trespassing on a railroad, the company is not liable for anything short of reckless and wanton misconduct on the part of its employees in managing its trains.

CASE
IN THE
COURT OF CHANCERY
OF
NEW JERSEY.

RANDOLPH v. GWYNNE ET AL.

[3 HALSTED'S CHANCERY, 88.]

WHERE MORTGAGOR OF MILL DRIVEN BY WATER PLACES STEAM-ENGINE in the basement thereof, on a stone and brick foundation, into which it is fastened by iron rods, and uses it for the purpose of propelling the machinery at such times only as the water proves insufficient for that purpose, the power of the engine being applied to run the machinery in the same manner as when the wheel is driven by water, such engine does not become subject to the mortgage, but may be removed from the premises.

MOTION to dissolve an injunction. The opinion states the case.

F. T. Frelinghuysen, for the motion.

C. Parker and W. Pennington, contra.

HALSTED, Chancellor. In 1839, Hugh F. Randolph conveyed to William Gwynne a mill-seat on Second river, in Essex county, and eight acres of land including the same, with two saw-mills and other buildings thereon, for fifteen thousand dollars; of which Gwynne paid one thousand five hundred, and for the residue thereof gave Randolph a mortgage on the premises, payable in installments; about six thousand dollars of which is now payable.

Gwynne converted the buildings, by alterations and additions, into a paper-mill, putting in the machinery proper for that purpose, and a new water-wheel; the mill being made complete as a mill to be driven by the water-power on the premises.

Several seasons previous to that of 1845 were so unusually dry

that the water was not sufficient to drive the mills all the time. Gwynne therefore placed a steam-engine in the basement or cellar of one of the buildings, digging a hole in the ground, and laying a foundation of stone, brick, and cement in the hole, large enough for the engine to rest upon; bolts or rods of iron being fastened in this foundation, in proper positions, and projecting above the upper surface of it far enough to pass through holes in the bed-plate of the engine, when placed upon it, and receive nuts to screw the engine down. The power of the engine was applied directly to the driving-wheel, so that the machinery of the mill moved precisely as if the wheel was turned by the water; and the engine was used only to supply power when the water was deficient. In 1848, and perhaps in 1847, there was no deficiency of water; and Gwynne, in the winter of 1848, made a contract to sell the engine, and was about removing it.

Randolph filed a bill for the foreclosure of his mortgage, a part of the money secured by it being payable and unpaid; and therein prayed an injunction restraining Gwynne from removing the steam-engine. The injunction was granted by a master, *ex parte*, and it is moved to dissolve it.

It is claimed on the part of the mortgagee that the engine, so placed, and for such purpose, became subject to the lien of his mortgage, and that Gwynne has no right to remove it. I can not think so. The mill is complete without it; and except in dry seasons it is useless. It has no such connection with any of the machinery of the mill proper, or with the building, but that it may be removed without injury to either; and it is easily removable. I see no reason why such a machine or engine might not be hired by a mill-owner for the exigency of a dry season, and placed upon the premises in any proper position, inside or outside of the mill, so as to apply its power to drive the machinery, until the rains should supply the water-power in reference to which the mill was built; and when the engine should be no longer wanted, it might be returned to the owner.

The injunction will be dissolved.

Order accordingly.

FIXTURES AS BETWEEN MORTGAGOR AND MORTGAGEE: See *Winslow v. Merchants' Ins. Co.*, 38 Am. Dec. 368, note 375, where other cases are collected.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
NEW JERSEY.

DOUGHTY v. SOMERVILLE & EASTON R. R. Co.

[3 HALSTED'S CHANCERY, 629.]

WHERE, ON APPEAL FROM ORDER DISSOLVING INJUNCTION, THE CHANCELLOR STAYS, until the next sitting of the court of errors and appeals, the proceedings which the injunction was issued to restrain, the court has power to extend such stay until the hearing on appeal; but this power should be exercised only upon the most imminent necessity. The granting or refusing of such extension rests in the sound discretion of the court, and it should not be granted where a temporary injunction will work irreparable injury to the party enjoined.

MOTION for order extending stay of proceedings. The injunction to which reference is made in the opinion was to restrain the defendant and its chief engineer from further proceedings for the appointment of commissioners; and from having any assessment of damages made to the complainant; and from taking possession of, using, or occupying, in any way, any land of the complainant. The other facts are sufficiently stated in the opinion.

P. D. Vroom and A. Whitehead, in support of the motion.

B. Williamson and F. T. Frelinghuysen, *contra*.

By Court, GREEN, C. J. By the ancient practice it was held that an appeal from a court of equity stayed all further proceedings in the court below. But by the modern English practice, the appeal does not stay proceedings, but an order for that purpose must be obtained either in the court of chancery or in the house of lords: *Huguenin v. Baseley*, 15 Ves. 182; *Willan v. Willan*, 16 Id. 216; *Monkhouse v. The Corporation of Bedford*, 17 Id. 380; *Eden on Inj.* 229.

The better practice seems to be to make the application to the house of lords, for even the order staying proceedings may be appealed from: *Huguenin v. Baseley*, 15 Ves. 182; *Lewes v. Morgan*, 5 Price, 468.

By our practice, an appeal from an interlocutory decree does not stay proceedings except by an order of this court or the court of chancery for that purpose. If an appeal from a final decree be filed in ten days, it prevents issuing process on the decree: Rules of the court of chancery, rule 20.

Prior to the revised statutes in New York, the appeal *ipso facto* stayed proceedings on the point appealed from. An order for leave to proceed was necessary: *Green v. Winter*, 1 Johns. Ch. 81 [7 Am. Dec. 475]; 2 Hoffman's Ch. Pr. 31; *Messonnier v. Kauman*, 3 Johns. Ch. 66.

The injunction being dissolved, the appeal can not revive the process or give it force. It can not be revived but by a new exercise of judicial power: *Hoyt v. Gelston*, 13 Johns. 140; *Wood v. Dwight*, 7 Johns. Ch. 295; *Hart v. Mayor of Albany*, 3 Paige, 381.

It is, in effect, the granting of a new injunction. It is said that this is an original exercise of judicial power; and unquestionably it is so. It is thereupon objected that this is a mere appellate tribunal, and can not exercise such power. The consequence does not follow. It may not exercise original power in acquiring jurisdiction over the cause. But that jurisdiction once regularly obtained, this court may exercise original jurisdiction over the parties, especially when the proceeding is *in rem*, and the object of the order to maintain unchanged, as far as practicable, the *status* or condition of the subject-matter of the controversy during the pendency of the suit. It is on the same principle upon which a court of common law, in an action of ejectment or dower, will make an order upon the party in possession, restraining the commission of waste. And a court of equity, prior to the hearing or argument, will, upon the same principle, grant a temporary injunction until the case can be heard. It is an inherent power in all superior tribunals, essential to the attainment of the object of litigation and the ends of justice. I am of opinion, therefore, that this court must of necessity have the power to make the order applied for.

The power existing, is this a proper case for its exercise? The question presented is not whether the appellate court will stay proceedings in the court below, upon the point appealed from, pending the appeal; but it is, whether upon an appeal

from a decree of the chancellor denying or dissolving an injunction, the appellate court will grant a temporary injunction until the final hearing of the appeal. We are upon this point entirely without precedent except in our own state. No precedent can be found either in the house of lords or in the court of errors of the state of New York, whose practice is strongly analogous to our own.

The first case in this court of which I have any knowledge is that of *Suydam v. New Jersey Railroad Company*, at January term, 1849. That order, it is well known, was obtained by surprise, without notice, in the absence of the opposing counsel, and under circumstances which should prevent its ever being resorted to or relied upon as a precedent. The language, moreover, in which it is couched leaves it extremely doubtful whether the court were in fact apprised of the real design of the order. It purports to be a mere order to stay proceedings upon the decree.

In the case of *Chetwood v. Brittain*, at May term, 1843, an order was granted in express terms staying proceedings at law. This is stated in the order to be by consent.

Since the present organization of the court, at July term, 1845, a similar rule was granted in *Chegary v. Scofield*. This rule, too, was obtained by surprise, without argument, in the absence of opposing counsel; and at the succeeding term was set aside by a decided vote of the court. Unfortunately the precise ground of setting aside the order does not appear. It may have been, and probably was, upon the ground that it went beyond the prayer of the original bill, and was made to operate upon persons not parties to the record.

It is worthy of notice that both in *Chetwood v. Brittain* and in *Chegary v. Scofield* the injunction was merely auxiliary to the main design of the suit. The object of the bill in one case was to avoid a bond; in the other, a sheriff's sale. The injunction in the former case restrained a suit at law upon the bond; in the latter, the delivery of the sheriff's deed. In both cases the order restraining proceedings was made without the least reference to the merits of the case. The original design of the order was merely to restrain proceedings until the case could be heard. In neither case were the merits necessarily involved, nor could the order operate to the serious detriment of the party enjoined. But in the present instance the whole object of the bill is the injunction. The sole inquiry is, Should the injunction issue? The chancellor, upon a full consideration, has decided that the

njunction should not issue. This court are now asked, not to restrain proceedings in the court below, but to restrain the company from proceeding under their charter. The power of this court is invoked to arrest the construction of the road; to do, what upon mature consideration the chancellor has decided ought not to be done. It is to reverse, at least temporarily, the order of the chancellor, and to grant the complainant *in limine* the prayer of his bill, before the cause has been heard, before his right to an injunction has been considered or settled in this court, and that too, after a solemn decision in the court below that no injunction should issue. In many cases, and probably in this, a temporary injunction before final hearing will effect the design of the applicant as effectually as the granting of a perpetual injunction. It will work an irreparable injury to the party enjoined, and compel them, in order to avoid that evil, to submit to any terms which the adverse party may dictate. It is manifestly a very high and delicate exercise of power—one which should by no means be exercised as a matter of course, but only upon the most imminent necessity.

The granting of this order necessarily involves the merits of the whole controversy. The argument upon the motion has necessarily and unavoidably turned upon the merits. The cause has been argued precisely as if we were now upon the hearing of the appeal. I think the merits ought not to be heard upon this summary motion. The practice will lead unavoidably either to a decision upon a partial hearing, or to a prejudging of the case upon its merits, in contravention of the rules and practice of the court.

It is a power which, in all cases where the merits are thus necessarily involved, had better be left to the discretion of the chancellor. He may properly exercise it, and with much more safety than this court are likely to do. He is familiar with the case, and may, without the necessity of a further argument, if he thinks the case demands it, grant a temporary injunction until the cause can be heard in this court.

That course was adopted in the case of *Hart v. The Mayor of Albany*, 3 Paige, 386. The bill was there filed for the purpose of restraining the corporation of Albany from removing from the Albany basin a floating store-house, which the complainant had erected and moored therein, against the ordinance of the corporation. On filing the bill, an *ex parte* order was made for an injunction restraining the defendants from carrying the provision of the ordinance of the corporation into effect. On the

coming in of the answer the injunction was dissolved. From that decree Hart, the complainant, appealed. Pending the appeal the corporation were proceeding to carry the ordinance into effect, by taking down and removing the store-house. The appellant thereupon applied to the chancellor for an order restraining proceedings pending the appeal. And upon the complainant's solicitor stipulating to expedite the cause, so as to bring it to a hearing at the next term of the court of appeals, a temporary injunction was granted by the chancellor until after the next December session of the court of appeals, unless the appeal should be sooner disposed of by that court.

The exercise of this power of the chancellor may always preserve, *pendente lite*, the just rights of the parties litigant. There is no necessity for its exercise by this court.

The opinion of the chancellor in *Monkhouse v. The Corporation of Bedford*, 17 Ves. 380, shows that the power even in that court will be exercised with great caution, and only when it can be done consistently with the rights of the party in whose favor the decree is made. The exercise of the power by this court in cases circumstanced like that now under consideration, will unavoidably be productive of serious evils, without any corresponding benefit. It would be far better, and more conducive to the ends of justice, to permit the appellant in all injunction bills, where the injunction is denied by the chancellor, to bring on the final hearing of the cause immediately upon the coming in of the appeal.

The motion must be denied.

In this opinion SINNICKSON, PORTER, SCHENCK, and SPEER, JJ., and CARPENTER, Justice, concurred.

Motion denied.

RANDOLPH, J., delivered a dissenting opinion, in which McCARTER, J., concurred.

CITED in *De Godey v. Godey*, 39 Cal. 167, to the point that when the court below has seen proper, in the exercise of its discretion, to continue an injunction in force until the hearing of the cause, its determination, in so far as it rests upon the effect of the denial of the equities of the bill merely, is entitled to great consideration by the supreme court, and will not be disturbed by it, except under peculiar circumstances, or unless an abuse of discretion is made to appear.

HALL'S EXECUTORS v. LAMBERT'S EXECUTORS.

[3 HALSTED'S CHANCERY, 651.]

ACCIDENTAL OMISSION TO INSERT IN MORTGAGE THE AMOUNT of the bond which it is given to secure does not invalidate the mortgage nor postpone its lien to that of a subsequent mortgage.

THIRD PERSON PAYING DEBT SECURED BY MORTGAGE, AT MORTGAGOR'S REQUEST, is subrogated to the rights of the mortgagee as against a subsequent mortgage.

BILL of foreclosure. The opinion states the case.

P. D. Vroom, for the appellants.

J. H. Wakefield and A. Wurts, for the respondents.

By Court, GREEN, C. J. The controversy in this cause is a question of priority between two mortgagees, each holding a mortgage upon the same premises.

The appellants' mortgage is prior, both in date and registry, but several reasons are assigned why this priority has ceased to exist. It is insisted that it is not a valid mortgage, because it was executed in blank, and the sum which it was designed to secure does not appear either upon the mortgage or registry. The mortgage is clearly a valid operative instrument as between the parties. The mortgage could not be prejudiced in a court of equity by the accidental omission to insert in the mortgage the sum for which the bond was given. The mortgage is redeemable upon the payment of a sum of money agreeably to the condition of a bond given by the mortgagor to the mortgagee, of even date with the mortgage, and payable at a day specified. There is no room for question as to the identity of the bond. The blank in the bond was filled. The amount for which the mortgage was given could readily be ascertained by recurrence to the bond.

It is unnecessary to decide what the effect of the registry of a mortgage in blank would be, as evidence of presumptive notice, because there is in this case indubitable proof of actual notice of the existence of the mortgage to the agent of Lambert, the subsequent mortgagee. He saw the record in the clerk's office, and was expressly informed of the amount which the mortgage was intended to secure. Nor can the question fairly arise as to the effect of a conflict respecting the amount of the mortgage between the actual notice and the presumptive notice by the registry. If the registry be available at all as a constructive notice, it can only be for the amount of the mortgage as it really exists. If not notice of this fact, it is not notice at

all, and the case stands upon clear proof of actual notice of the real amount secured by the mortgage.

The only remaining question is, whether the mortgage was paid and satisfied, or is still a subsisting incumbrance. The mortgage was originally given on the first of May, 1841, to Hugh B. Ely, administrator of John Wilson. It was the first mortgage on the premises, and was given to secure a part of the purchase money. The amount due on the mortgage was subsequently paid in three several payments, not by the mortgagor, but by Samuel W. Hall, the appellant. Receipts for these payments are indorsed on the bond; the first two payments purporting to be on account of the bond, and the last purporting to be the balance in full on the bond. The bond and mortgage were not assigned either by parol or in writing. But they were delivered uncanceled to Hall, who had made the payments, and have been retained by him uncanceled, as he insists for his security; the mortgage remaining uncanceled of record. There is no proof either of a request to assign, or of an agreement to assign the bond and mortgage. The parol proof amounts to this: that the amount due on the bond and mortgage was advanced by the appellant, at the request of the mortgagor who had made application to him for a loan of money for that purpose, and that the mortgagee who received the money, understood that it was the intention of the party paying the money not to extinguish the mortgage, but to stand in the place of the mortgagee.

In the present case there is no pretense of fraud attempted or meditated. The circumstances excluded all pretense of fraud. When Lambert's mortgage was recorded, the prior mortgage of Hall was standing in full force; no payment had been made upon it. The payments were all made, not only after Lambert's mortgage had been recorded, but at a time when the mortgagor's property was heavily incumbered by judgments at law. It seems the obvious dictate of justice and equity, that where a third party advances his money in good faith, at the request and for the benefit of the mortgagor, in satisfaction of the mortgage debt, and holds the bond and mortgage in his possession uncanceled, he should be permitted to stand in the shoes of the mortgagee, and to have the protection of the mortgage security, although there be no assignment of the security, or even though the mortgagee should absolutely refuse to assign.

It has been the constant policy of a court of equity to treat the mortgage either as canceled or outstanding, as shall best

promote the ends of justice, and the actual and just intention of the parties: *Starr v. Ellis*, 6 Johns. Ch. 395; *Neville v. Demeritt*, 1 Green Ch. 336.

I am of opinion that the mortgage executed by William Hall and wife to Hugh B. Ely, administrator of Wilson, and by him assigned to the appellant, is a valid and subsisting lien and incumbrance upon the premises therein described, and is entitled to priority over the mortgage of the respondent.

The decree of the chancellor should be reversed, and the record remitted to be proceeded in agreeably to law, and the opinion of this court.

In this opinion the court concurred, except RISLEY, J., who dissented.

Decree reversed.

MISTAKE IN MORTGAGE, EFFECT OF: See *Bumpas v. Dotson*, 46 Am. Dec. 81, note 85; *Stover v. Herrington*, 41 Id. 86, note 91; *White v. Wilson*, 39 Id. 437; note to *North v. Belden*, 35 Id. 87; note to *Gordon v. Preston*, 26 Id. 79, where other cases are collected. In *Graham v. McCampbell*, 33 Id. 126, it was decided that the assignee of a note, given in part consideration for the purchase price of land, to secure the payment of which the vendor reserved the legal title in himself, is entitled to have his debt satisfied out of the land.

CASES
IN THE
COURT OF APPEALS
OF
NEW YORK.

VAN RENSSELAER v. JEWETT.

[2 NEW YORK (2 COMSTOCK), 135.]

CONSULT SHOULD NOT BE DIRECTED IF PLAINTIFF IS ENTITLED TO RECOVER ANYTHING upon the evidence.

INTEREST IS RECOVERABLE UPON RENT from the time when the rent became due by the lease; notwithstanding it was payable in produce or services instead of in money.

INTEREST SHOULD BE ALLOWED THOUGH DEMAND IS UNLIQUIDATED wherever a debtor is in default in paying money, delivering property, or rendering services pursuant to his contract, if the amount can be ascertained by an inquiry concerning the value.

APPEAL from an order of the supreme court denying a motion for a new trial. The action was covenant for rent reserved by one of the old manor leases, such as were given by the "pat-rooms" of the great New York estates many years ago. The plaintiff established a clear right to recover rent, but claimed interest. Defendant disputed the claim to interest, especially because the rent was expressed in the lease to be payable in grain, poultry, and services, instead of in money. The judge who tried the cause directed the jury to allow interest, and the defendant moved for a new trial, alleging that ruling, among others, as error. The supreme court denied this motion: 5 Den. 135; and the defendant appealed.

J. S. Coll, attorney, and *Rufus W. Peckham*, of counsel, for the appellant, the tenant.

Jenkins and McMartin, attorneys, and *Nicholas Hill, jun.*, of counsel, for the respondent, the landlord.

By Court, BRONSON, J. It is unnecessary to inquire what should have been the rule in apportioning the rent; for as the proof stood when the motion for a nonsuit was made, the plaintiff was clearly entitled to recover something, and the motion was therefore properly overruled. The question was not raised in any other form than by the motion for a nonsuit.

The only question is on the allowance of interest. The payment was not to be made in money, nor was a specified sum to be paid in any other way. The damages were unliquidated; and there was no agreement for interest. As the authorities bearing on the question have been very fully considered by the supreme court in this, and another case which will be mentioned, it can not be necessary to review them on the present occasion. It was decided in 1806, without assigning any reason for the judgment, that interest was not recoverable in a case of this kind: *Van Rensselaer v. Platner*, 1 Johns. 276. But since that time the supreme court has deliberately held, on three several occasions, including the present one, that interest is recoverable in such a case: *Lush v. Druse*, 4 Wend. 313; *Van Rensselaer v. Jones*, 2 Barb. 643. The principle to be extracted from these decisions may be stated as follows: Whenever a debtor is in default for not paying money, delivering property, or rendering services in pursuance of his contract, justice requires that he should indemnify the creditor for the wrong which has been done him; and a just indemnity, though it may sometimes be more, can never be less, than the specified amount of money, or the value of the property or services at the time they should have been paid or rendered, with interest from the time of the default until the obligation is discharged. And if the creditor is obliged to resort to the courts for redress, he ought, in all such cases, to recover interest, in addition to the debt, by way of damages. It is true that on an agreement like the one under consideration, the amount of the debt can only be ascertained by an inquiry concerning the value of the property and services. But the value can be ascertained; and when that has been done, the creditor, as a question of principle, is just as plainly entitled to interest after the default, as he would be if the like sum had been payable in money. The English courts do not allow interest in such cases; and I feel some difficulty in saying that it can be allowed here, without the aid of an act of the legislature to authorize it. But the courts in this and other states have for many years been tending to the conclusion which we have finally reached, that a man who breaks his contract to pay a debt,

whether the payment was to be made in money, or in anything else, shall indemnify the creditor, so far as that can be done by adding interest to the amount of damage which was sustained on the day of the breach. The rule is just in itself; and as it is now nearly nineteen years since the point was decided in favor of the creditor, and eight out of nine judges of the supreme court have, at different times, concurred in that opinion, we think the question should be regarded as settled.

New trial denied.

INTEREST UPON RENT.—In *Obermyer v. Nichols*, 6 Am. Dec. 439, it is held that rent carries interest from the time it is due, unless from the conduct of the landlord it may be inferred that he does not mean to insist upon it, or unless he acts oppressively in demanding more than is due, where the tenant is willing to do justice, or unless there are other equitable circumstances making the allowing of interest improper. But in *Breckenridge v. Brooks*, 12 Id. 401, a Kentucky case, it is decided that interest upon rent in arrears is not allowable, because it is in the nature of compound interest. A statute was subsequently passed in that state, however, allowing interest upon rent after due: See the note to the case last cited. That interest is recoverable upon rent after default in payment is held, following the principal case, in *Livingston v. Miller*, 11 N. Y. 86; *Cowing v. Howard*, 46 Barb. 584. So where rents are collected by one tenant in common, it is held that his co-tenant may, in an action for money received to his use, recover his proportion, with interest thereon, without a demand: *Scott v. Guernsey*, 60 Barb. 180, citing *Van Rensselaer v. Jewett*.

INTEREST, ALLOWANCE OF, IN GENERAL: See the leading case of *Selleck v. French*, 6 Am. Dec. 185, and the note thereto, discussing this subject in its various phases. See also *Hunt v. Jucks*, 1 Id. 555; *De Peau v. Russell*, 2 Id. 676; *Dilworth v. Sinderling*, Id. 489; *Freeland v. Edwards*, Id. 620; *Scudder v. Morris*, 4 Id. 382; *People v. Gasherie*, 6 Id. 263; *Wood v. Robbins*, Id. 182; *Shaller v. Brand*, Id. 482; *Houghton v. Page*, 9 Id. 30; *Goddard v. Bulow*, Id. 663; *Hart v. Brand*, 10 Id. 715; *Glen v. Fisher*, Id. 310; *Smith v. Vanderhoest*, Id. 674; *Barelli v. Broton*, Id. 683; *Cannon v. Beggs*, Id. 677; *Cartmill v. Brown*, Id. 763; *Lofland v. Maull*, 12 Id. 106; *Bouthemy v. Ducourneau*, Id. 486; *Rector v. Mark*, 13 Id. 500; *Stewart v. Stocker*, 15 Id. 589; *Sickman v. Lapsley*, Id. 596; *Newsom v. Douglass*, 16 Id. 317; *Simpson v. Feltz*, Id. 602; *Miles v. Oden*, 19 Id. 177; *Haven v. Foster*, Id. 353; *Fridge v. State*, 20 Id. 463; *Hunt v. Nevers*, 26 Id. 616; *Washington v. Planters' Bank*, 28 Id. 333; *Mover v. Kip*, 29 Id. 748; *Patterson v. Nichol*, 31 Id. 473; *Lorton v. Gilliam*, 33 Id. 430; *Shaw v. Wilkins*, 49 Id. 692; *Northrop's Ex'rs v. Graves*, 50 Id. 264, and the notes thereto. Interest upon interest: See *Talliaferro's Ex'rs v. King's Adm'r*, 35 Id. 140; *Doig v. Barkley*, 45 Id. 762, and notes thereto, collecting the prior cases in this series. Interest on unliquidated demands: See *McConnico v. Curzen*, 1 Id. 540; *Murray v. Ware*, 4 Id. 637; *Foster v. Dupré*, 12 Id. 466; *Shaw v. Wilkins*, 49 Id. 692. Interest on contract to pay property: See *Guthrie v. Wickliffe*, 7 Id. 746. The principal case is very extensively cited as an authority upon this subject.

Thus it is cited and approved on the point that interest is always allowable on default in payment of a fixed sum payable on a specified day, in *Blakely v. Jacobson*, 9 Bosw. 146; *Scott v. Guernsey*, 60 Barb. 180; *De Lavalette v. Wendt*,

75 N. Y. 582. And generally, wherever a debtor is in default in the payment of money, delivery of property, or rendition of services pursuant to a contract, interest is allowable: *Matter of Berriam*, 44 How. Pr. 218; *Currie v. White*, 6 Abb. Pr., N. S., 381; S. C., 37 How. Pr. 359; S. C., 1 Sweeny, 202; *Adams v. Fort Plain Bank*, 36 N. Y. 261; *White v. Miller*, 78 Id. 395. So even though the amount be unliquidated, if it can be ascertained by computation and by reference to established market values: *Sipperly v. Stewart*, 50 Barb. 69; *McMahon v. New York etc. R. R. Co.*, 20 N. Y. 469; *McCollum v. Seward*, 62 Id. 318; *Fitch v. Livingston*, 4 Sandf. 515; *Barrow v. Reab*, 9 How. 371. In *Holmes v. Rankin*, 17 Barb. 456, the general rule is affirmed to be that interest is not allowable on unliquidated demands, and the principal case is cited as establishing an exception to this rule. But though it is not necessary that the amount of a demand should be liquidated so as to make interest allowable, default in payment or performance is essential: *Campbell v. Bruen*, 1 Bradf. 233; *Mygatt v. Wilcox*, 1 Lans. 60. Until the debt or demand is due, interest will not run upon it: *Esterly v. Cole*, 3 N. Y. 503, where it is held, on this ground, that interest can not be collected on an open running account, where there is no agreement to pay interest. But interest is allowable in an action on an account for goods sold from the time of presentment, for the party is then in default: *Beers v. Reynolds*, 11 N. Y. 102. In *White v. Miller*, 78 N. Y. 395, it is held that interest will not run from the commencement of the action on a demand unless a demand before action would set interest running. In accordance with the general doctrine laid down in the principal case, interest is allowable in action for damages for breach of a special contract: *Kelly v. Fall Brook Coal Co.*, 67 Barb. 187. So in an action for breach of a bond of indemnity against a liability: *Lyon v. Clark*, 8 N. Y. 157. So for breach of a covenant by a lessor in a lease to pay the value of the tenant's improvements at the end of the term: *Renwick v. Renwick*, 1 Bradf. 238. In *Dana v. Fredler*, 1 E. D. Smith, 483, it is held that a direction to the jury to allow interest in an action for the non-delivery of personal property is erroneous, and that the allowance of interest in such cases is in the discretion of the jury; and it is said that the principal case, although it contains some expressions to the contrary, can not be understood to overrule previous decisions establishing this as the rule. In *Jackson v. New York Central R. R. Co.*, 2 Thomp. & C. 656, it is held, citing the principal case and others, that though the amount of an indebtedness is unliquidated, if there is an actual breach of a contract to pay and an actual indebtedness due, interest is recoverable. In *Gallup v. Perne*, 10 Hun, 525, 526, on the other hand, it is held that in an action by an attorney against his client for professional services, where no bill has been presented and the demand is unliquidated, interest is not recoverable from the rendition of the services, and the principal case is distinguished as one in which there was an express agreement to deliver certain specified property as rent at a fixed time and place.

RENT PAYABLE IN PRODUCE OR SERVICES: See *Wait, Appellant*, 19 Am. Dec. 262; *Dockham v. Parker*, 23 Id. 547; *Johnson v. Smith*, 24 Id. 539; *Deaver v. Rice*, 34 Id. 388; *Putnam v. Wise*, 37 Id. 309; *Case v. Hart*, 38 Id. 735; *Van Rensselaer v. Bradley*, 45 Id. 451. That rent payable in produce stands on the same footing as rent payable in money, is held, citing the principal case, in *People v. Van Rensselaer*, 9 N. Y. 328.

THAT ASSIGNEE OF LESSEE IS LIABLE FOR RENT, and that a covenant to pay rent, with the incidental remedies for a breach, runs with the land, is a point to which the principal case is cited in *Van Rensselaer v. Hays*, 19 N. Y. 93,

and *Main v. Green*, 32 Barb. 458, because, as a matter of fact, the action was against an assignee of the lease, though, as will be seen from the opinion, no question arose on that point. See, on that subject, *Childs v. Clark*, 49 Am. Dec. 164, and the cases cited in the note thereto.

COMPULSORY NONSUIT: See *French v. Smith*, 24 Am. Dec. 616, and the note thereto discussing this subject. See also *Dain v. Cowing*, 39 Id. 585; *Martin v. Webb*, Id. 363; *Cahill v. Kalamazoo etc. Ins. Co.*, 43 Id. 457, and cases cited in the notes to those decisions. If the plaintiff is entitled even to nominal damages, no question as to the *quantum* of damages can be raised by a motion for a nonsuit so as to bring it up on error: *Lillie v. Hoyt*, 40 Id. 360. The doctrine laid down in the principal case on this point is approved in *Malory v. Tioga R. R. Co.*, 3 Abb. App. Dec. 142; S. C., 3 Keyes, 355; 36 How. Pr. 203; 5 Abb. Pr., N. S., 423.

HAY v. COHOES COMPANY.

[2 NEW YORK (2 COMSTOCK), 159.]

RIGHT OF A LAND-OWNER TO MAKE EXCAVATIONS in his land (such as are involved in making a canal) is subject to the limitation that he must not cast the soil, stones, etc., upon neighboring land, to the annoyance or inconvenience of its owners.

APPEAL from a judgment reversing a judgment of nonsuit in an action of trespass on the case. The Cohoes Company was incorporated by New York laws, 1826, p. 70, c. 90, with authority, among other things, to construct a canal; and its agents and servants, in the course of blasting for making the necessary excavations, threw, according to plaintiff's declaration and evidence, large quantities of gravel, slate, and stones upon plaintiff's dwelling, and also darkened its windows, broke its chimney, etc.; for doing which he brought this action. There was no averment of negligence or malice, and no proof of anything more than injury to plaintiff's premises incidental to the making of excavations by defendants, on their own premises, in the construction of a work which had been authorized by the legislature; and therefore the presiding judge granted a motion for a nonsuit. The supreme court reversed the judgment and granted a new trial: 3 Barb. 42; and defendants appealed.

John K. Porter, attorney, and *D. Wright*, of counsel, for the appellants, the company causing the injury.

Edward F. Bullard, attorney and counsel, for the respondent, the land-owner injured.

By Court, GARDINER, J. The defendants insist that they had the right to excavate the canal upon their own land, and

were not responsible for injuries to third persons, unless they occurred through their negligence and want of skill, or that of their agents and servants.

It was an elementary principle in reference to private rights, that every individual is entitled to the undisturbed possession and lawful enjoyment of his own property. The mode of enjoyment is necessarily limited by the rights of others—otherwise it might be made destructive of their rights altogether. Hence the maxim, *Sic utere tuo*, etc. The defendants had the right to dig the canal. The plaintiff, the right to the undisturbed possession of his property. If these rights conflict, the former must yield to the latter, as the more important of the two, since, upon grounds of public policy, it is better that one man should surrender a particular use of his land, than that another should be deprived of the beneficial use of his property altogether, which might be the consequence if the privilege of the former should be wholly unrestricted. The case before us illustrates this principle. For if the defendants in excavating their canal, in itself a lawful use of their land, could, in the manner mentioned by the witnesses, demolish the stoop of the plaintiff with impunity, they might, for the same purpose, on the exercise of reasonable care, demolish his house, and thus deprive him of all use of his property.

The use of land by the proprietor is not therefore an absolute right, but qualified and limited by the higher right of others to the lawful possession of their property. To this possession the law prohibits all direct injury, without regard to its extent or the motives of the aggressor. A man may prosecute such business as he chooses upon his premises, but he can not erect a nuisance to the annoyance of the adjoining proprietor, even for the purpose of a lawful trade: *Aldred's Case*, 9 Coke, 58. He may excavate a canal, but he can not cast the dirt or stones upon the land of his neighbor, either by human agency or the force of gunpowder. If he can not construct the work without the adoption of such means, he must abandon that mode of using his property, or be held responsible for all damages resulting therefrom. He will not be permitted to accomplish a legal object in an unlawful manner.

In Rolle's Abridgment, 565, it is said that if A. erects a new house upon the confines of his land, and next adjoining the land of B., and B. afterwards digs his land so near the land of A. that it falls, no action can be sustained by A. The purpose of B. in the case cited, in digging upon his own land, was law-

ful, and so for aught that appears were the means taken to accomplish it. The right of A. to occupy and use his land in a particular manner was qualified and limited by a similar right in B. No action consequently could be sustained. "A man, however, can not dig his land so near mine," the reporter adds, "as to cause mine to slide into the pit." In the last case, the injury would consist in depriving the owner of a part of the soil to which his right was absolute. No degree of care in the excavation by the pit-owner, would, I apprehend, justify the transfer of a portion of another man's land to his own.

So in all that class of cases where the mode of enjoyment is turned into an absolute right by custom, grant, or prescription, the party is entitled to protection against any alteration of the adjacent premises by which he may in any way be injured: *Lasala v. Holbrook*, 4 Paige, 173 [25 Am. Dec. 524], and cases cited. In *Panton v. Holland*, 17 Johns. 92 [8 Am. Dec. 369], the parties were owners of contiguous building lots, in the city of New York. The defendant in order to lay a foundation for a dwelling-house, dug below the foundation of the plaintiff's house, in consequence of which it settled and the walls cracked. Held, that the defendant was not liable without proof of negligence. In other words, the plaintiff was bound to show that the means adopted by the defendant were illegal. *Clark v. Foot*, 8 Johns. 421, is to the same effect. If, with the same purpose in view, the defendant had placed earth upon or transported it across the plaintiff's lot, the means, *per se*, would be wrongful.

In this case, the plaintiff was in the lawful possession and use of his own property. The land was his, and, as against the defendant, by an absolute right from the center *usque ad cælum*. The defendants could not directly infringe that right by any means or for any purpose. They could not pollute the air upon the plaintiff's premises: *Morley v. Pragnel*, Cro. Car. 510; nor abstract any portion of the soil: Roll. Abr. 565, note; *Thurston v. Hancock*, 12 Mass. 221 [7 Am. Dec. 57]; nor cast anything upon the land: *Lambert v. Bessey*, Ray. T. 421; by any act of their agents, neglect, or otherwise. For this would violate the right of domain. Subject to this qualification the defendants were at liberty to use their land in a reasonable manner, according to their pleasure. If the exercise of such a right upon their part, operated to restrict the plaintiff in some particular mode of enjoying his property, they would not be liable. It would be *damnum absque injuria*.

No one questions that the improvement contemplated by the

defendants upon their own premises was proper and lawful. The means by which it was prosecuted were illegal notwithstanding. For they disturbed the rightful possession of the plaintiff, and caused a direct and immediate injury to his property. For the damages thus resulting, the defendants are liable. Without determining the other questions discussed upon the argument, we think, upon the ground above stated, that the judgment of the supreme court should be affirmed.

Judgment affirmed.

LIABILITY FOR DAMAGE TO OTHERS FROM ACTS DONE ON ONE'S OWN LAND: See, particularly as to liability for injuries to adjacent property by excavations on one's own land, *Thurston v. Hancock*, 7 Am. Dec. 57, and note; *Panton v. Holland*, 8 Id. 369; *Lasala v. Holbrook*, 25 Id. 524, and note. As to liability for other nuisances and injurious acts maintained or done on one's land, see *Neal v. Henry*, 33 Id. 125; *Callin v. Valentine*, 38 Id. 567; *Wagoner v. Jermaine*, 45 Id. 474; *Pierce v. Fernald*, 46 Id. 573; *Fish v. Dodge*, 47 Id. 254, and cases cited in the notes thereto. One storing a large quantity of gunpowder in a wooden building near other buildings is guilty of a public nuisance, and is liable for damages resulting from an explosion thereof, without proof of any negligence on his part causing the explosion: *Myers v. Malcolm*, 41 Id. 744, and see the note to that case. The principal case is recognized in the following decisions as an authority upon this subject: That one may lawfully use his own land for all purposes for which such property is usually applied, without being liable for consequential injuries to his neighbors, if he employs due skill and caution, and if no legal right is infringed, is a point to which the case is cited in *Radcliff's Ex'rs v. Mayor etc. of Brooklyn*, 4 N. Y. 199; *Carhart v. Auburn Gas Light Co.*, 22 Barb. 297, 308. But his right to the use of his land is not absolute. It is qualified by the right of adjacent owners to the beneficial use and enjoyment of their property, and if he goes beyond the limits of lawful use and creates a nuisance to his neighbors, or does a direct injury to their property by taking away a part of the soil, or casting stones, rubbish, or other substances upon it, or the like, he is liable without regard to negligence, and even though proper care be shown: *O'Riley v. McChesney*, 3 Lans. 282; *Carhart v. Auburn Gas Light Co.*, *supra*; *Pixley v. Clark*, 32 Barb. 274; *Hutchins v. Smith*, 63 Id. 255; *Radcliff's Ex'rs v. Mayor etc. of Brooklyn*, *supra*; *Losee v. Saratoga Paper Co.*, 42 How. Pr. 385, 392. Thus, where one interferes with the natural flow of a stream through his land by dams, etc., so that the water flows upon his neighbor's land to his injury, either by direct overflow or by percolation through the embankments, though due care is used, he has been held liable: *Pixley v. Clark*, 35 N. Y. 520, 523. So where a canal company enlarges its canal and causes adjacent land to be inundated, though the work is done with reasonable care and skill: *Selden v. Delaware etc. Canal Co.*, 24 Barb. 364. So where one paves his yard so that water will not pass through into the soil, and in carrying water from his roof by insufficient drains to his privy vault, causes an accumulation of water upon his premises which is cast upon his neighbor's land, though he uses reasonable diligence to prevent it: *Jutte v. Hughes*, 67 N. Y. 267, 273. So where a riparian owner obstructs or diverts a stream so as to prevent its reasonable use by an adjacent owner: *Prentice v. Geiger*, 9 Hun, 353; or corrupts the stream by noxious deposits therein: *O'Riley v. McChesney*, 3 Lans.

282; *Carhart v. Auburn Gas Light Co.*, 22 Barb. 297, 308. Or where he pollutes the air by noxious gases and fumes from a lime-kiln, or from the engines of an elevated railway: *Hutchins v. Smith*, 63 Barb. 255; *Caro v. Metropolitan etc. R. R. Co.*, 14 Jones & S. 169-171. So where a land-owner or canal contractor, in blasting or making improvements, casts rocks or other materials on another's land: *Gourdier v. Cormack*, 2 E. D. Smith, 202; *St. Peter v. Denison*, 58 N. Y. 421; S. C., 17 Am. Rep. 258; *Mairs v. Manhattan etc. Ass.*, 89 N. Y. 505. So where one stored gunpowder in a magazine upon his premises, constructed with the usual safeguards, and it exploded without apparent cause, to the injury of the plaintiff's adjacent house, an instruction that the plaintiff could not recover without proof that the powder was negligently kept upon the premises, was declared erroneous, and it was held that the fact that the explosion took place without apparent cause, notwithstanding the precautions taken, evinced its dangerous character, and that it should have been left to the jury to determine whether, from its proximity to other buildings and from the other circumstances, the magazine was in fact a nuisance: *Heeg v. Licht*, 80 N. Y. 579, 583; S. C., 8 Abb. N. C. 360. So where a railroad contractor stored explosive materials, to be used in blasting, within the limits of a town, in the vicinity of a tunnel which he was excavating, and an explosion occurred, to the injury of adjacent property, the contractor was held liable without proof of negligence or unskillfulness: *McAndrews v. Collier*, 42 N. J. L. 189, 191. But where nitro-glycerine, while being held in store by a carrier for transportation, exploded, to the injury of adjacent property, it was held, distinguishing the principal case, that the carrier was not liable without proof of knowledge of the dangerous character of the article, or of actual negligence: *Parrott v. Barney*, 1 Sawy. 238; S. C., 2 Abb. Pr., N. S., 211. So where a steam-boiler in use on one's land accidentally exploded, occasioning injury to adjacent property, it was held that no action would lie without proof of negligence: *Losee v. Saratoga Paper Co.*, 42 How. Pr. 385, 392. In a subsequent decision concerning the same accident, Potter, J., thought also that proof of negligence was unnecessary, but the majority of the court disagreed with him on this point, though they agreed with him in granting a new trial on other grounds: *Losee v. Buchanan*, 61 Barb. 105. But in *Losee v. Buchanan*, 51 N. Y. 476, 479, the decision in 61 Barb. was reversed, and it was held that the owner of the boiler was not liable for the explosion except on proof of negligence, distinguishing the principal case as one in which the injury was the direct and necessary result of the defendant's act. In *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 48 How. Pr. 44, 49, it was held that a railroad company was not liable for the negligence of a subcontractor in blasting rock whereby adjacent property was injured, and the principal case was distinguished as raising no question upon this point.

Where the adjacent house of the plaintiff was jarred by the running of an engine upon the defendant's premises, and the inmates annoyed and terrified by the noise so that the occupancy of the house became uncomfortable, the defendant was held liable, under the rule of the principal case: *McKeon v. See*, 4 Robt. (N. Y.) 467. So where one cut trees on the dividing line between himself and an adjacent owner: *Relyea v. Beaver*, 34 Barb. 552. So where a land-owner, in excavating on his own land, destroyed the support of adjacent land: *Farrand v. Marshall*, 19 Id. 383; S. C., 21 Id. 414. The case is cited on the same point in *People v. Canal Board*, 2 Thomp. & C. 278. But where, in a grant of land, the right to the minerals therein was reserved to the grantor, which right he subsequently conveyed to another, it was held that the grantees thereof could lawfully sink shafts and run tunnels to reach the minerals, so

far as necessary for the reasonable use and enjoyment of his property therein, leaving sufficient support for the surface as it was at the time of the grant, or as then contemplated by the parties, and would not be liable to an action or to an injunction, though the owner of the soil might thereby be prevented from using the premises in a particular way: *Marvin v. Brewster Iron Mining Co.*, 55 N. Y. 538. Folger, J., delivering the opinion, thus distinguishes the principal case: "Nor does this case fall, in its main aspects at least, within the rule recognized and applied in *Hay v. Cohoes Co.*, 2 N. Y. 159. There the adjacent owner, though following a lawful purpose upon his own land, in excavating a canal thereon, cast rocks from it upon his neighbor's land. He immediately and physically invaded his neighbor's exclusive possession. He had the right to dig the canal. His neighbor had the right of undisturbed possession of his property. It was held, on grounds of public policy, better, if these rights conflicted, that he should give up the right of a particular use than that his neighbor should lose the beneficial use of his altogether. Here, however, the case, if not reversed, is nearly so. The sole use which the defendant can make of its property is to excavate and remove it. If it is doing only what is necessary to that end, shall it give up altogether the sole beneficial use of its property, that the plaintiff may use his undisturbedly in one way, the most profitable, doubtless, and the most desirable, but still one way of several?" Where, without any negligence on the part of the owner, logs in a boom broke loose by reason of a freshet and lodged on the plaintiff's land, and were suffered to remain there several months, occasioning damage to his meadow, it was held that the owners were not liable for damages by the mere lodgment, but were liable for damages for the delay in removal, and the principal case was cited to the point that one is liable for a direct injury to another's property: *Sheldon v. Sherman*, 42 Barb. 368, 370.

In *Pickard v. Collins*, 23 Barb. 458, where the defendant built a high fence on his own land, which had the effect of darkening the plaintiff's windows in his adjacent house, and although he did so for that purpose, it was held that he was not liable, it not appearing that the plaintiff had any prescriptive or other legal right to an unobstructed view, citing the principal case as not in conflict with that doctrine.

TREMAIN v. COHOES COMPANY.

[2 NEW YORK (2 COMSTOCK), 163.]

LAND-OWNER WHO, IN EXCAVATING HIS LAND for a contemplated improvement, has cast dirt, stones, and rubbish upon adjoining land, to the injury thereof, can not defend an action for compensatory damages by evidence that the work was done with care and skill; he is liable for the actual injury, irrespective of negligence.

APPEAL from a judgment for defendants in an action of trespass on the case. The action arose out of the same general facts as those of *Hay* against the same company (reported *ante*, 279), Tremain being a land-owner near *Hay*, and suffering in the same way as he from the company's blasting operations. The difference between the two cases as presented on their respective trials was merely this: that in *Hay's* action neither party offered any

proof as to negligence; but in Tremain's, the company offered to prove that their agents and servants had proceeded in the most careful manner in making the excavations complained of. The presiding judge excluded this evidence, and the plaintiff had a verdict and judgment. The supreme court, in an opinion by Hand, J. (not reported), held that the excluded evidence was admissible on the ground that, though not a bar to the action, it was relevant on the question of damages, for it was adapted to aid the jury in determining how much injury was done, since if the work were done with care the actual injury would be less than if done carelessly. From this decision the plaintiff appealed.

Edward F. Bullard, for appellant, the land-owner injured.

John K. Porter, of counsel, for respondents, the company causing the injury.

By Court, GARDINER, J. The evidence offered by the defendants to 'prove "that the work was done in the best and most careful manner,"' was deemed by the court below relevant on the question of damages. The action was case. The declaration lays no foundation for exemplary damages; it does not aver that the injury was willful, or even that it arose from the negligence of the defendants. No claim to them was made upon the trial, and the jury were expressly instructed to limit their verdict to a compensation for the actual injury sustained by the plaintiff.

If the plaintiff's windows were darkened one half the day, the inconvenience to him would be the same whether the light was obstructed by accident or design, with an intent to injure him or from an anxious wish to preserve his property. The actual damage to the plaintiff would be the same whatever might be the motive for the act which caused it.

How the defendants performed their work was in this view of no consequence: what they did to the plaintiff's injury was the sole question. And upon that issue the evidence offered was calculated to mislead instead of enlighten the jury: *Hoyt v. Gelston*, 13 Johns. 152; *Conrad v. Pacific Insurance Co.*, 6 Pet. 262, 282; *Bell v. Cunningham*, 3 Id. 69; *Tracy v. Swartwout*, 10 Id. 80, 86.

We therefore think the common pleas right in excluding it, and that the judgment of the supreme court must be reversed.
Judgment reversed.

LIABILITY FOR INJURIES BY ACTS DONE ON ONE'S OWN LAND: See *Hay v. Cohoes Co.*, ante, 279, and note. This case is cited as a companion case to

that in *Relyea v. Beaver*, 34 Barb. 552; *Loose v. Buchanan*, 61 Id. 105, 106; *O'Riley v. McChesney*, 3 Lans. 282; *Radcliff's Ex'rs v. Mayor etc. of Brooklyn*, 4 N. Y. 199; *Pizley v. Clark*, 35 Id. 523; *St. Peter v. Denison*, 58 Id. 423; *McCafferty v. Spuyten Duyvil etc. R. R. Co.*, 61 Id. 187; *Heeg v. Licht*, 80 Id. 583; S. C., 8 Abb. N. C. 360; *McAndrews v. Collierd*, 42 N. J. L. 191, 192. For a more particular mention of these cases, see the note to *Hig v. Cohoes Co.*, ante, 279.

SHORTER v. THE PEOPLE.

[2 NEW YORK (2 COMSTOCK), 193.]

HOMICIDE IS JUSTIFIABLE (both at common law and under 2 N. Y. R. S. 660, sec. 3), when committed in self-defense by one who, being attacked without his fault, believes, with good reason, that his assailant means to kill him or do him great bodily harm, even though he was mistaken in such belief.

USING DANGEROUS WEAPON TO RETURN BLOW WITH NAKED HAND, where there is no reason to apprehend a design to do great bodily harm, is unjustifiable.

PURSUING RETREATING ADVERSARY AND KILLING HIM is unjustifiable homicide, even though the deceased was the first assailant.

JUDGMENT WILL NOT BE REVERSED ON ERROR, FOR INCORRECT INSTRUCTIONS, even in a capital case, if they can not have prejudiced the prisoner; as where, on a trial for murder, the explanations given to the jury as to the right of self-defense were narrower than the true rule, but the facts proved were such that no question of justifiable homicide could properly arise.

LAW OF BILLS OF EXCEPTION IN CRIMINAL CASES is the same as in civil.

ERROR to the supreme court to review a judgment sustaining a conviction for murder. The bill of exceptions stated the evidence below as having been to the effect that Shorter (the accused), who was a negro, and Brush (the deceased), meeting by chance, and without any previous difficulty, on a sidewalk in Buffalo, became engaged in a quarrel arising out of words uttered by Brush about negroes, at which Shorter took offense. Blows passed between the two men, and Brush, exclaiming, "He has a knife," retreated, pursued by Shorter, to the middle of the roadway, where in a few moments he fell, mortally stabbed by a knife in Shorter's hands. The witnesses disagreed as to which struck the first blow, but there is no dispute that Brush was endeavoring to retreat at the moment when the fatal wound was given. The prisoner's counsel, among other requests, asked the court to charge that, although the prisoner might have been mistaken, yet if he believed himself in imminent danger, and did not strike with the knife to gratify malice or revenge, he was justifiable; that the question was not whether there was

danger, but whether he believed that there was. The presiding judge refused this request, and instructed the jury, that in order to acquit they should be satisfied that there was in fact imminent danger; and the jury found the prisoner guilty. The supreme court sustained the conviction; two judges holding (in an opinion not reported), that the charge and refusal were substantially correct, because a mere belief that he was in peril would only reduce the grade of the prisoner's offense to manslaughter, and the third thinking the conviction good irrespective of the charge and refusal, because there were no facts proved to which they could apply; and the prisoner was sentenced to death.

Benjamin H. Austin, district attorney, for the defendants in error, the people.

Eli Cook, for the plaintiff in error, the accused.

By Court, BRAXSON, J. When one who is without fault himself, is attacked by another in such a manner or under such circumstances as to furnish reasonable ground for apprehending a design to take away his life, or do him some great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, I think he may safely act upon appearances, and kill the assailant, if that be necessary to avoid the apprehended danger; and the killing will be justifiable, although it may afterwards turn out that the appearances were false, and there was in fact neither design to do him serious injury, nor danger that it would be done. He must decide at his peril upon the force of the circumstances in which he is placed, for that is a matter which will be subject to judicial review. But he will not act at the peril of making that guilt, if appearances prove false, which would be innocence had they proved true. I can not better illustrate my meaning than by taking the case put by Judge, afterwards Chief Justice, Parker, of Massachusetts, on the trial of Thomas O. Selfridge. "A. in the peaceable pursuit of his affairs sees B. walking rapidly towards him with an outstretched arm and a pistol in his hand, and using violent menaces against his life as he advances. Having approached near enough in the same attitude, A., who has a club in his hand, strikes B. over the head, before, or at the instant the pistol is discharged; and of the wound B. dies. It turns out that the pistol was loaded with powder only, and that the real design of B. was only to terrify A." Upon this case the judge inquires, "Will any reasonable man say that A. is more criminal than he would have been if there had been a

bullet in the pistol? Those who hold such doctrine must require, that a man so attacked must, before he strikes the assailant, stop and ascertain how the pistol was loaded—a doctrine which would entirely take away the right of self-defense. And when it is considered that the jury who try the cause, and not the party killing, are to judge of the reasonable grounds of his apprehension, no danger can be supposed to flow from this principle." The judge had before instructed the jury, that "when from the nature of the attack, there is reasonable ground to believe that there is a design to destroy his life, or commit any felony upon his person, the killing of the assailant will be excusable homicide, although it should afterwards appear that no felony was intended:" *Selfridge's Trial*, 160; 1 Russ. Cr., 699, ed. of 1824; 485, note, ed. of 1836. To this doctrine I fully subscribe. A different rule would lay too heavy a burden upon poor humanity.

I have stated the case of *Selfridge* the more fully, because it is not only an authority in point, but it is one which the revisers professed to follow in framing our statute touching this question.

I shall not stop to consider the common-law distinctions between justifiable and excusable homicide, because our statute has placed killing in self-defense under the head of justifiable homicide: 2 R. S. 660, sec. 3.

The Massachusetts case lays down no new doctrine. The same principle was acted on in *Levett's Case*, recited by Jones, J., in *Cook's Case*, Cro. Car. 538, to the following effect: Levett was in bed with his wife, and asleep, in the night, when the servant ran to them, in fear, and told them that thieves were breaking open the house. He arose suddenly, and taking a drawn rapier in his hand, went down and was searching the entry for the thieves, when his wife espying some one whom she knew not in the buttery, cried out to her husband, in great fear, "Here they be that would undo us." Levett thereupon hastily entered the buttery in the dark, not knowing who was there, and thrusting with his rapier before him, killed Frances Freeman, who was lawfully in the house, and wholly without fault. On these facts, found by special verdict, the court held that it was not even a case of manslaughter, and the defendant was wholly acquitted. Now here, the defendant acted upon information and appearances which were wholly false: and yet as he had reasonable grounds for believing them true, he was held guiltless. Foster, Crown Law, p. 299, says of this case:

"Possibly it might have been better ruled manslaughter at common law, due circumspection not having been used." I do not understand him as questioning the principle of the decision, but as only expressing a doubt whether the principle was properly applied. He calls it nothing more than a case of manslaughter, when, if a man may not act upon appearances, it was a plain case of murder. So far as I have observed, no other writer upon criminal law has questioned, in any degree, the decision in *Levell's Case*, and most of them have fully approved it. East, in his *Pleas of the Crown*, vol. 1, pp. 274, 375, has done so. Hale, 1 P. C. 42, 474, mentions it among cases where ignorance of the fact will excuse from all blame. Hawkins, 1 P. C. 84, Curwood's ed., says the killing had not the appearance of a fault. Russell, *Crimes*, vol. 1, p. 550, ed. of 1836, approves the decision, which he introduces with the remark, that "important considerations will arise in cases of this kind [he was speaking of homicide in defense of one's person, habitation, or property], as to the grounds which the party killing had for supposing that the person slain had a felonious design against him; more especially where it afterwards appears that no such design existed." Roscoe, *Crim. Ev.*, p. 639, says: "It is not essential that an actual felony should be about to be committed in order to justify the killing. If the circumstances are such as that, after all reasonable caution, the party suspects that the felony is about to be immediately committed, he will be justified." And he then gives *Levell's Case* as an example.

The case of Sir William Hawkesworth, who, through his own fault, was shot by the keeper of his park, who took him for a stranger who had come to destroy the deer, went upon the same principle: 1 Hale's P. C. 40; 1 East P. C. 275; 1 Russ. Cr. 549. Other cases are put in the books where the killing will be justified by appearances, though they afterwards prove false. A general, to try the vigilance or courage of his sentinel, comes upon the sentinel in the night in the posture of an enemy, and is killed. There the ignorance of the sentinel that it was his general, and not an enemy, will justify the killing: 1 Hale's P. C. 42; 1 East P. C. 275; 1 Russ. Cr. 540. The case mentioned by Lord Hale, which was before him at Peterborough, where a servant killed his master, supposing he was shooting at deer in the corn in obedience to his master's orders, belongs to the same class: 1 Hale's P. C. 40, 476; 1 Russ. Cr. 540. In *Rampton's Case*, Kel. 41, the defendant killed his wife with a pistol which he had found in the street, after ascertaining, as

he supposed, by a trial with the ramrod, that it was not loaded, though in fact it was charged with two bullets. This was adjudged to be manslaughter, and not merely misadventure. Foster, Crown Law, 263, 264, calls this a hard case, and thinks the man should have been wholly acquitted, on the ground that he exercised due caution—the utmost caution not being necessary in such cases. But if the decision was right, as I am inclined to think it was, for the want of proper caution, still the case goes on the ground that the degree of guilt may be affected by appearances which afterwards prove false; for if he had not tried the pistol, it would have been murder. Foster, Id. 265, mentions a case which was tried before him, where the prisoner had shot his wife with a gun, which he supposed was not loaded. The judge, being of opinion that the prisoner had reasonable ground to believe that the gun was not loaded, directed the jury, that if they were of the same opinion, they should acquit the prisoner; and he was acquitted. In *Meade's Case*, 1 Lew. C. C. 184, the prisoner had killed with a pistol one of a great number of persons who came about his house in the night-time, singing songs of menace, and using violent language. Holroyd, J., told the jury that if there was nothing but the song, and no appearance of violence—if they believed there was no reasonable ground for apprehending danger—the killing was murder. And in *The People v. Rector*, 19 Wend. 569, Cowen, J., said alarm on the part of the prisoner, on apparent though unreal grounds, was pertinent to the issue. In *The U. S. v. Willberger*, 3 Wash. C. C. 515, 521, the judge told the jury, that for the purpose of justifying the killing, the intent of the deceased to commit a felony must be apparent, which would be sufficient, although it should afterwards turn out that the real intention was less criminal, or even innocent. He afterwards added, that the danger must be imminent—meaning, undoubtedly, that it must wear that appearance. *The State v. Wells*, 1 Cox, 424 [1 Am. Dec. 211], is entirely consistent with this doctrine. The supreme court of Tennessee has gone still further, and held that one who kills another, believing himself in danger of great bodily harm, will be justified, although he acted from cowardice, and without any sufficient ground, in the appearances, for the killing: *Grainger v. The State*, 5 Yerg. 459 [26 Am. Dec. 278]. This was, I think, going too far. It is not enough that the party believed himself in danger, unless the facts and circumstances were such that the jury can say he had reasonable grounds for his belief.

We have been referred to two cases where it was said, in substance, that the killing must be necessary: *Regina v. Smith*, 8 Car. & P. 160, and *Regina v. Bull*, 9 Id. 22; and other authorities to the same effect might have been cited. The life of a human being must not be taken upon slight grounds; there must be a necessity, either actual or apparent, for the killing, or it can not be justified. That, I think, is all that was meant by such remarks as have been mentioned. The unqualified language that the killing must be necessary has, I think, never been used when attention was directed to the question whether the accused might not safely act upon the facts and circumstances as they were presented at the time. I have met with no authority for saying, that a homicide which would be justifiable had appearances proved true, will be criminal when they prove false.

But it is said that our statute has changed the rule of the common law on this subject; and that there must in fact be danger of great bodily harm, or the killing can not be justified. We know that such a change was not intended by the revisers, for they said in their notes, that the provision was "according to the views of most of the writers on the subject, and the express decisions in Massachusetts and New Jersey." Those writers and decisions have already been noticed. As I read the statute, it affirms the rule of the common law. The words are, homicide in self-defense is justifiable "when there shall be a reasonable ground to apprehend a design to commit a felony, or to do some great personal injury, and there shall be imminent danger of such design being accomplished:" 2 R. S. 660, sec. 3, subd. 2. The words "imminent danger," in the last branch of the clause, do not mean, as the argument for the prisoner assumes, that there must in fact be an impending evil which is ready to fall; but only that there is a threatened evil, or one which appears as if it were ready to fall. There must be reasonable ground to apprehend a wicked design, and apparent danger that such design will be accomplished. It is enough, by the express words of the statute, that there is reasonable ground to apprehend a wicked design; and it is absurd to suppose that such a provision was immediately followed by another, that the danger of the apprehended design being accomplished must be actual, and not merely apparent. Such a construction would make the last part of the clause nullify the first; for if there must be actual danger that the design will be accomplished, there must of necessity be an actual design to be accomplished.

Although I can not concur in the law of that part of the

charge to which exception was taken on the trial, it does not necessarily follow that we must reverse the judgment. The evidence did not make a case for laying down the law of justifiable homicide; and an error of the court concerning an abstract proposition, having nothing to do with the matter in hand, is not a sufficient ground for reversing a judgment. If every controverted fact mentioned in the bill of exceptions is taken in favor of the prisoner, the best case which he can possibly make will be substantially as follows: There was a sudden combat between the parties in the night, in which the deceased gave the first blow; but the prisoner entered readily into the fight. The deceased had no weapon, and gave blows with his naked hands or fists, while the prisoner struck with a knife, inflicting not less than nine wounds, one or more of which were mortal. After several blows had passed, the deceased hallooed, "He has got a knife," and retreated towards the middle of the street. The prisoner followed, and continued to give blows; the deceased at the same time either giving blows or defending himself against those given by the prisoner. The prisoner did not leave the sidewalk. When the deceased got to the middle of the road, he cried out, "Oh, boys!" fell, and died in a few minutes. The prisoner did nothing to shun the combat, nor did he show any disposition to stop the fight after it had commenced. Although one witness thought the deceased had the best of the fight at first, no important advantage was gained over the prisoner: he was neither knocked down, nor seriously injured, nor was he in any danger of life or limb. He followed when the deceased tried to escape, still giving blows with a deadly weapon, until very near the moment when the deceased fell down and expired.

This is the most favorable statement of the case for the prisoner which can be drawn from the facts detailed in the bill of exceptions; and much more favorable than any intelligent jury would draw from the whole of the evidence. But taking the case as I have stated it, there is no color for calling it justifiable homicide, or for leaving any such question to the jury. If it was not murder, it was manslaughter at the least; and so far as relates to these offenses, no exception was taken to the charge. When a man is struck with the naked hand, and has no reason to apprehend a design to do him any great bodily harm, he must not return the blow with a dangerous weapon. After a conflict has commenced he must quit it, if he can do so in safety, before he kills his adversary: and I hardly need add, that if his adver-

sary try to escape, he must not pursue, and give him fatal blows with a deadly weapon.

As there was no question of justifiable homicide in the case, the prisoner had no right to call on the court to instruct the jury on that subject; and although the instruction given was wrong in point of law, I do not see how it can possibly have operated to the prejudice of the prisoner. As this is a criminal and a capital case, I can not but feel a strong disposition to give the prisoner a new trial. But the law concerning bills of exceptions is the same in criminal as it is in civil cases: *The People v. Wiley*, 3 Hill (N. Y.), 194, 214, and we must not allow our feelings to draw us into the making of a bad precedent. I am of opinion that the judgment of the supreme court should be affirmed; and my brethren concur in this opinion, upon both the points which have been considered.

Judgment affirmed.

HOMICIDE DEEMED JUSTIFIABLE ON GROUND OF SELF-DEFENSE, when and when not: See *State v. Wells*, 1 Am. Dec. 211; *Grainger v. State*, 26 Id. 278, and note; *People v. McLeod*, 37 Id. 328; *State v. Scott*, 42 Id. 148; *State v. Hill*, 34 Id. 396. See, generally, as to the extent of the right of self-defense: *Gray v. Combs*, 23 Id. 431; *Scribner v. Beach*, 47 Id. 265. The doctrine of the principal case, that where one is attacked, without fault on his part, under circumstances furnishing reasonable ground for apprehending a design to take his life or do him great bodily harm, and there is reasonable ground for believing the danger imminent that such design will be accomplished, he may act upon the appearances and lawfully kill the assailant, if necessary to avoid the danger, although it may turn out that the appearances were false; and that the party assaulted must act at his peril upon the circumstances, is approved in *People v. Lamb*, 2 Abb. Pr., N. S., 160; S. C., 2 Keyes, 373; *Patterson v. People*, 46 Barb. 635; *People v. Stout*, 3 Park. Cr. 678; *Evers v. People*, 3 Hun, 718; S. C., 6 Thomp. & C. 158. The jury, in order to acquit on the ground of self-defense in such a case, are not required to find that the apprehended danger actually existed; it is enough if the accused had reasonable ground to believe that the danger existed: *People v. Sullivan*, 11 N. Y. Leg. Obs. 24; S. C., 7 N. Y. 400; *Uhl v. People*, 5 Park. Cr. 413. In the latter case an instruction to the jury in the following words was held erroneous: "If you find that the prisoner was justified in defending himself, and carried that protection further than was necessary to his defense, then he is guilty of manslaughter in some of its four degrees." There must be belief of imminent danger founded upon reasonable grounds; mere impressions are not enough: *People v. Lamb*, 2 Abb., N. S., 160; S. C., 2 Keyes, 373. Where one is advancing upon another in a threatening attitude, it may amount to an assault justifying a resort to violence to repel the attack: *Keyes v. Devlin*, 3 E. D. Smith, 524. See to that point also *State v. Davis*, 35 Am. Dec. 735, and note.

RESISTANCE TO AN ASSAULT ENTIRELY DISPROPORTIONATE to the violence of the attack renders the party assaulted the assailant: *State v. Hill*, 34 Am. Dec. 396. In *People v. Shay*, 4 Park. Cr. 351, under an indictment for murder, where it appeared that the deceased struck the prisoner with his naked

fist and then retreated, when the prisoner followed him up, drew a knife, and killed him, a conviction for murder was held right, and the court, *per Ingraham, J.*, said they could not distinguish the case from *Shorter v. People*.

ERRONEOUS INSTRUCTIONS WHICH COULD NOT HAVE PREJUDICED the losing party or influenced the verdict are no ground for reversal: *Zachary v. Pace*, 47 Am. Dec. 744; *Melledge v. Boston Iron Co.*, *ante*, 59, and see other cases cited in the notes thereto. The principal case is cited to the same point in *People v. Horton*, 4 Mich. 85; *Dows v. Rush*, 28 Barb. 185; *People v. White*, 55 Id. 613; *Knickerbocker v. People*, 43 N. Y. 179. See also *Melledge v. Boston Iron Co.*, *ante*, 59, and the note thereto. And generally, that erroneous instructions furnish no ground for reversal if the verdict and judgment are right upon the facts and law of the whole case: See *Gibbons v. Dillingham*, 50 Am. Dec. 233, and note, and *Potts v. House*, Id. 330.

IMMATERIAL ERRORS OF ANY KIND in the course of the trial, which manifestly cause no prejudice to any legal right, will be disregarded on error or appeal. See, on this point, the cases collected in the note to *Worrall v. Parmelee*, 49 Am. Dec. 351, as well as in the note to *Melledge v. Boston Iron Co.*, *ante*, 59. The principal case is often cited as an authority for this general doctrine as applied both to civil and criminal cases: *Crounse v. Fitch*, 14 Abb. Pr. 351; S. C., 23 How. Pr. 356; *Horner v. Wood*, 16 Abb. Pr. 391; *Buck v. Waterbury*, 13 Barb. 118; *Fry v. Bennett*, 28 N. Y. 331; *Ashley v. Marshall*, 29 Id. 503; *People v. Gonzales*, 35 Id. 60; *Messner v. People*, 45 Id. 10; *Shaw v. People*, 3 Hun, 281; S. C., 5 Thomp. & C. 447; *Eggler v. People*, 3 Id. 796; *Gardiner v. People*, 6 Park. Cr. 190; *Taylor v. People*, Id. 352. But if the court can not see that no prejudice could have resulted from the error, it can not be disregarded: *Shaw v. People*, 3 Hun, 281; S. C., 5 Thomp. & C. 447. See, also, the cases cited in the note to *Worrall v. Parmelee*, 49 Am. Dec. 351, before mentioned.

CANDEE v. LORD.

[2 NEW YORK (2 COMSTOCK), 289.]

JUDGMENT IS CONCLUSIVE EVIDENCE, IN CREDITOR'S SUIT founded upon it, as against other creditors of the debtor, that the plaintiff is a creditor, and to the amount awarded him by such judgment, unless it is impeached for fraud or collusion.

GENERAL REPLICATION IN CREDITOR'S SUIT, to an answer which alleges an immaterial objection to the judgment on which the suit is founded, is not a waiver of the complainant's right to rely on the judgment as an estoppel; he may in such a case except to the answer, but is not bound to do so.

ORDER GRANTING A FEIGNED ISSUE out of chancery is discretionary, and will not be reviewed on appeal, even where the appellate court is of opinion that no question of fact was in issue, calling for a jury trial.

APPEAL (taken to the former court of errors, but transferred to the court of appeals) to review an order of the former court of chancery granting a feigned issue. The suit was a creditor's bill, founded on a judgment recovered by complainant against the defendant Lord, and seeking to set aside judgments confessed by Lord in favor of other defendants, on which real prop-

erty of Lord had been sold on executions, bought in by the other defendants, and conveyed to them by the sheriff. The separate answers of the creditors in these confessed judgments alleged that complainant's judgment was recovered upon an indorsement which in truth was forged; but did not charge that it was suffered fraudulently or collusively. The complainant did not except to these answers, but filed a general replication; and the defendants then prayed a feigned issue, to try, among other matters of fact, the question, whether the indorsement on which complainant's judgment was recovered was a forgery. The chancellor granted the application, and the complainant appealed from this order.

Hiram Denio, for appellant, the complaining judgment creditor.

J. P. Whittemore, solicitor, and *Charles P. Kirkland*, of counsel, for respondents, the preferred creditors.

By Court, GARDINER, J. The most important question in this cause is, whether a judgment obtained without fraud or collusion, is conclusive evidence in suits between creditors, in relation to the property of the judgment debtor, of the indebtedness of the latter.

A debtor may be said to sustain two distinct relations to his property: that of owner, and *quasi* trustee for his creditors. As owner he may contract debts to be satisfied out of his property, confess judgments, create liens upon it, sell or give it to others at pleasure; and so far as he is personally concerned, will be bound by his own acts. But the law lays upon him an obligation to pay his debts, and holds him in behalf of his creditors to the exercise of good faith in all transactions relating to the fund upon which they must depend for payment. He can, therefore, neither create a debt, nor do any of the things above mentioned *mala fide* to their prejudice. The common law, of which the English statute and our own is but the exposition, declares that every such debt, judgment, or assurance, contracted or given with the intent to hinder, delay, or defraud his creditors, as against them, to be void. And equity, in many cases, holds the debtor and his confederates in the fraud as trustees for the parties aggrieved. The rights of creditors to the property of the debtor, are to be worked out through the different relations to which I have alluded.

In creating debts, or establishing the relation of debtor and creditor, the debtor is accountable to no one unless he acts *mala*

fide. A judgment, therefore, obtained against the latter without collusion, is conclusive evidence of the relation of debtor and creditor against others: 1. Because it is conclusive between the parties to the record, who in the given case have the exclusive right to establish it; and, 2. Because the claims of other creditors upon the debtor's property are through him, and subject to all previous liens, preferences, or conveyances made by him in good faith. Any deed, judgment, or assurance of the debtor, so far at least as they conclude him, must estop his creditors and all others. Consequently, neither a creditor nor stranger can interfere in the *bona fide* litigation of the debtor, or retry his cause for him, or question the effect of the judgment as a legal claim upon his estate. A creditor's right, in a word, to impeach the act of his debtor, does not arise until the latter has violated the tacit condition annexed to the debt; that he has done and will do nothing to defraud his creditors.

Where, however, fraud is established, the creditor does not claim through the debtor, but adversely to him, and by a title paramount, which overreaches and annuls the fraudulent conveyance or judgment by which the latter himself would be estopped. It follows from the principles suggested that a judgment obtained without fraud or collusion, and which concludes the debtor, whether rendered upon default, confession, or after contestation, is, upon all questions affecting the title to his property, conclusive evidence against his creditors, to establish, first, the relation of creditor and debtor between the parties to the record; and second, the amount of the indebtedness. This principle is assumed in our statute in relation to creditors' bills: 2 R. S. 174, sec. 38; and decided in *Rogers v. Rogers*, 3 Paige, 379; 2 Greenl. Ev. 531; *Marsh v. Pier*, 4 Rawle, 288, 289 [26 Am. Dec. 131].

It is immaterial whether the debt was created prior or subsequent to the fraudulent lien, or conveyance, which is sought to be removed. The right of the creditor to impeach the assurance of the debtor arises out of the relation which exists between them at the commencement of the suit for that purpose, and does not depend upon the time when the fraud was consummated. Hence a conveyance made with intent to defraud subsequent creditors is void at their election. And the fraudulent grantee would not be permitted to allege, in bar of the action against him, that the parties seeking relief were not creditors prior to or at the time of the conveyance: *Walker v. Burrows*, 1 Atk. 94; *Stileman v. Ashdown*, 2 Id. 481; *Fitzner v. Fitzner*, Id.

512; *Seward v. Jackson*, 8 Cow. 431, 441; *Hind v. Longworth*, 11 Wheat. 209; 1 Story's Eq., sec. 356; *Jackson v. Myers*, 18 Johns. 425; *Wilcox v. Fitch*, 20 Id. 472. The only difference in the two cases is found in the degree of evidence necessary to establish the fraud. In this case the defendants have not alleged that the judgment of the complainant was not obtained in good faith. But they insist that there was error in the suit in which it was obtained, in the determination of a question of fact; and that they are not concluded by the defense of the debtor, because they are not in privity with him. We think otherwise. The law which gave the judgment debtor the unlimited right (when honestly exercised) to contract debts, to settle and adjust their amount, to secure and to pay them, made him to this extent the representative of all his creditors who should seek the satisfaction of their demands out of his property; so far at least they are in privity with and claim under their debtor. If, as the defendants insist, they hold the property in question by a title derived under a valid judgment, prior to that of the complainant, their rights can not be affected by this evidence. If, however, as the bill alleges, their judgment was fraudulent, the complainant, as a creditor, can repudiate it, and claim the property as that of his debtor, his acts to the contrary notwithstanding, and hold his confederates in the fraud accountable as trustee for his benefit. If the defendants would shield themselves under the maxim, *Potior est conditio defendentis*, they should show, at least allege, that the complainant is in *pari delicto*.

But it is insisted that the complainant, by replying instead of excepting to the answer, has waived all right to insist upon the judgment as an estoppel: and that upon the pleadings the whole question of the indebtedness of the judgment debtor is opened as a question of fact. The judgment is distinctly stated in the bill, and as distinctly admitted in the answer of the defendants. The estoppel, therefore, appears upon the record.

This is all that is necessary to satisfy the rule of pleading at law: Ch. Pl. 592; *Veale v. Warner*, 1 Saund. 326. In chancery, the general replication only is allowed. It is a denial of the defense and a maintenance of the bill: Story's Eq. Pl., sec. 887. But it does not put in issue immaterial facts stated in the answer. The complainant might have excepted to the answer, it is true, but he was not obliged to do so. The defendant can not, by stuffing his answer with irrelevant matter, compel the complainant to except, or to lose the benefit of material facts

averred by him and admitted by the answer. This would be to enable a party to take advantage of his own bad pleading. In courts of equity, misleading in matters of form is never allowed to prejudice any party: Story's Eq. Pl., sec. 882.

And finally, it is said that the granting of a feigned issue rests in the discretion of the chancellor. This is true, where facts are to be ascertained, not where they are admitted. The defendants admit the judgment, and its legal effect was a question of law, which the chancellor could not submit to a jury. Discretion in this case, implies a right in the chancellor to fix the mode of trial according to his own judgment. But if the judgment as evidence was conclusive, there was nothing to try, and of course no room for discretion as to the mode of trial.

My brethren concur in the conclusions above stated, upon all the points discussed except the last. A majority of the court are of opinion that the decision of the chancellor was upon a question of practice, which is not a proper subject of review in this court, and for that reason the appeal should be dismissed.

Appeal dismissed.

JUDGMENT AS EVIDENCE IN CREDITOR'S SUIT.—Where a judgment creditor comes into equity to enforce his judgment, it is held, in *Garland v. Riese*, 15 Am. Dec. 756, that the judgment is *prima facie* evidence as against strangers claiming under the debtor that he is a debtor, and to impeach it they must show fraud, or that a full defense was not made, or produce new proof that the debt is not due. See generally, as to who may or may not impeach a judgment collaterally, *Vose v. Morton*, 50 Id. 750, and cases cited in the note thereto. That a judgment against a donor or grantor in a conveyance or assignment alleged to be fraudulent as to creditors, whether recovered before or after such conveyance or assignment, is conclusive as to the fact and amount of the indebtedness to the judgment creditor, as against other creditors or persons claiming through the debtor, if such judgment is not impeachable for fraud or collusion, is held, following the principal case and other like decisions, in *Ludington's Petition*, 5 Abb. N. C. 323; *Swihart v. Sharon*, 24 Ohio St. 422, 437; *Pickett v. Pipkin*, 64 Ala. 520. And, generally, a judgment not impeached for fraud or collusion is conclusive as to the fact and amount of indebtedness as against creditors and others claiming through the debtor: *Sidensparker v. Sidensparker*, 52 Me. 481, 490; *Hersey v. Benedict*, 15 Hun, 285; *Raymond v. Richmond*, 78 N. Y. 354. In *Atkins v. Hosley*, 3 Thomp. & C. 325, it is said, citing the principal case, that such a judgment is at least *prima facie* evidence against other creditors. In *Jarvis v. Sewall*, 40 Barb. 464, it is held, also citing the principal case, that a judgment against sureties on an appeal bond is, in the absence of fraud or collusion, conclusive as to the existence and amount of the liability in a subsequent suit against the obligors in a bond to indemnify the sureties: See also *Chace v. Hiaman*, 24 Am. Dec. 39, and note. So in *Westervelt v. Smith*, 2 Duer, 457; S. C., 12 N. Y. Leg. Obs. 81, a judgment against a sheriff for his deputy's default was held in like manner conclusive in an action against the sureties in a bond given to indemnify the sheriff against liability for the defaults of his deputy, where

the deputy had notice of the action against the sheriff and an opportunity to defend. That third persons may assail a judgment for fraud in proper cases, and that, upon this principle, a tax collector having seized certain property for sale for a delinquent tax may impeach as fraudulent a judgment under which the property is claimed by a creditor of the delinquent tax payer, is held in *Simson v. Wrigley*, 86 N. Y. 332, 337, where *Canlee v. Lord* is referred to as not contravening this doctrine. To the point that a judgment will not be relieved against, even though it be void as between parties who are *in pari delicto*, the principal case is cited in *Kerrison v. Kerrison*, 8 Abb. N. C. 450; S. C., 60 How. Pr. 57.

THAT DEBTOR'S CONTRACTS, ASSURANCES, AND TRANSFERS are, in the absence of fraud or collusion, binding upon his creditors who have no prior liens, is a point to which the principal case is cited in *Miller v. Lewis*, 4 N. Y. 559; *Murray v. Judson*, 9 Id. 83; *Curtis v. Leavitt*, 15 Id. 51. So where an account is adjusted in due course of administration between a creditor and the administrator of his debtor, other creditors can not be heard to allege anything against it, unless there be fraud or collusion: *Bank of Poughkeepsie v. Hasbrouck*, 6 Id. 224.

ORDER DIRECTING ISSUE OUT OF CHANCERY IS DISCRETIONARY, but the discretion must be cautiously exercised, and when it is apparent that there was no necessity for it, it is held, in *Le Guen v. Gouverneur*, 1 Am. Dec. 121, that the order will be reversed by an appellate court. That the granting or refusal of an order awarding an issue is discretionary, and therefore not appealable as a general rule, is held, following the principal case, in *Lansing v. Russell*, 4 How. Pr. 215; and in *Devin v. Patchin*, 26 N. Y. 445. See generally, as to when an issue may or should be directed, *Pryor v. Adams*, 1 Am. Dec. 533; *Hooe v. Marquess*, 2 Id. 570; *Seymour v. De Lancey*, 14 Id. 552; *Reybold v. Dodd*, 26 Id. 401. That an award of a feigned issue is merely for the information of the court, and that the finding of the jury upon such issue is not conclusive, but may be accepted either wholly or in part, or rejected altogether, is a point to which *Candee v. Lord* is cited in *Clark v. Brooks*, 2 Abb. Pr., N. S., 407; *Wood v. Mayor etc. of New York*, 4 Id. 155; *Hegeman v. Cantrell*, 50 How. Pr. 189.

DECISIONS ON MATTERS RESTING IN DISCRETION of the court are not the subject of review in an appellate court, unless there has been an abuse of the discretion: See *Wann v. McNulty*, 43 Am. Dec. 58; *Ferguson v. Miles*, 44 Id. 702; *McDaniel v. State*, 47 Id. 93; *Moody v. Fleming*, 48 Id. 210; *Commonwealth v. Eastman*, Id. 596; *Kimball v. Thompson*, 50 Id. 799, and cases cited in the notes thereto. So held, also, citing *Candee v. Lord*, in *Wakeman v. Price*, 3 N. Y. 334; *Devin v. Patchin*, 26 Id. 445; *Lansing v. Russell*, 4 How. Pr. 215; S. C., 2 N. Y. 565.

PITT v. CONGDON.

[2 NEW YORK (2 COMSTOCK), 352.]

INDORSER NOT DISCHARGED BY SURRENDER OF COLLATERAL SECURITY.—

The indorser for value, and in usual course of business, of a negotiable bill or note, does not become a surety for the maker or acceptor in such sense that he is discharged by the holder's surrendering a collateral security received from the maker.

SUCH AN INDORSER IS DISCHARGED BY ANY DEALINGS between the holder and the principal debtor which defeat the indorser's remedy on the instrument. But he has no claim on a collateral security which the holder may have taken on his own account from the principal, and therefore no remedy of his is prejudiced by its surrender.

ACCOMMODATION INDORSER OR ACCEPTOR IS TO BE REGARDED AS SURETY for the principal debtor on a note or bill, as to all persons having notice. *Per Gardiner, J.*

ERROR to review a judgment for plaintiffs in *assumpsit* against indorsers. There were three notes in controversy, made by Lawrence to the order of Charles and William Pitt, the defendants, and by them indorsed for value to Hillsburgh. Two actions were originally brought, one on two of the notes in Hillsburgh's name, and the other on the third note, in the name of Congdon for Hillsburgh's use; but Lawrence, the maker, suffered judgment by default, and Hillsburgh died, and the actions were then consolidated under a stipulation for prosecuting them as if one action had been brought by Congdon against the two Pitts. No question was made but that the proper steps had been taken to charge the defendants as indorsers; but they proved, in defense of the action, that Hillsburgh, the beneficial owner of the notes, received a bond and mortgage from the maker as collateral security for payment of them, and that after the defendants had become indorsers, Hillsburgh surrendered this security, which was ample in amount, to Lawrence, without defendants' consent; and on this proof they moved for a nonsuit. The presiding judge denied the motion, and directed a verdict for plaintiff. A motion for a new trial was denied, the court holding, in an opinion not reported, that an indorser is not a surety in the sense of being entitled to the benefit of a collateral security unless upon proof that he indorsed accommodation, and that the holder knew this. Plaintiff therefore had judgment, and defendants brought error.

Howland and Chase, attorneys, and *Nelson Chase*, of counsel, for the plaintiff in error, representing the owner and holder of the notes.

Mills and Beckwith, attorneys, and *A. C. Bradley*, of counsel, for the defendants in error, the indorsers.

By Court, GARDINER, J. If the indorser of negotiable paper for value, in the ordinary course of business, is a surety for the maker, or acceptor, the judgment of the common pleas is erroneous, and should be reversed. This is the sole question in the cause.

In a variety of cases, and in books of undoubted authority, we find it said that drawers and indorsers are in the "light of sureties, in the nature of sureties," etc.: 3 Kent's Com. 112, marginal paging; *Griffith v. Reed*, 21 Wend. 504 [34 Am. Dec. 267]; *Snydam v. Westfall*, 4 Hill (N. Y.), 216; *Philpot v. Briant*, 4 Bing. 717; *Wood v. Jefferson Co. Bank*, 9 Cow. 194. But we have been referred to no adjudication, nor have I been able to find one, in which it has been held that they are sureties in fact. The case of *Hurd v. Little*, 12 Mass. 503, is in principle directly in point, to show that they do not sustain that relation. The plaintiff was the holder of a foreign bill of exchange, which was protested for non-acceptance. The plaintiff then took security of the drawer (the party primarily liable), which he subsequently gave up, relying upon assurances that the bill would be paid by the drawee. It was not paid, and this suit was brought against the indorser. The court said, that as he had only taken further security, without giving new credit, the indorsee was not discharged. *Pring v. Clarkson*, 1 Barn. & Cress. 14, is to the same effect. There a new bill was taken from the acceptors, discounted, and the proceeds were more than sufficient to discharge the first draft, which was afterwards indorsed to the plaintiff for value. Held to be collateral security; and as there was no agreement to give time, the drawer was liable. Chief Justice Abbott said that in no case had it been held that taking a collateral security from the acceptor should have the effect to discharge the other parties to the bill.

The authorities to which we have been referred only determine that the holder of a bill, or note, can not deal with the maker or acceptor in such a way as to deprive the drawer or indorser of any remedy he may have upon the instrument. They can not discharge the party primarily liable, and then sue the indorser, because the latter would in this way be deprived of his remedy over. They can not extend the time, without the assent of the drawer, or indorser, for this would change their contract: *Word v. Jefferson City Bank*, 9 Cow. 194, and cases there cited; Chit. on Bills, 410. The same is true of sureties. But these rights, or restrictions, upon the power of the holder of the paper are by no means peculiar to them. The holder can not release one of the joint makers of a note, without discharging all: *Id.* 314; and no man's contract can be altered without his assent, be he maker or indorser.

When an individual becomes party to a note or bill, at the request and for the benefit of another, the relation of principal

and surety exists, and must be regarded by all other parties or holders affected with notice: *Griffith v. Reed*, 21 Wend. 504 [34 Am. Dec. 267]. The adoption of this rule has been regretted by judges in England and in this country, but it is established here, and can only be changed by legislation: *Kerrison v. Cooke*, 8 Camp. 362. We are not inclined to extend the doctrine beyond the cases to which it has been restricted. In this case, the note was indorsed for a consideration received by the indorser, and for his own benefit, exclusively, without reference to the wishes or convenience of the maker.

We think, therefore, that he was not a surety for the maker, in any such sense as would entitle him to an account, from the holder of these notes, for the value of a collateral security, taken by him from the maker, on his own account, and subsequently surrendered in good faith, and without payment. The judgment must be affirmed.

Judgment affirmed.

DISCHARGE OF INDORSER BY INDULGENCE TO MAKER OR ACCEPTOR.—Mere delay in proceeding against the maker or acceptor of a note or bill does not discharge an indorser, even though the indorser requests the holder to proceed: *Page v. Webster*, 33 Am. Dec. 608; nor an agreement for delay or for an extension of time, provided there be no new consideration therefor, nor anything precluding the holder from proceeding against such maker or acceptor: *Huie v. Bailey*, 35 Id. 214; nor the dismissal of a suit, nor the discharge of an attachment against the maker or acceptor: *Page v. Webster*, 33 Id. 608; nor the discharge of the maker or acceptor from imprisonment under a *ca. sa.* and permitting him to leave the state: *Huie v. Bailey*, 35 Id. 214. But it is held in *Scarborough v. Harris*, 1 Id. 609, that whenever a new credit or extension of time for payment is given by the holder to the drawer of a bill, he thereby releases the indorser. And in *Sharpe v. Bingley*, 12 Id. 643, it is decided that receiving partial payments from the maker, granting him extensions of time, and promising him not to call on the indorser, will release the latter. An agreement with the maker for an extension of time after judgment against the maker and indorser, it is held, in *Manufacturers' etc. Bank v. Bank of Pennsylvania*, 42 Id. 240, will discharge the judgment against the indorser. A release of the maker of a note amounts to payment and releases the indorser: *Commercial Bank v. Cunningham*, 35 Id. 322. But a release of one of several joint makers, excepting such maker's liability to the indorser, will not discharge the latter: *Stewart v. Eden*, 2 Id. 222. That an indorser is not released by the holder's taking collateral security from the maker without an agreement extending the time of payment, is held, citing the principal case, in *Artisans' Bank v. Backus*, 31 How. Pr. 251. So in *Deck v. Works*, 57 Id. 309, S. C., 18 Hun, 273, it is held that a guarantor for value is not a surety, and is not discharged by the release of securities for the debt, nor by the holder's neglect to take steps to charge an indorser. Where the maker of a note held by a bank makes a general deposit therein after the note is due, without any express direction or agreement that it is to be applied to the note, and the bank afterwards pays out the money on the

maker's order, it is no payment so as to release an indorser on the note: *National Bank of Newburgh v. Smith*, 5 Id. 184; affirmed in 66 N. Y. 273, citing the principal case.

ACCOMMODATION INDORSERS, ACCEPTORS, AND MAKERS, rights and liabilities of, in general: See *Warder v. Tucker*, 5 Am. Dec. 62; *Smith v. McLean*, 7 Id. 693; *Buck v. Cotton*, Id. 251; *Seymour v. Minturn*, 8 Id. 380; *Bank of Montgomery v. Walker*, 11 Id. 709; *Daniel v. McRea*, Id. 787; *Douglas v. Waddle*, 13 Id. 630; *Clopper v. Union Bank*, 16 Id. 294; *Lambert v. Sandford*, 18 Id. 149; *Knox v. Dixon*, 23 Id. 488; *Whitwell v. Crehore*, 28 Id. 141; *Okie v. Spencer*, 30 Id. 251; *Kimbrow v. Lytle*, 31 Id. 585; *Griffith v. Reed*, 34 Id. 267; *Phelps v. Garrow*, 35 Id. 688; *Nash v. Skinner*, 36 Id. 338; *Bullit v. Thatcher*, 37 Id. 175; *White v. Hopkins*, Id. 542; *Abercrombie v. Knox*, Id. 721; *Aiken v. Barkley*, 42 Id. 397; *McDowell v. Cook*, 45 Id. 289, and notes. See, particularly as to what indulgence to the principal debtor, or dealings between him and the holder, will or will not release an accommodation acceptor or indorser, *Bullit v. Thatcher*, 37 Id. 175; *White v. Hopkins*, Id. 542; *Abercrombie v. Knox*, Id. 721, and cases cited in the notes thereto. That an accommodation indorser or acceptor is to be regarded as a surety, is a point to which the principal case is cited in *Boyd v. Finnegan*, 3 Daly, 223; *Cassebeer v. Kalbfleisch*, 11 Hun, 123, and *First National Bank v. Morris*, 1 Id. 682; S. C., 4 Thomp. & C. 185.

HOLDER SURRENDERING COLLATERAL SECURITY DISCHARGES SURETY: See *Lichtenthaler v. Thompson*, 15 Am. Dec. 581; *Smith v. Tunno*, 16 Id. 617; *Cullum v. Emanuel*, 34 Id. 757; *New Hampshire etc. Bank v. Colcord*, 41 Id. 685. For the surety upon paying the debt is entitled to be subrogated to collateral securities given by the maker to the holder: *Pratt v. Thompson*, 48 Id. 492, and cases cited in the note thereto. See, generally, as to what indulgence to the principal will or will not discharge a surety, *Curan v. Colbert*, 46 Id. 427; *Pintard v. Davis*, 47 Id. 172; *King v. State Bank*, Id. 739; *Bank v. Fordyce*, 49 Id. 561; *Carter v. Jones*, Id. 425, and cases cited in the notes thereto. That taking the principal's note or collateral security for a debt, without any agreement extending the time of payment, will not suspend the creditor's remedy against the principal or surety, is held, citing *Pitt v. Congdon*, in *Williams v. Townsend*, 1 Bosw. 416. In *Bank of Toronto v. Hunter*, 20 How. Pr. 298, the case is cited to the point that a surety upon paying the debt is entitled to be subrogated to securities held by the creditor. In *Wells v. Mann*, 45 N. Y. 330, the case is cited, among others, as adhering to the rule laid down in *Pain v. Packard*, 7 Am. Dec. 369, as to the discharge of a surety by neglect to proceed against the principal when requested, where the principal afterwards becomes insolvent, but as declining to extend that rule.

POST v. KEARNEY.

[2 NEW YORK (2 COMSTOCK), 394.]

COVENANT IN LEASE THAT LESSEE SHALL PAY ASSESSMENTS runs with the land, and may be enforced against the assignee.

TRANSFER OF LESSEE'S INTEREST, which contains a covenant that the transferee will surrender the premises to the lessee at the expiration of the term, is a sublease, not an assignment.

COVENANT IN LEASE THAT LESSEE SHALL PAY ALL RATES, TAXES, AND ASSESSMENTS for which the premises shall be liable, includes not only such charges as may be imposed by laws then in force, but also such as may be authorized by laws afterwards enacted.

ERROR to review a judgment of the New York superior court, in favor of plaintiff in an action of covenant. The covenant in controversy was contained in a lease made by John Watts to John Ellis, of land in New York city, and was to the effect that the lessee "shall and will at all times well and truly pay and discharge all such rates, taxes, and assessments for which the said premises shall be liable, or shall be rated, levied, or assessed on the same, during the continuance of the lease." Watts devised the land, subject to the lease, to Philip Kearney, jun., and he having been compelled to pay an assessment laid upon the land for expenses of a street opening, brought this action to recover the amount from defendant, George D. Post, as assignee of the lease. The defenses were: 1. That the covenant did not run with the land, and could not be enforced against an assignee. 2. If it could be, that defendant had intermediately assigned the term to one Shepherd, which transfer had made Shepherd the party liable. 3. That the assessment was not within the purview of the covenant. On the trial these defenses were overruled, and the plaintiff had a verdict and judgment: *Kearney v. Post*, 1 Sandf. 105; to review which defendant brought error.

Buller & Evarts, attorneys, and *J. Prescott Hall*, of counsel, for plaintiff in error, the assignee of the lease.

A. N. Gouverneur, attorney, and *Jonathan Miller*, of counsel, for defendant in error, the owner of the covenant.

By Court, GARDINER, J. The defendant contends: 1. That the covenant in the original lease to pay assessments did not run with the land. It is obvious that this covenant affected the value, and, in this case, the mode of enjoying the demised property. It was more than a covenant collateral to the land, and was, therefore, assignable: *Taylor's Land. & Ten.* 128; *Palmer's Case*, 5 Co. 25; *Norman v. Wells*, 17 Wend. 148; *Astor v. Hoyt*, 5 Id. 615. That the defendant was assignee in fact, distinctly appears from the recital in the lease executed by him to Collins Shepherd, of the premises in question. 2. The lease between the parties last mentioned is in the usual form, with covenants by the lessee for the payment of rent, and for the surrender of the premises at the close of the term in good order and condi-

tion. Shepherd therefore did not hold the premises as assignee, but as the under-tenant of the defendant: *Piggot v. Mason*, 1 Paige, 414, 415. 3. It is insisted that the assessment in question is not embraced by the terms of the covenant of the lease of 1799; that it is extraordinary, and not within the contemplation of the parties, or the law, as a part of the rent reserved; that no assessments, but those authorized by the law existing at the execution of the lease, are within its terms. By the provisions of the lease of 1799, the lessee covenanted, in consideration of the demise, "to discharge all such rates, taxes, and assessments (which comprehends every charge imposed by public authority), for which said premises shall be liable, or shall be raised, levied, or assessed on the same during the continuance of the lease." The lease continued from 1799 to 1841, the defendant admits. The assessment was imposed by resolution of the common council of the city of New York, and the report of the commissioners was subsequently confirmed by the supreme court. It was one therefore for which the premises were liable. The defendant became assignee of this lease by a conveyance from the insurance company, made in express terms, "subject to the rents and covenants in said indenture of lease mentioned." By those covenants, the lessee or assignee was to provide for all assessments, whether imposed according to laws then existing, or those subsequently enacted. What the precise character or amount of the subsequent assessments would be, could not be known, although the parties must have anticipated an increase during a term of forty years, and in a city rapidly growing in importance. Of all this the tenant agreed to take the hazard, and to obtain compensation in a diminished rent, and the increased value of the demised premises.

The covenant is, we think, perfectly plain; and unless there is some law that prohibited parties from making their own contracts, the defendant must abide by the one he has voluntarily assumed.

The decision of the judge was correct, and the judgment must be affirmed.

Judgment affirmed.

COVENANT BY LESSEE TO PAY TAXES, CONSTRUCTION AND EFFECT OF: See *Bolling v. Stokes*, 21 Am. Dec. 606. As to when the administrator of the lessee is personally liable on such a covenant, see *Matter of Galloway*, 34 Id. 209. That such covenants run with the land, see the note to *Morse v. Garner*, 47 Id. 573. In *Garner v. Hannah*, 6 Duer, 262, 269, it was held, citing the principal case as decisive of the question, that a provision in a lease that the tenant should pay "the ordinary and yearly taxes" included the annual

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water-rent charged on the premises by the Croton department, pursuant to an act of the legislature passed after the execution of the lease.

COVENANTS IN LEASE RUNNING WITH THE LAND, what are, in general: See the note to *Fulton v. Stuart*, 15 Am. Dec. 544. See also *Pollard v. Shaeffer*, 1 Id. 239; *Taylor v. Owen*, 20 Id. 115; *Watertown v. Cowen*, 27 Id. 80; *Kellogg v. Robinson*, Id. 550; and the note to *Morse v. Garner*, 47 Id. 569, 573.

ASSIGNMENT OF LEASE AND SUBLETTING, DISTINCTION BETWEEN: See *Childs v. Clark*, 49 Am. Dec. 164. See also the note to *Fulton v. Stuart*, 15 Id. 545. The principal case is approved and followed on the point that where a lease of premises lets them to another for the whole term, reserving rent and a right of re-entry, taking covenants for the payment of taxes and assessments, as stipulated for in the original lease, and for a surrender at the end of the term, the instrument or contract is an under-lease, and not an assignment, in *Linden v. Hepburn*, 5 How. Pr. 188, 189; *People v. Robertson*, 39 Barb. 9, 15; *Martin v. O'Conner*, 43 Id. 514, 522; *Collins v. Hasbrouck*, 56 N. Y. 157, 162. In *Constantine v. Wake*, 1 Sweeny, 239, on the other hand, where a lessee granted and demised the premises for the whole of his unexpired term, at the same rent as in the original lease, it was held an assignment, and not a sublease, because no reversionary interest was left in the original lessee. Freedman, J., delivering a concurring opinion, after quoting the language of Gardiner, J., in the principal case on this point, said: "This remark, from which it does not appear whether Shepherd's lessor did or did not part with his entire interest in the original lease, or whether he did or did not retain a reversionary interest therein, and which does not disclose to whom Shepherd was bound to surrender, has since been frequently cited in support of the theory that every conveyance not containing the proper technical words of an assignment should be considered as a sublease, and not as an assignment, even if it convey the whole estate of the grantor in the unexpired term, and in many cases seems to have misled."

In *Woodhull v. Rosenthal*, 61 N. Y. 382, 392, it was also held, that an instrument executed by a lessee of premises, transferring all his interest in a part thereof, with or without conditions, though in form a lease, and though containing a stipulation for a surrender, was but an assignment *pro tanto*, and not a sublease. Dwight, C., delivering the opinion, said: "The owner of the lease of the lot in controversy made over to the plaintiff's assignor his entire interest in the lease, so far as the *locus in quo* was concerned. It was not a sublease, but an assignment of all the lessee's interest in a part of the premises. If a lessee has two houses embraced in one lease at an entire rent, and sells all his interest in one of the houses, this is an assignment *pro tanto*, and not a subletting. It is immaterial what form of instrument is used, whether it purports to be an assignment or a new lease. The essential distinction between an assignment and a sublease is simply this: If a lessee, by any instrument whatever, whether reserving conditions or not, parts with his interest, he has made a complete assignment; if he has transferred his entire interest in a part of the premises, he has made an assignment *pro tanto*. If he retains a reservation in himself, he has made a sublease: *Belford v. Terhune*, 30 N. Y. 454, 457. It is there said, that 'it is essential to an under-tenancy that it be of a part only of an unexpired term.' It is true that *Martin v. O'Conner*, 43 Barb. 522, holds that though the lessee transfers his entire term, if he takes a covenant from the transferee to surrender up possession to him at the expiration of the term, and reserves a right of entry in case the rent is not paid, the transaction is a sublease, and not an assignment. This case is rested upon the decision in *Post v. Kearney*, 2 N. Y. 394. That

case goes upon the ground that there was an express clause in the lease providing for a surrender by the derivative lessee to the lessee. It was considered, as far as I can understand the case, that this created a sort of reversion in the lessee, and made the transaction an under-lease. It is certainly difficult to reconcile *Post v. Kearney* and *Martin v. O'Conner* with *Bedford v. Terhune*. In this last case it is said, that when there is a transfer of the whole of a term, the person taking is an assignee, and not an under-tenant, although there is, in form, an underletting." He then cites, as sustaining this view, *Langford v. Selmes*, 3 Kay & J. 226, 229; *Pluck v. Digges*, 5 Bligh, N. S., 31, 65; *Parmenter v. Webber*, 8 Taunt. 593; *Hicks v. Dowling*, 1 Ld. Raym. 99; *Lloyd v. Cozens*, 2 Ashm. 138; *Palmer v. Edwards*, Doug. 187, n.; *Doe v. Bateman*, 1 Barn. & Ald. 168; and after quoting Bac. Abr., Leases, I. 3, says: "The case at bar resembles this statement by Bacon. There was an agreement by Horspool to surrender at the end of his term, but no specific agreement to surrender to the lessee (Kelly). The case, therefore, does not fall within the precise ruling in *Post v. Kearney*. The doctrine of that case is not to be extended, the theory in *Bedford v. Terhune* being more in accordance with principle and authority."

WILSON v. LITTLE.

[2 NEW YORK (2 COMSTOCK), 442.]

SHARES OF CORPORATE STOCK MAY BE PLEDGED, and although their owner transfers them absolutely in form, yet if the intention of the parties is that the transferee shall hold them only as security for money lent, and that the owner may redeem them at any time (even after the loan falls due) before the lender has exercised his power of sale, the transaction is a pledge, not a mortgage.

PLEDGE CAN NOT SELL THE PAWN without demanding payment of the debt and giving notice to the pledgor of the time and place of sale.

CONSENT THAT PLEDGE MAY SELL without giving notice does not relieve him from the necessity of demanding payment of the debt before he sells.

ACTION FOR SELLING STOCKS PLEDGED for a debt, without having first demanded payment of the debt, may be maintained without making tender of the sum due.

MEASURE OF DAMAGES IN ACTION FOR WRONGFULLY SELLING PLEDGE, discussed in a case where there had been negotiation between a pledgor and pledgee of stocks for a payment of the debt and a return of similar stocks to those which the pledgee had received and sold, pending which, such stocks had risen in value; and held, that the pledgor was entitled, under such circumstances, to recover the highest value down to the time when the negotiations were broken off.

APPEAL from a judgment of the New York superior court in favor of plaintiff in trover. The facts are stated in the opinion. See also the report of the decision of the superior court in 1 Sandf. 351. Pending the appeal, the plaintiff, James Wilson, jun., died, and the cause was continued by Gertrude Cutting as administratrix, the title being changed accordingly.

S. Beardsley, for the appellant.

W. Curtis Noyes, for the respondent.

By Court, *RUGGLES, J.* This was an action for wrongfully selling fifty shares of Erie railroad stock, which the defendants Little & Co. had received in security for a loan of two thousand dollars made by them to Wilson, through the agency of R. L. Cutting, a broker. The contract in writing was in these words: "\$2,000. New York, Dec. 20, 1845.

"I promise to pay Jacob Little or order two thousand dollars, for value received, with interest at the rate of seven per cent. per annum, *having deposited with them as collateral security*, with authority to sell the same at the broker's board, or at public auction, or at private sale, at option, on the non-performance of this promise, without notice on fifty Erie.

"R. L. CUTTING."

The stock in fact belonged to the plaintiff Wilson, but stood in Cutting's name on the books of the New York & Erie Railroad Company. It was of that kind known as consolidated capital stock. Cutting negotiated the loan as the plaintiff's broker. On the same day Cutting made a transfer of the stock on the books of the company in the words following:

"N. Y. & Erie Co.

"For value received, I hereby transfer unto Jacob Little & Co. all my right, title, and interest in fifty shares of the consolidated capital stock of the New York & Erie Railroad Company.

"New York, Dec. 20, 1845.

R. L. CUTTING."

It is contended, on the part of the defendants, that the transaction was a mortgage and not a pledge; that the money was payable immediately, and the stock became absolutely the property of the appellants, and was only redeemable in equity. If this be true, the supreme court and the court for the correction of errors must have rendered their judgments in the case of *Allen v. Dykers*, 3 Hill (N. Y.), 593, and *Dykers v. Allen*, 7 Id. 498 [42 Am. Dec. 87], upon a mistaken view of the law. In that case, as in the present, there was a loan of money, a promissory note for the payment of the amount, in which it was stated that the borrower had deposited with the lenders, as collateral security, with authority to sell the same on the non-performance of the promise, two hundred and fifty shares of the stock therein mentioned. The money in that case was payable in sixty days—the sale was to be made at the board of brokers, and notice waived if not paid at maturity. The stock was assigned to the lenders

of the money, and the transfer entered on the books of the company, on the day the note was given. With respect to the question whether the stock was mortgaged or pledged, I can perceive no difference between that case and the present. The question does not appear, by the report of that case, to have been raised. It would have been a decisive point, for if it had been a mortgage and not a pledge, the plaintiff must have failed. The sale of the stock in that case, by the lender, before the maturity of the note, did not make it the less decisive: See *Brown v. Bement*, 8 Johns. 98. If there had been good ground for saying, in *Allen v. Dykers*, that the stock was mortgaged and not pledged, it is not to be believed that it would have escaped the attention of the eminent counsel who argued the cause, and of both the courts; and on examining the question, I am satisfied that if the point had been taken it would have been overruled.

The argument of the defendant in this case is founded on the assumption that when personal things are pledged for the payment of a debt, the general property and the legal title always remain in the pledgor: and that in all cases where the legal title is transferred to the creditor, the transaction is a mortgage and not a pledge. This, however, is not invariably true. But it is true that possession must uniformly accompany a pledge. The right of the pledgee can not otherwise be consummated. And on this ground it has been doubted whether incorporeal things like debts, money in stocks, etc., which can not be manually delivered, were the proper subjects of a pledge. It is now held that they are so; and there seems to be no reason why any legal or equitable interest whatever in personal property may not be pledged; provided the interest can be put, by actual delivery or by written transfer, into the hands or within the power of the pledgee, so as to be made available to him for the satisfaction of the debt. Goods at sea may be passed in pledge by a transfer of the muniments of title, as by a written assignment of the bill of lading. This is equivalent to actual possession, because it is a delivery of the means of obtaining possession. And debts and choses in action are capable, by means of a written assignment, of being conveyed in pledge: *Story on Bail.*, secs. 290, 297. The capital stock of a corporate company is not capable of manual delivery. The scrip or certificate may be delivered, but that of itself does not carry with it the stockholder's interest in the corporate funds. Nor does it necessarily put that interest under the control of the pledgee. The mode in which the capital stock of a corporation is transferred usually

depends on its by-laws: 1 R. S. 600, sec. 1. It is so in the case of the New York & Erie Railroad Company: Laws of 1832, c. 224, sec. 18. The case does not show what the by-laws of that corporation were. It may be that nothing short of the transfer of the title on the books of the company would have been sufficient to give the defendants the absolute possession of the stock, and to secure them against a transfer to some other person. In such case the transfer of the legal title being necessary to the change of possession, is entirely consistent with the pledge of the goods. Indeed, it is in no case inconsistent with it, if it appears by the terms of the contract that the debtor has a legal right to the restoration of the pledge on payment of the debt at any time, although after it falls due, and before the creditor has exercised the power of sale. *Reeves v. Capper*, 5 Bing. N. C. 136, was a case in which the debtor "made over" to the creditor "as his property" a chronometer, until a debt of fifty pounds should be repaid. It was held to be a valid pledge.

In the present case the note for the repayment of the loan and the transfer of the stock were parts of the same transaction, and are to be construed together. The transfer, if regarded by itself, is absolute, but its object and character is qualified and explained by the contemporaneous paper which declares it to be a deposit of the stock as collateral security for the payment of two thousand dollars, and there is nothing in the instrument to work a forfeiture of the right to redeem or otherwise to defeat it, except by a lawful sale under the power expressed in the paper.

The general property which the pledgor is said usually to retain, is nothing more than a legal right to the restoration of the thing pledged on payment of the debt. Upon a fair construction of the note and the transfer taken together, this right was in the plaintiff, unless it was defeated by the sale which the defendant made of the stock.

In every contract of pledge there is a right of redemption on the part of the debtor. But in this case that right was illusory and of no value, if the creditor could instantly, without demand of payment and without notice, sell the thing pledged. We are not required to give the transaction so unreasonable a construction. The borrower agreed that the lender might sell without notice, but not that he might sell without demand of payment, which is a different thing. The lender might have brought his action immediately, for the bringing an action is

one way of demanding payment; but selling without notice is not a demand of payment, and it is well settled that where no time is expressly fixed by contract between the parties for the payment of a debt secured by a pledge, the pawnee can not sell the pledge without a previous demand of payment, although the debt is technically due, immediately: *Story on Bail.*, sec. 308; *Stearns v. Marsh*, 4 Denio, 227 [47 Am. Dec. 248].

Payment of the note in this case was not demanded until the third of January, 1846. Previous to that time, and about the twenty-fourth of December, 1845, the defendants had sold the whole or the greater part of the fifty shares of consolidated stock pledged to them by the plaintiff, and were therefore not in condition to fulfill the contract on their part by restoring the pledge. Nor were they able nor did they offer to restore the same kind of stock, or stock of the same value as that which had been pledged in behalf of the plaintiff. On the third of January, when the defendants offered to deliver the converted stock, which was of a different kind and value, the plaintiff's broker was willing to receive any stock of the same description as that which had been pledged; but no stock of that kind was offered by the defendants. There was at that time a material difference in the market price between the consolidated and the converted stock of the company, the former selling at eighty-five dollars, and the latter at fifty-five dollars, per share. The pledge of the fifty shares of consolidated stock, therefore, could not be restored or made good to the plaintiff by assigning to him the same number of shares of converted stock. The defendants were bound to restore the identical stock pledged. The sale of it by the defendants before payment demanded was therefore wrongful, and the evidence sustains the third count in the plaintiff's declaration. The defendants having voluntarily put it out of their power to restore the pledge, a tender of the money borrowed would have been fruitless, and was therefore unnecessary: *Allen v. Dykers*, 3 Hill (N. Y.), 596; *Dykers v. Allen*, 7 Id. 498 [42 Am. Dec. 87].

The remaining question is as to the rule of damages. The stock was disposed of by the defendants as early as the twenty-fourth of December, when its market price was about sixty-eight dollars the share. The defendant did not, however, distinctly inform the plaintiff then or afterwards that he had sold it, although he said he "had not got it," and gave that as a reason why he did not then transfer it, promising at the same time, that he would make the transfer as soon as the stock

came in. The plaintiff, to accommodate the defendant, agreed to wait until the following day, when the transfer was not made, the defendant again promising to make it shortly. The plaintiff's broker reminded the defendant of the stock frequently, and on the thirtieth of December, formally notified him that he wanted to pay the loan and get back the stock, insisting that there should be no more delay, and that if it was not returned, he was directed by the party for whom he was acting to buy fifty shares at the board and charge it to the defendants. The defendant then said the stock should be returned the next day, but failed to return it; and it was not until the second of January that the defendant ceased to hold out the expectation of restoring the stock, or stock of the same kind and of equivalent value. On that day and on the third of January, the consolidated stock sold at eighty-five dollars the share.

The defendants insist that they are chargeable only with the value of the pledge at the time it was wrongfully converted by them to their own use on or before the twenty-fourth of December, and not with its increased value at any subsequent period. The court below, in making up the verdict, estimated the stock at eighty-four dollars the share. In actions for the wrongful conversion of personal property, it has in some cases been held that the value of the property is to be estimated according to its price at the time of the conversion, and in others that the plaintiff is entitled to damages according to its value at any time between the time of the conversion and the day of the trial: *Bank of Buffalo v. Kortright*, 22 Wend. 348, 366. It is unnecessary in this case to settle the general rule. The ground on which the defendants insist that the damages must be estimated according to the price of the stock on the twenty-fourth of December, is that the plaintiff, on learning that the defendants had sold it, might then have gone into the market and purchased it at the current price on that day. But it is evident that he was prevented from doing so by the repeated promises of the defendants to restore the stock. Although the plaintiff was strictly entitled to a retransfer of the same shares that were pledged, it appears that his broker was willing to receive other stock of the same description and value, which the defendant promised from day to day to give, the plaintiff being all the time ready to pay the money borrowed. Time having thus been given to the defendants at their request for the fulfillment of their obligation, and the plaintiff having waited for the delivery of the stock for the accommodation of the defendants, and

having relied on the expectation thus held out, and lost the opportunity of purchasing at a reduced price, it is manifestly just that the plaintiff should recover according to the value of the thing pledged when the defendant finally failed in his promises to restore it.

Judgment affirmed.

STOCK CERTIFICATES MAY BE PLEDGED: See *Nourse v. Prime*, 8 Am. Dec. 806; S. C., 11 Id. 403; *Dykens v. Allen*, 42 Id. 87, and note; *Gilpin v. Howell*, 45 Id. 720; *Whitlock v. Heard*, 49 Id. 73. See also the note to *Luckett v. Townsend*, 49 Id. 734. The principal case is cited as an authority for the same doctrine in *Newton v. Fay*, 10 Allen, 507; *Goldstein v. Hort*, 30 Cal. 376; *Campbell v. Parker*, 9 Bosw. 329; *In re Wiley*, 4 Biss. 172. A transfer of shares of stock in writing, as collateral security for a debt, is a pledge; unless they are expressly made assignable by delivery, they can be pledged in no other way: *Brewster v. Hartley*, 37 Cal. 25. And though the legal title passes to the pledgee of stock delivered as collateral security, it is nevertheless a pledge, and not a mortgage: *Hasbrouck v. Vandervoort*, 4 Sandf. 78. The pledgor has only a legal right of restoration of the stock in case of payment: *Brewster v. Hartley*, 37 Cal. 26; all citing the principal case.

TRANSFER OF STOCK TO A BONA FIDE PURCHASER ON THE BOOKS OF THE CORPORATION, in accordance with its by-laws, passes the legal title, though the certificates are not surrendered: *New York etc. R. R. Co. v. Schuyler*, 38 Barb. 542, 543; S. C., 34 N. Y. 80, citing the principal case as to the necessity of a transfer on the books. See on that point *Commercial Bank v. Kortright*, 24 Am. Dec. 317; *State v. Harris*, 36 Id. 460; *Duke v. Cahawba Nav. Co.*, 44 Id. 472, and notes.

WHAT MAY BE PLEDGED IN GENERAL: See the note to *Luckett v. Townsend*, 49 Am. Dec. 733. That choses in action and other property not capable of manual delivery may be the subject of a pledge, is a point to which the principal case is cited in *Haskins v. Kelly*, 1 Abb. Pr., N. S., 73; *Wright v. Ross*, 36 Cal. 442. Thus a note and mortgage may be pledged: *Wright v. Ross*, *supra*; *Warren v. Emerson*, 1 Curt. 241.

DISTINCTION BETWEEN PLEDGE AND MORTGAGE: See the note to *Luckett v. Townsend*, 49 Am. Dec. 731. The principal case is cited on that point in *Wilson v. Brannan*, 27 Cal. 271; although, for the purposes of that case, it was held to be immaterial whether the transaction was to be regarded as a pledge or as a mortgage. A chattel mortgage, unlike a pledge, is a present transfer of the title subject to be defeated by payment, but which becomes absolute in case of non-payment at maturity: *Parshall v. Eggert*, 54 N. Y. 23. But an assignment of a chose in action, as collateral security, is not necessarily a mortgage because the title passes, for, as stated above in considering the subject of pledges of stock, it may be that an assignment is necessary to give full control of the security as a pledge: *Gay v. Moss*, 34 Cal. 125, 132. An instrument transferring certificates of state indebtedness as collateral security for a debt, with authority to sell in case of non-payment within thirty days after maturity, is a pledge, and not a mortgage: *Leuis v. Varnum*, 12 Abb. Pr. 308; all citing the principal case. But a transfer of a note and mortgage to indemnify a party against a liability, he agreeing to re-transfer the same upon being otherwise indemnified, was held, in *Warren v. Emerson*, 1 Curt. 241, not to be a legal mortgage or pledge, but a conveyance in trust, distinguishing *Wilson v. Little*. An absolute transfer of an interest

in a vessel may be shown to have been intended merely as a security by way of pledge: *West v. Crary*, 47 N. Y. 425, also citing the principal case. That a deposit of stock as collateral security for a loan is a pledge and not a mortgage, is a point to which the principal case is cited *per* Brady, J., dissenting, in *Woodworth v. Morris*, 56 Barb. 104.

DELIVERY IS ESSENTIAL TO A PLEDGE: *Lucketts v. Townsend*, 49 Am. Dec. 731, note; *Goldstein v. Hort*, 30 Cal. 376; *Campbell v. Parker*, 9 Bosw. 329; *Haskins v. Kelly*, 1 Robt. (N. Y.) 172; *Milliman v. Neher*, 20 Barb. 40; *Muller v. Pondir*, 6 Lana. 480, all citing *Wilson v. Little*. But a manual delivery is not essential where the thing pledged is not capable of it, but a written transfer is sufficient: *Haskins v. Kelly*, 1 Robt. (N. Y.) 172; as in the case of goods at sea: *Muller v. Pondir*, 6 Lana. 490. Shares of stock may be pledged by delivery of the certificates, if that is sufficient to give the pledgee control: *Goldstein v. Hort*, 30 Cal. 376.

PLEDGEE'S POWER TO SELL PLEDGE: See *Dykens v. Allen*, 42 Am. Dec. 87; *Stearns v. Marsh*, 47 Id. 248; *Whitlock v. Heard*, 43 Id. 73, and notes. See also the note to *Lucketts v. Townsend*, 49 Id. 736. A pledgee may sell the pledge in case of default in payment, whether an express authority to sell is given by the pledgor or not, and may either resort to judicial process to cut off the right to redeem, or may sell without it after due notice to redeem, and of the time and place of sale: *Andrews v. Clerke*, 3 Bosw. 590; *Markham v. Jaudon*, 41 N. Y. 241; *Porter v. Parks*, 49 Id. 569; *Wright v. Ross*, 36 Cal. 429. But a demand of payment and notice of the time and place of sale are essential, unless the contract provides otherwise or demand and notice are waived: *Lewis v. Graham*, 4 Abb. Pr. 110, 111; *McNeil v. Tenth National Bank*, 55 Barb. 64; *Huggans v. Fryer*, 1 Lana. 279; *Taylor v. Ketchum*, 5 Robt. (N. Y.) 518; S. C., 35 How. Pr. 299; *Durant v. Einstein*, Id. 231; *Wheeler v. Newbould*, 5 Duer, 34; *Atlantic etc. Ins. Co. v. Boies*, 6 Id. 587; *Ketchum v. Stevens*, Id. 485; *Milliken v. Dehon*, 10 Bosw. 328; S. C., in court of appeals, 27 N. Y. 375; *Markham v. Jaudon*, 41 N. Y. 241; *Farwell v. Importers' etc. Bank*, 90 Id. 490; and a waiver of demand is not a waiver of notice of sale: *Durant v. Einstein*, 35 How. Pr. 231; *Taylor v. Ketchum*, Id. 299; S. C., 5 Robt. (N. Y.) 518. The fact that the authority to sell is express does not dispense with demand and notice: *Andrews v. Clerke*, 3 Bosw. 590. But it is held, in *Hyatt v. Argenti*, 3 Cal. 161, 163, commenting upon and distinguishing the principal case, that where express authority is given to the pledgee to sell at his option, the doctrine above laid down does not apply. A sale which is unauthorized is a conversion: *Scott v. Rogers*, 4 Abb. App. Dec. 164, note; *Read v. Lambert*, 10 Abb. Pr., N. S., 436; and the pledgor may sue therefor without a tender of payment: *Read v. Lambert*, *supra*. In all the foregoing cases the authority of *Wilson v. Little* is recognized. The case is cited also in *Farwell v. Importers' etc. Bank*, 90 N. Y. 489, and *Brewster v. Hartley*, 37 Cal. 28, to the point that the pledgor upon payment before sale is entitled to a restoration of the pledge.

MEASURE OF DAMAGES FOR WRONGFUL SALE BY PLEDGEE.—Where a plaintiff commences and prosecutes with reasonable diligence an action for the conversion of stock by a bailee, it is held, in *Romaine v. Van Allen*, 26 N. Y. 310, citing the principal case, that he is entitled to the highest market price from the time of conversion to the trial. But in *Atkins v. Gamble*, 42 Cal. 102, it was decided, in an action for the conversion of shares of stock, that if the wrong-doer was always ready and willing to transfer to the plaintiff an equal number of similar shares in the same corporation, the plaintiff was entitled to nominal damages only, and the principal case was referred to

as going upon the ground, that there was a material difference between the stock offered to be returned and that which was pledged, the latter being "consolidated" and the former "converted" stock. In *Smith v. Dunlap*, 12 Ill. 192, the principal case is cited to the general proposition, that in an action for breach of a contract to deliver property, where the price was paid in advance, or of a contract to replace stocks, the plaintiff is entitled to the highest market value between the period of delivery and the trial. See, as to the measure of damages for an unauthorized sale by a factor, *Blot v. Boiceux*, *post*, 345, and note.

VANDERBILT v. RICHMOND TURNPIKE COMPANY.

[2 New York (2 COMSTOCK), 479.]

CORPORATION IS NOT LIABLE FOR A TORTIOUS ACT committed willfully and maliciously by its servant, without authority from the directors or other governing body, even though it was done under orders from the president and general manager.

THE action was for the running down of the plaintiff's steamboat, the *Wave*, by the defendants' steamboat, the *Samson*. The only question was, whether, under the circumstances detailed in the opinion (see also the proof made on the former trial of the cause, reported as *Richmond Turnp. Co. v. Vanderbilt*, 1 Hill (N. Y.), 480), the corporation owning the colliding vessel was liable for the willful and tortious act of her master.

George Wood, for the appellant, the owner of the vessel injured.

John Sherwood, attorney, and *S. Sherwood*, of counsel, for the respondents, the corporation owning the colliding vessel.

By Court, Cady, J.' The injury of which the plaintiff complained was occasioned by the willful act of Captain Braisted, who had charge of the defendants' boat, the *Samson*; and for such act, the supreme court held the defendants were not liable: *Richmond Turnp. Co. v. Vanderbilt*, 1 Hill (N. Y.), 480. It was proved on the last trial, that Mr. Oroondates Mauran was president of the said company, and one of the principal stockholders, and had the control and management of the business of the company as general agent. It was also proved, that before the injury complained of was done, Captain Braisted told Mr. Mauran, that the plaintiff's boat, the *Wave*, had crowded him out of his course a few days before, and said she was a much smarter boat than the *Samson*; that Mr. Mauran then said to Braisted, "If she ever does that again, damn her, run into her, sink her, Braisted." It was also

proved that immediately after the injury, Mr. Mauran was asked, "whether he did not think it was unpardonable to allow his boat to run into and try to sink the Wave when so many people were on board of her?" he said, "Damn him, I wish he had sunk him." It is not easy to discover what was meant by these words, but if it be assumed that Mr. Mauran was the general agent of the company, and intended by these words to approve of the acts of the captain, the question then is, Is the company liable for a malicious and willful trespass committed by the captain of its boat, and approved of by its general agent? If the company be not so responsible, then the plaintiff ought to have been nonsuited, and the judge erred in his charge to the jury. He charged the jury to inquire "whether Mr. Mauran authorized or gave his previous sanction to Captain Braisted's running into the plaintiff's boat, or assented to, or ratified it, when it was done. If he did, and at that time had the general charge and management of the defendants' affairs, they are liable." I can find no authority making a corporation liable for the willful trespass of its general or special agent, or other than 1 R. S., 2d ed., 683, sec. 10, and that is only understood as making the owners of a steamboat liable for the penalty imposed by the ninth section: *Richmond Turnp. Co. v. Vanderbilt*, 1 Hill (N. Y.), 481. Neither an individual nor a corporation, by appointing a general agent, authorizes him to commit a willful trespass, or to authorize or approve of such a trespass, any more than such authority is conferred by the appointment of a special agent. Suppose a farmer directs his servant to take his wagon and horses and take a load of wheat to mill, and on the way to the mill the servant willfully drives the team and wagon over a man and breaks his leg, the farmer is not liable. That was decided in *Wright v. Wilcox*, 19 Wend. 343 [32 Am. Dec. 507]. Suppose the farmer has a large stock of cattle and horses, and carriages, and farming utensils of all sorts on his farm, and he appoints a general agent to manage and transact all business on and in relation to the farm and all things thereon for ten years, and the general agent was, in terms, authorized to employ such and as many servants as he pleased for the purpose of doing the work on and in relation to the farm; and suppose this general agent should order one of the hired servants to take a load of wheat to mill on a wagon, and drive over and kill John Doe's cow, if he found her in the road, and the servant should obey the order, and kill the cow, would the owner of the farm be lia-

ble for this willful trespass? A general agent, when he commits or orders a willful trespass to be committed, acts without the scope of his authority, as much as a special agent would in committing or ordering the same trespass to be committed. The jury were charged that if the general agent assented to or ratified it (the trespass) when it was done, then the defendant was liable. Suppose that after the captain of the boat had committed the willful trespass, the general agent had said, I approve of what the captain has done, and wish he had sunk the steamboat Wave. This would have been a more distinct approval and assent than any which was proved, and yet would that have made the company liable? When the captain committed the willful trespass, the company was not liable, and could it be made liable after the trespass was committed by the declaration of its general agent that he approved of what the captain had done, and wished that the captain had sunk the boat? The general agent was appointed for no such purpose; he was appointed to manage all the business of the company in the most advantageous manner for the stockholders, and not to ruin them by his passionate and foolish declarations.

As to public officers, the approbation by a superior, of a trespass committed by his inferior officer, renders the superior a trespasser: *Van Brunt v. Schenck*, 13 Johns. 414. In that case the defendant was surveyor of the port of New York, and was sued for seizing and taking the schooner called the Nancy. W. Van Beuren, a witness for the defendant, "testified that he seized the Nancy for a breach of the embargo laws, and immediately reported the seizure to the defendant, who approved of what he had done." This, the supreme court said, "was a complete ratification and adoption of the act of seizure, and put the defendant in the same situation as if he had himself made the seizure." The defendant had an interest in the seizure. Had the schooner been condemned, he would have been entitled to a part of the forfeiture. The defendant, while the schooner was under seizure, had used her to transport his goods from Hell Gate to New York.

In the case of *Bishop v. Viscountess Montague*, Cro. Eliz. 824, the defendant's bailiff took five oxen as for heriots due to the defendant, when there was not any due, without any command from the defendant; but she agreed thereto, and converted the oxen to her own use. Two of the judges held that she was liable in trespass, but not in trover, and the other two judges held that she was liable in trespass or trover. In that case a

trespass was committed and the property taken and delivered to the defendant. She accepted the property, and appropriated it to her own use. She accepted the property which her bailiff had wrongfully taken for her, and thus affirmed his act as her own. So a person receiving stolen goods, knowing them to have been stolen, may commit felony; but if a man, on hearing that a horse had been stolen from a neighbor, should say, I am glad of it; I wish the thief had stolen two horses instead of one, he would not thereby incur the guilt of a felon, or make himself a trespasser. A sheriff is responsible for the wrongful act of his deputy. He is answerable *civiliter* for the extortion of his deputy: *McIntyre v. Trumbull*, 7 Johns. 35. So a sheriff is liable in trespass for the act of his deputy in taking the goods of one man on an execution against another: *Ackworth v. Kempe*, 1 Doug. 40. But I can find no case where the principal has been made liable for a willful trespass committed by a servant, because approved of by a general agent.

I am therefore of opinion that the judgment of the superior court ought to be reversed and a new trial granted.

Judgment reversed.

LIABILITY OF MASTER FOR WILLFUL, WANTON, OR MALICIOUS TORT OF SERVANT: See the note to *Ware v. Barataria etc. Canal Co.*, 35 Am. Dec. 198, discussing this subject. See also *Meares v. Commissioners*, 49 Id. 412; *Johnson v. Barber*, 50 Id. 416, and notes referring to other cases. To the point that for such a tort committed without the master's authority or assent, and outside of the course of the servant's employment, the master is not liable, the principal case is cited and approved in *Thomson v. Sixpenny Savings Bank*, 5 Bosw. 309; *Courtney v. Baker*, 5 Jones & S. 255; *Baldwin v. New York etc. Co.*, 4 Daly, 317; *Weisser v. Denison*, 10 N. Y. 77; *Fraser v. Freeman*, 43 Id. 570; *Isaacs v. Third Avenue R. R. Co.*, 47 Id. 127; *Rounds v. Delaware etc. R. R. Co.*, 64 Id. 135; *Mott v. Consumers' Ice Co.*, 73 N. Y. 548. As in case of a forgery of the master's checks by a confidential clerk, and drawing the money thereon: *Weisser v. Denison*, 10 N. Y. 77. So where a deck-hand on a steamer willfully and wantonly drew in the gang-plank and precipitated the plaintiff into the water: *Baldwin v. New York etc. Co.*, 4 Daly, 317. So where the master and servant went to make an entry, under a claim of right, upon premises occupied by another, and the servant, without authority, shot and killed the occupant: *Fraser v. Freeman*, 43 N. Y. 570. So where a brakeman willfully and maliciously kicked a person off the platform of a baggage-car, who had jumped on to ride, though as the brakeman was authorized to remove the person by force, if he had used excessive violence through mere want of judgment and violence of temper the company would have been liable: *Rounds v. Delaware etc. R. R. Co.*, 64 Id. 135. So where a conductor of a street-car refused to stop the car to allow a lady passenger to alight, and wantonly pushed her off the platform, it was held that the company was not liable: *Isaacs v. Third Avenue R. R. Co.*, 47 Id. 127. But where the conductor of a railway train, upon which the plaintiff was a passenger, willfully stopped the train and left it all night in a swamp, to

the injury of the plaintiff's health, the company was held liable because this was a breach of its duty as a carrier, distinguishing the principal case: *Weed v. Panama R. R. Co.*, 5 Duer, 193, 196; affirmed in 17 N. Y. 362, 366. Where a master sent his servant upon the roof of his house to clear off the ice and snow, and the servant got another person to assist him, and they threw down ice and injured a person lawfully in the street, the master was held liable, and Denio, J., referred to and distinguished the principal case: *Althorp v. Wolfe*, 22 N. Y. 367. The case is distinguished also by Bosworth, J., in *Mechanics' Bank v. New York etc. R. R. Co.*, 4 Duer, 551, where a corporation was held liable for a fraudulent issue of stock by its servant under peculiar circumstances; but this judgment was reversed by the court of appeals, as appears from the report in 4 Duer. If the party for whose benefit and in whose name a trespass is committed, sanctions the acts and appropriates the proceeds with full knowledge of the facts, it is evidence from which the jury may infer a previous command: *Welsh v. Cochran*, 63 N. Y. 184. In *St. Louis etc. R. R. Co. v. Dalby*, 19 Ill. 372, the principal case was cited by counsel as lending some countenance to the doctrine that trespass for assault and battery will not lie against a corporation, but the court show that it is not authority for any such doctrine.

LEWIS v. WOODWORTH.

[2 NEW YORK (2 COMSTOCK), 512.]

ADMISSION BY ONE OF TWO JOINT MAKERS OF A NON-NEGOTIABLE NOTE, that it was given for value and is binding, does not estop the other from impeaching the consideration, even against a purchaser for value on the faith of the admission. So held, where there was no proof of partnership between the makers.

APPEAL from an order of the supreme court granting a new trial to plaintiff in *assumpsit*. The action was on an engagement in writing set forth in the case on appeal, as follows:

"By the first day of May next, for value received, we jointly and severally promise to pay Sylvester Lewis, or bearer, one buggy wagon, to be worth one hundred dollars, to be made in the most fashionable style.

AZEL WOODWORTH,

"NORWICH, Oct. 4, 1843.

H. R. PRATT."

The defense was want of consideration; to overcome which, the plaintiff proved on the trial that after the note was made, Lewis, the payee, parted with it, and it passed through several owners, from one of whom it was taken in exchange for a horse, by J. S. Tillinghast; and that he, before delivering the horse and accepting the note, conversed with Woodworth, one of the signers, who told him that it was all right, and made no objection to the note. It subsequently became the property of Clark, for whose benefit this action was brought; but in the name of

the original payee, because the note was non-negotiable. On this proof the presiding judge sustained a request for an instruction that both makers of the note were estopped by Woodworth's declaration to Tillinghast, from impeaching the consideration of the note, as against Tillinghast, or any one claiming under him, and directed a verdict for the plaintiff. The supreme court, in an opinion not reported, pronounced this ruling erroneous, because there was no proof that the makers of the note were partners, or that Tillinghast, when buying the note, had in fact relied on the declaration attributed to Woodworth sufficiently to create an estoppel; and therefore ordered a new trial. From this decision the plaintiff appealed.

H. Hubbard, attorney, and of counsel, for the appellant, the owner of the note.

J. E. Babcock, attorney, and *B. T. Rexford*, of counsel, for respondents, the makers.

By Court, *Horst, J.* There is no evidence in the case to show that the defendants were partners; on the contrary, it would be inferred from the fact of their signing the note separately, that the purchase of the patent right by them, and giving the note therefor, was a single isolated transaction. The defendants severally joined in the making of the contract, and in the engagement to pay, neither trusted to the other to contract for or bind him. So far, therefore, as there is any evidence or inference to be drawn from the transaction, they did not make the purchase as partners, but as tenants in common. There is nothing to show that either defendant had power to bind the other, or to increase or extend his liability beyond that contained in the note itself. By that contract, Pratt was protected against a transfer of the note to his prejudice. He had joined with Woodworth in making the purchase and giving the note in question, but in doing so, he had taken care to make it in such form, as to enable him to set up any defense which he might have to it, against the payee or any person deriving title through him. And Woodworth had no power to deprive him of that defense. If Woodworth could make admissions which would deprive Pratt of the right to show that the note was fraudulently obtained from him, or that there was no consideration for it, it is difficult to see why he could not with the same propriety change the contract and make Pratt liable for its payment, in a manner different from that stipulated in the note. I can see no good reason for adopting such a rule.

In the case of partners, each partner is the agent of the firm, and of the other partner, and has a right to act for all the members of the firm. But not so with simple joint contractors, or purchasers as tenants in common; there, neither is agent of the other, and their liability is not to be extended beyond their own acts and contracts. Upon the same principle, it has been held that a notice of protest served on one partner is notice to all. But a notice of protest served on one of two joint indorsers, is not notice to the other, and no recovery can be had against either without a service on both: *Willis v. Green*, 5 Hill (N. Y.), 232 [40 Am. Dec. 351]; *Cayuga Co. Bank v. Warden*, 1 Const. 418.

I think the defendant Pratt was not estopped by the admissions of Woodworth, and that a new trial was properly granted.

New trial granted.

ADMISSIONS BY ONE OF TWO MAKERS of a note were held admissible to charge the other, in an action against both, in *Lowe v. Boteler*, 1 Am. Dec. 410. So in *Costello v. Cave*, 27 Id. 404, declarations of one of several joint covenantors relative to the matter of the covenant were held admissible against the others. And see the citations in the note to that case. Admissions by one plaintiff are held, in *Dan v. Brown*, 15 Id. 395, not to be evidence against his co-plaintiffs claiming as tenants in common with him. In *Smith v. Vincent*, 38 Am. Dec. 52, it is held, also, that admissions by one defendant in ejectment are admissible against himself, but not against his co-defendants, though he is merely their tenant, but his situation may be considered in weighing the evidence. A bill taken *pro confesso* against one of two joint defendants does not estop the other from denying and disproving its allegations: *Petty v. Hannum*, 36 Id. 303. Admissions by one of several administrators may be received in evidence, but can not be considered by the jury, unless the other administrators made like admissions: *Forsyth v. Ganson*, 21 Id. 241. That notice of dishonor of a negotiable instrument served on one of two joint indorsers not partners is not notice to the other, and is not sufficient to charge either, as stated in the principal case, see *Willis v. Green*, 40 Id. 351, and note; *Sayre v. Frick*, 42 Id. 249. So a demand upon one of several makers of a note, not partners, is insufficient to charge an indorser: *Union Bank v. Willis*, 41 Id. 541. See, on the subject of admissions by one joint debtor to bind his co-debtors, especially under the statute of limitations: *Van Keuren v. Parmelee*, *post*, 322, and the note thereto. The principal case is cited with approval on the point that each joint debtor stands on his own footing, in *Merritt v. Scott*, 3 Hun, 659; S. C., 6 Thomp. & C. 162, under the name of *Merritt v. Sawyer*. Admissions by one joint debtor can not deprive a co-debtor of his defense: *Dunham v. Dodge*, 10 Barb. 572; *Ferguson v. Hamilton*, 35 Id. 440; *Shoemaker v. Benedict*, 11 N. Y. 187. The power of a joint contractor to bind a co-contractor by his admissions is unreasonable and dangerous: *Thompson v. Richards*, 14 Mich. 188; all citing the principal case.

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VAN KEUREN v. PARMELEE.

(2 NEW YORK (2 COMSTOCK), 523.)

ACKNOWLEDGMENT OR NEW PROMISE TO PAY OUTLAWED PARTNERSHIP DEBT, made by one only of the partners, after a dissolution, will not remove the bar of the statute as against the other partners.

IMPLIED AGENCY OF A PARTNER to bind his copartner by a new promise ceases at dissolution.

ACKNOWLEDGMENT OR NEW PROMISE TO TAKE DEBT OUT OF STATUTE OF LIMITATIONS, sufficiency of, in general, discussed *per* BRONSON, J.

APPEAL from a judgment of the supreme court, in favor of plaintiff, in *assumpsit* on a promissory note. The plea was the statute of limitations, and the only question was, whether, under the facts stated in the opinion by BRONSON, J., the apparent bar of the statute had been removed as against all the makers, by a new promise made by one only.

C. W. Swift, attorney, and *H. Swift*, of counsel, for appellants, the makers not parties to the new promise.

Dodge and Campbell, for the respondent, the holder of the note.

By Court, BRONSON, J. The question is on the statute of limitations; and the case is shortly this: The plaintiff sues on a note made by three partners, on the first day of May, 1831, and payable immediately. The partnership was dissolved in the spring of 1832; the suit was commenced in July, 1847, more than sixteen years after the cause of action had accrued; and the jury find a promise by "John Van Keuren, one of the defendants," within six years before action brought: but they find no promise by either of the other defendants. The new promise by John Van Keuren was made more than nine years after the partnership was dissolved; and more than four years after an action upon the note had been barred by the statute of limitations. It can not but strike every one with some degree of astonishment that the promise of one, made at such a time, and under such circumstances, should bind all of the defendants. But still the question must be considered upon authority; and if the rule has been so settled, it must be followed, whatever we may think of it as an original proposition.

Before looking at the cases, I will inquire, for a moment, how the matter stands upon principle. And however much it may be out of the ordinary course, I will begin by referring to the statute. The words are: "The following actions [including as-

sumpsit] shall be commenced within six years next after the cause of such action accrued, and not after:" 2 R. S. 295, sec. 18. If the plaintiff sues on the note, "the cause of action accrued" more than sixteen years before the suit was commenced, and of course the action is barred. There is but one possible mode of escaping this difficulty; and that is by saying, that the plaintiff does not sue upon the note, but upon the new promise; treating it as a new contract, springing out of, and supported by, the original consideration. That will do very well where the original promise was made by one; or if by more than one, where all join in making the new contract. But in this case, the new contract was made by only one of the three original debtors; and the question is, What binds the other two? As they did not contract for themselves, it is not their agreement, unless John Van Keuren, who made the new promise, had authority to contract for them. The only authority claimed for him is, that he had before been the partner of the other two. This leads to an inquiry concerning the principle on which each partner can bind all his associates. And it is generally agreed, that it is the principle of agency. Each partner, when acting within the scope of the partnership, is deemed to be the authorized agent of all his fellows. The authority is presumed from the nature and necessity of the case; for without it, third persons would not be safe in dealing with one of the associates, and the business of the partnership could not be carried on with success. Now, how long does this presumed agency continue? Clearly, no longer than the necessity for it exists; and for most purposes, the necessity ceases with the termination of the partnership. When that is dissolved, there is no longer any ground for presuming an agency, except as to such things as are indispensable in winding up the concerns of the company. If there be no agreement to the contrary, it may be presumed that each partner still has authority to dispose of the partnership property, to collect, adjust, and pay debts, and give proper acquittances. But there is no ground whatever for presuming a power to make new promises or engagements in the name of the firm, even though they only change, without increasing the prior obligations of the partners. We shall presently see, upon authority, that they have no such power.

In reference to the statute of limitations, a distinction has sometimes been taken between a new promise made before the statute has run, and one made after the parties have been exonerated by the lapse of time. That would sustain the defense in

this case; for the statute had run upon the claim long before the new promise was made. But the defense may be rested upon the still broader ground, that the dissolution of the partnership was a revocation of the agency, and the power of the partners to bind each other by new engagements ceased from that moment.

The statute of 21 James I., c. 16, which limited actions on promises to six years, was not very well received by the legal profession; and although the early decisions under it are not open to much observation, it was not long before the courts began to regard the statute with disfavor, and to resort to the most subtle constructions for the purpose of restricting its influence. There was a period when one who was spoken to on the subject of an old debt, could not well give a civil answer, without saying enough to take the case out of the statute. At a later period, and since the commencement of the present century, the courts began to regard this as a beneficial statute—a statute of repose—and commenced the difficult task of retracing their steps. But there were many obstacles in the way of the backward movement; and the legislature, both here and in England, took up the matter, and went beyond the old statute, by requiring the new promise or acknowledgment to be in writing. In consequence of the early departure from principle in the construction of the statute, the different views which prevailed at different periods, and the unequal pace of the courts in attempting to get back on to solid ground, the books are full of conflicting decisions; and any attempt to reconcile them would be a useless waste of time. I shall not, therefore, go into a general review of the cases.

The leading case on this question in England is *Whitcomb v. Whiting*, 2 Doug. 652, where Lord Mansfield and his associates held, that part payment, within six years, by one of four joint and several makers of a promissory note, took the case out of the statute of limitations as to all of the makers. That case is distinguishable from the one before us in two particulars. First, it does not appear in that case that the action was barred prior to the payment; while here, the statute bar was complete long before the new promise was made. Second, that was the case of a payment, which has been deemed much safer ground to go upon than a new promise, or acknowledgment. Lord Tenterden's act, 9 Geo. IV., c. 14, which requires a writing in the case of a new promise or acknowledgment, leaves the effect of a payment untouched; and such, in substance, is the provision in our recent code: Stat. 1849. p. 638, sec. 110. In *Wyatt*

v. *Hodson*, 8 Bing. 309, Tindal, C. J., said: "The payment of principal or interest stands on a different footing from the making of promises, which are often rash or ill interpreted, while money is not usually paid without deliberation; and payment is an unequivocal act, so little liable to misconstruction as not to be open to the objection of an ordinary acknowledgment." There is force in these remarks.

But I do not intend to lay much stress upon the distinctions between that case and the one at bar. Lord Mansfield made no distinction between the influence of a payment and a promise; and if his reasoning is sound, it reaches this case. His words are, "payment by one, is payment for all, the one acting, virtually, as agent for the rest; and, in the same manner, an admission by one, is an admission by all; and the law raises the promise to pay, when the debt is admitted to be due." Nothing but the great name of Lord Mansfield could have given currency to this reasoning. It is plain enough that "payment by one, is payment for all," so far as relates to the satisfaction of the debt: but that fact neither shows, nor has it any tendency to show, a new promise or acknowledgment by the other joint debtors. Payment is nothing more than an admission that the debt is due; and like any other admission, it can only affect the party who makes it, unless he has authority to speak for others, as well as himself. A joint debtor has no such authority. It can not be justly inferred from the relation which he sustains to the other joint debtors; and though he may conclude himself by an admission, he can not conclude them. His lordship, after saying, that "payment by one, is payment for all," adds—"the one acting, virtually, as agent for the rest." If the meaning be, that there is such an agency as will make the payment by one inure to the benefit of all the joint debtors, the reasoning is well enough; but it proves nothing on the point in controversy. If the meaning be, that one joint debtor is the agent of the others for the purpose of making admissions to bind them, that was assuming the very point to be proved; and the assumption had neither authority nor argument to support it. There is nothing in the relation of joint debtors from which such an agency can be inferred. A joint obligation is the only tie which links them together; and from the nature of the case, payment of the debt is the only thing which one has authority to do for all. I am persuaded that such a decision would not have been made, had it not been for the strong disposition which prevailed at that time to get round the statute of limita-

tions. It was in direct conflict with *Bland v. Haselrig*, 2 Vent. 151, which was decided ninety years before, when the statute was in better repute; and which is an authority in point, against the judgment under review. The case was this: in *assumpsit* against four, the statute of limitations was pleaded, and the verdict was, that one of the defendants promised within six years, but the others did not. Upon this verdict, judgment was rendered for the defendants. The case of *Whitcomb v. Whiting*, 2 Doug. 652, has been several times questioned in England, and in *Atkins v. Tredgold*, 2 Barn. & Cress. 23, the court seemed much disposed to disregard it. But the authority of a great name has proved more than a match for common sense; and the decision in *Douglas* is now regarded as good law in England: *Perham v. Raynal*, 2 Bing. 306; *Pritchard v. Draper*, 1 Russ. & M. 191. But it is not so in this country. Although the case in *Douglas* has been followed in some of the states, it has been questioned in others; and in several of the states, and by the supreme court of the United States, it has been wholly disregarded. I shall hereafter have occasion to refer to some of the cases.

I will now inquire how the question stands in this state. It first came up in *Smith v. Ludlow*, 6 Johns. 267, nearly forty years ago, when the statute of limitations was in bad repute, and when few men ventured to think for themselves after Lord Mansfield had spoken. The court said, that where the original debt was proved, the confession of one partner, though made after the dissolution of the partnership, would bind the other, so as to prevent him from availing himself of the statute of limitations. This was said on the authority of *Whitcomb v. Whiting*, already mentioned, and *Jackson v. Fairbank*, 2 H. Black. 340, which was decided on the authority of the same case, though it went a more extravagant length. Of the case in *Douglas* I have already spoken; and of the case in *Blackstone* it is enough to say that it has been condemned in England: *Brandram v. Wharton*, 1 Barn. & Ald. 463; and overruled in this state: *Roosevelt v. Mark*, 6 Johns. Ch. 266, 291. I may add, that what was said in *Smith v. Ludlow*, about binding one partner by the confessions of the other, made after the partnership had been dissolved, was not necessary to the decision of the cause; for there had been confessions by both of the partners which the court held sufficient to take the case out of the statute, without making the admission of one evidence against the other. Still, on the authority of this case, and those in *Douglas* and *Black-*

stone, it was decided in *Johnson v. Beardslee*, 15 Johns. 8, that the promise of one joint debtor was sufficient to take the case out of the statute. And in *Patterson v. Choate*, 7 Wend. 441, it was held, that although one partner can not after a dissolution bind the other by a new contract, yet his acknowledgment of a previous debt due from the partnership will bind the other partner, so far as to prevent him from availing himself of the statute of limitations. This doctrine has been mentioned on other occasions: *Hopkins v. Banks*, 7 Cow. 653; *Roosevelt v. Mark*, 6 Johns. Ch. 291; *Dean v. Hewit*, 5 Wend. 262; but there are, I believe, no other decisions in this state to the like effect. In *Patterson v. Choate*, the six years had run, and the bar was complete before the acknowledgment was made. No one, I venture to say, who does not go upon the ground that the statute of limitations ought not to be enforced, can assign a solid reason for the distinction between contracting a new debt against a former partner, and making an acknowledgment which shall charge him with that which, though once a debt, has ceased to be so by the operation of law. I agree with the late Chief Justice Spencer, in *Sands v. Gelston*, 15 Johns. 519, that "the statute of limitations is the law of the land;" and that in point of principle "there is no substantial difference between a debt barred by the statute of limitations and a debt for the payment of which the debtor has been exonerated by a discharge under a bankrupt or insolvent act." Still, if there was no counterbalance in the adjudications of our own courts, I should feel bound to follow the two or three cases which support the plaintiff's claim, and leave reforms to the legislature. But those cases conflict, in principle, with many other decisions in this state; and can not be supported.

Although the rule is different in England in relation to admissions concerning partnership transactions: *Wood v. Braddick*, 1 Taunt. 104; it has been settled by a series of adjudications in this state that the authority of partners to bind each other by any undertaking or admission, even though it relate to partnership transactions, ceases with the partnership. In *Hackley v. Patrick*, 3 Johns. 536, although it was mentioned in the notice of dissolution that Hastie, one of the partners, would adjust the unsettled business of the partnership, it was held that his subsequent admission of a balance due from the firm to the plaintiffs on account would not bind his copartner. The court said it was "a clear case. After a dissolution of a copartnership the power of one party to bind the others wholly ceases.

There is no reason why his acknowledgment of an account should bind his copartners, any more than his giving a promissory note in the name of the firm, or any other act." This doctrine was reasserted and applied in *Sanford v. Mickles*, 4 Johns. 224, where it was held that a partner to whom authority had been given on the dissolution to collect and pay debts, could not indorse a promissory note belonging to the firm so as to pass the title to the indorsee: See *Yale v. Eames*, 1 Met. 486. In *Walden v. Sherburne*, 15 Johns. 409, it was again decided that the admission by one of the partners, after a dissolution, of a balance against the firm, did not bind the other partner. And where the notice of dissolution stated that the business would be settled by one of the partners, who was duly authorized to sign the name of the firm for that purpose, it was held that such partner could not renew a note previously given by the firm, and which was running in the bank at the time of the dissolution: *National Bank v. Norton*, 1 Hill (N. Y.), 572. *Mitchell v. Ostrom*, 2 Id. 520, asserts the same general doctrine. And in *Baker v. Stackpoole*, 9 Cow. 420 [18 Am. Dec. 508], the rule that one partner, after a dissolution, can not bind his fellows by an admission relating to partnership transactions, was sanctioned by the unanimous judgment of the court for the correction of errors.

Enough has, I think, been said to justify the remark, that the two or three cases on which the plaintiff relies can not be supported. They conflict in principle with a series of decisions spreading over a period of forty years, and including a determination of the court of last resort.

But this is not all. Since the supreme court first fell into the error of following *Whitcomb v. Whiting*, the course of decision upon the statute of limitations has undergone a great change in this country, and particularly in this state. At the former period, the statute amounted to little more, in judicial construction, than a ground for presuming the debt paid, which might be rebutted by the mere admission that such was not the fact. But the law is not so now. There must be a promise, a new contract, though founded on the original consideration, to take a case out of the statute. If the promise is not express, the case must be such that it can be fairly implied. There must, at the least, be a plain admission that the debt is due, and that the party is willing to pay it: *Allen v. Webster*, 15 Wend. 284; *Stafford v. Richardson*, Id. 302; *Bell v. Morrison*, 1 Pet. 362. It is the new promise and not the mere acknowledgment, that re-

vives the debt and takes it out of the statute: *Roosevelt v. Mark*, 6 Johns. Ch. 290. This doctrine is sustained by many decisions in other states; but I do not think it necessary to cite them.

The case of *Whitcomb v. Whiting* has, to a limited extent, been followed in Massachusetts: *Cady v. Shepherd*, 11 Pick. 400 [22 Am. Dec. 379]; *Bridge v. Gray*, 14 Id. 55 [25 Am. Dec. 358]; *Sigourney v. Drury*, Id. 387, 391, 392; *Vinal v. Burrill*, 16 Id. 401; in Connecticut: *Bond v. Lathrop*, 4 Conn. 336; *Coit v. Tracy*, 8 Id. 268; *Austin v. Bostwick*, 9 Id. 496; *Clark v. Sigourney*, 17 Id. 511 [20 Am. Dec. 110]; in Maine: *Parker v. Merrill*, 6 Greenl. 41; *Pike v. Warren*, 15 Me. 390; *Dinsmore v. Dinsmore*, 21 Id. 433; *Shepley v. Waterhouse*, 22 Id. 497; and in Vermont: *Joslyn v. Smith*, 13 Vt. 353; *Wheelock v. Doolittle*, 18 Id. 440. But I think the judgment under review would not be upheld in either of those states. In North Carolina it has been held that the acknowledgment of the debt by one partner, though after the dissolution, will prevent the operation of the statute: *McIntire v. Oliver*, 2 Hawks, 209 [11 Am. Dec. 760]. And the same has been decided in Georgia, provided the new promise is made before the action is barred; but not when the new promise is made afterwards, as it was in the case before us: *Brewster v. Hardeman*, Dudley, 138. It has been decided by the court of appeals in South Carolina, that a promise by one partner made after the dissolution, and after the statute had run, will not charge the other partner: *Steele v. Jennings*, 1 McMull. 297. In *The Exeter Bank v. Sullivan*, 6 N. H. 124, the authority of *Whitcomb v. Whiting* was wholly denied; and the court held that a payment by one of the joint makers of a promissory note did not take the case out of the statute as to the other. In Alabama, a promise by the principal debtor will not revive the demand against a co-debtor, who is a surety: *Lowther v. Chappel*, 8 Ala. 353 [42 Am. Dec. 643]. In Tennessee, a promise by one partner after the dissolution of the partnership, to pay a note made by the firm, does not take the case out of the statute of limitations as to the other partner: *Belote's Ex'rs v. Wynne*, 7 Yerg. 534; *Muse v. Donelson*, 2 Humph. 166 [36 Am. Dec. 309]. This is also the rule in Pennsylvania: *Levy v. Cadet*, 17 Serg. & R. 126 [17 Am. Dec. 650]; *Searight v. Craighead*, 1 Pen. & W. 135. It is also held in Indiana, that the power of one partner to bind the other by the admission of a debt, ceases with the partnership: *Yandes v. Lefavour*, 2 Blackf. 371. And in *Bell v. Morrison*, 1 Pet. 351, the supreme court of the United States followed the decisions in Kentucky,

and held that the dissolution of the partnership put an end to the authority of the partners to bind each other by any new engagement; and consequently that the acknowledgment of a debt by one partner, after the dissolution, would not take the case out of the statute of limitations. The elaborate argument of Mr. Justice Story, who delivered the opinion of the court, covers the whole field of discussion, and stands on principles, which, though they may be disregarded, can not be overthrown.

I have not stopped to inquire whether the statute operates upon the debt or the remedy; for though this might be a point to be considered in a court of conscience, it is of no practical importance in a court of law. We are not dealing with moral, but with legal obligations; and it is idle to talk of a debt where there is no legal obligation to pay it.

I am of opinion that the judgment should be reversed, and that judgment should be rendered for the defendants on the verdict.

JEWETT, C. J., also delivered a written opinion in favor of reversal.

And thereupon the judgment of the supreme court was reversed, and judgment awarded for the defendants on the special verdict.

ACKNOWLEDGMENT OR NEW PROMISE BY PARTNER, AFTER DISSOLUTION, to take a debt out of the statute of limitations: See *Houser v. Irvine*, 38 Am. Dec. 768; *Wheelock v. Doolittle*, 46 Id. 103; *Ellicott v. Nichols*, 43 Id. 546, and other cases and notes in this series cited in the notes to those decisions. The principal case is cited and approved as the "leading case" in New York, on the point that a partner, after dissolution of the firm, can not by any acknowledgment, promise, or payment, before or after a debt is barred by the statute of limitations, take it out of the statute, as to his copartners, in *New York Life Ins. Co. v. Covert*, 29 Barb. 441; S. C., in court of appeals, 3 Abb. App. Dec. 357; S. C., Abb. Pr., N. S., 169; *Payne v. Slate*, 39 Barb. 636; *Berlin v. Hall*, 48 Id. 445; *Graham v. Selover*, 59 Id. 316; *Newman v. Marvin*, 12 Hun, 239; *Bloodgood v. Bruen*, 8 N. Y. 369; *Shoemaker v. Benedict*, 11 Id. 184; *Winchell v. Hicks*, 18 Id. 559; *Payne v. Gardiner*, 29 Id. 178; *Pickett v. Leonard*, 34 Id. 176; *Gales v. Beecher*, 60 Id. 525.

POWER OF PARTNER AFTER DISSOLUTION, GENERALLY: See *Commercial Bank v. Perry*, 43 Am. Dec. 168; *Parker v. Cousins*, 44 Id. 388; *Humphries v. Chastain*, 43 Id. 247; *Ellicott v. Nichols*, Id. 546, and the citations in the notes thereto. That the admissions of a partner after dissolution are not competent evidence to charge his copartners with any new liability, is held, citing the principal case, in *Burns v. McKenzie*, 23 Cal. 103, and *Thompson v. Bowman*, 6 Wall. 318. Nor can such partner bind the firm by giving a note, or accepting a bill, even for a firm liability: *Morrison v. Perry*, 11 Hun, 35. But if there be no agreement to the contrary, he has still power to dispose of the partnership property, to receive and pay debts, and give

receipts, etc., in adjustment of the affairs of the firm, the partnership being regarded as still subsisting for those purposes: *Pennoyer v. David*, 8 Mich. 410; *Bennett v. Buchan*, 5 Abb. Pr., N. S., 416; S. C., in court of appeals, 61 N. Y. 223; *Huntington v. Potter*, 32 Barb. 304; all citing the principal case. Where, however, upon dissolution of a firm, it was agreed that the business was to be liquidated at the firm's store, and both the partners were to assist, and were authorized to sign in liquidation, and one of the partners thereafter, without the knowledge or consent of the other, sent a statement of account to a creditor of the firm, upon which an action was brought thereon, it was held to be binding only on the party making it: *Hart v. Woodruff*, 24 Hun, 510, 512, where Dykman, J., says that the prior New York decisions on this point were reviewed in the "celebrated case of *Van Keuren v. Parmelee*," and, after quoting the language of the case, says that it is as applicable to the case then before the court as if written with special reference to it.

PRINCIPLE UPON WHICH PARTNERS HAVE POWER TO BIND COPARTNERS is that of agency, each partner being regarded, while the relation continues, as the agent of his copartners as to all matters within the scope of the partnership business: *Hitchcock v. Peterson*, 14 Hun, 390; *Cookingham v. Lasher*, 38 Barb. 658; *Comstock v. Buchanan*, 57 Id. 147, note, giving the opinion of Marvin, J., in the court of appeals in that case. In *Klock v. Beekman*, 18 Hun, 506, the principal case is cited by Learned, P. J., dissenting, to the point that the agency of a partner extends only to partnership matters. In that case, however, it was held by the majority of the court that, in an action against a surviving partner to recover money lent to a deceased partner, the defense being that it was not borrowed or used for firm purposes, declarations of the deceased partner after the borrowing, that it was borrowed for firm purposes, were admissible against the survivor.

ACKNOWLEDGMENT OR PAYMENT BY ONE JOINT AND SEVERAL PROMISOR will not revive, against his co-promisors, a debt barred by the statute of limitations, where he is not, by reason of an existing partnership, or otherwise, authorized as their agent or representative to bind them: *Bogert v. Vermilyea*, 10 Barb. 32, 35; *New York Life Ins. etc. Co. v. Covert*, 3 Abb. App. Dec. 357; S. C., 6 Abb. Pr., N. S., 169. So where the admission or payment is made before the statute has run: *Dunham v. Dodge*, 10 Barb. 566; *Barger v. Durvin*, 22 Id. 70; *Shoemaker v. Benedict*, 11 N. Y. 176, 181. But in *Winchell v. Bowman*, 21 Barb. 448, S. B. Strong, J., says, that while he concurred with Bronson, J., in the decision in the principal case, he did not agree with him as to the propriety of extending the doctrine to cases where the new promise, acknowledgment, or payment was made before the bar attached. Generally, one joint promisor has no power, as such, to bind his co-debtor by any acknowledgments or admissions respecting the debt, where there is no agency express or implied: *Thompson v. Richards*, 14 Mich. 188; *Wallis v. Randall*, 81 N. Y. 170; *City National Bank v. Phelps*, 86 Id. 492; though he may bind himself: *City National Bank v. Phelps*, *supra*. Every joint debtor stands upon his own footing where no such agency exists: *Merritt v. Scott*, 3 Hun, 659; S. C., reported as *Merritt v. Sawyer*, 6 Thomp. & C. 162. But where the holder of a joint and several note which is barred by statute is referred by some of the makers to one of the co-makers, and the latter, upon being applied to and informed of the reference, makes a payment, it is deemed authorized by others, and revives the debt as to all: *Winchell v. Bowman*, 21 Barb. 448; *Winchell v. Hicks*, 18 N. Y. 558. See *Lewis v. Woodworth*, *ante*, 319, and *note*.

NEW PROMISE, ACKNOWLEDGMENT, OR PART PAYMENT to take a debt out

of the statute of limitations, generally: See *Mellick v. De Seelhorst*, 12 Am. Dec. 172; *Hunt v. Bridgham*, 13 Id. 458; *Newlin v. Duncan*, 25 Id. 66; *Coles v. Keasey*, 47 Id. 661; *Dickinson v. McCamy*, 48 Id. 298; *Lanier v. McCabe*, Id. 173; *Christy v. Flemington*, 49 Id. 590; *McClenney v. McClenney*, Id. 738, and cases cited in the notes thereto. That an acknowledgment of a debt, to take it out of the statute of limitations, must show a plain admission of it as due, and that the party is willing to pay it, is held, citing the principal case, in *Commercial Mutual Ins. Co. v. Brett*, 44 Barb. 492; *Wakeman v. Newman*, 9 N. Y. 93. If it amount to that, it is held sufficient, even though it be in an answer in a suit between the debtor and other parties: *Bloodgood v. Bruen*, 4 Sandf. 440. See, as to an acknowledgment made to a stranger, *St. Joan v. Garrow*, 29 Am. Dec. 280. The acknowledgment, promise, or part payment must also be by the debtor or some one authorized by him: *Harper v. Fairley*, 53 N. Y. 445. A part payment by an authorized agent is equivalent to a new promise: *Haight v. Avery*, 16 Hun, 254, referring to the principal case as not in conflict with this doctrine. A part payment by an assignee for the benefit of creditors will not take a debt of the assignor out of the statute: *Pickett v. King*, 34 Barb. 197; *Pickett v. Leonard*, 34 N. Y. 175, 176, citing the principal case to the point that the acknowledgment or part payment must be by an agent or representative. In *New York Life Ins. etc. Co. v. Covert*, 3 Abb. App. Dec. 357; S. C., 6 Abb. Pr., N. S., 169, it is held that a payment by a mortgagor is sufficient to rebut the presumption of payment of a mortgage debt under the statute in a foreclosure suit against a subsequent owner of the equity of redemption, and it is said that *Van Keuren v. Parmelee* does not apply. In *Smith v. Ryan*, 66 N. Y. 355, the delivery of a bill as collateral security, or as a provisional or conditional payment, is held a sufficient acknowledgment to take a case out of the statute within the doctrine of the principal case. In *Shoemaker v. Benedict*, 11 N. Y. 184, and *Winchell v. Hicks*, 19 Id. 559, the case of *Van Keuren v. Parmelee* is referred to as establishing or recognizing the following propositions: 1. That in case of a revival of a debt, the action is substantially on the new promise; 2. That an express promise to pay, or an acknowledgment of the debt constituting an admission or recognition of it as an existing liability, with an expression of willingness to pay it, is essential, as the foundation of an implied promise; 3. That the promise or acknowledgment must be by the party to be charged, or by his authorized agent; 4. That there is no mutual agency among joint debtors empowering one to make an acknowledgment for the others. The case is cited to the same effect, *per* Hunt, J., in *Pickett v. Leonard*, 34 N. Y. 176. To the first of these propositions the case is also cited in *Phillips v. Peters*, 21 Barb. 358; *White's Bank v. Ward*, 35 Id. 638; *Sands v. St. John*, 36 Id. 632; S. C., 23 How. Pr. 143; but in the latter case it is said that the new promise is not the substantive cause of action, notwithstanding the reasoning of Bronson, J., in the principal case. See, on that point, *Lord v. Shaler*, 8 Am. Dec. 160; *Newlin v. Duncan*, 25 Id. 66. In *Harper v. Fairley*, 53 N. Y. 444, the principal case is referred to as clearly setting forth the true reason why an authorized part payment will take a case out of the statute.

LEAVITT v. PALMER.

[3 NEW YORK (3 COMSTOCK), 19.]

BANKING ASSOCIATION FORBIDDEN TO ISSUE BILLS OR NOTES, UNLESS PAYABLE ON DEMAND and without interest, can not give its notes, payable on time and bearing interest, to a creditor by way of evidence of or security for its indebtedness; such prohibition will not be limited by construction to paper intended for circulation.

CERTIFICATE OF DEPOSIT PAYABLE AT FUTURE DAY IS PROMISSORY NOTE in legal effect.

TRUST DEED BY BANKING ASSOCIATION TO SECURE NOTES ISSUED IN VIOLATION OF STATUTE is void. It can not be supported by the doctrine that a transaction illegal only in part may be enforced so far as it is valid, nor can it (in absence of proof of mistake) be reformed and enforced as a security for the individual debt.

EQUITY WILL NOT REFORM CONTRACT FOR MISTAKE OF LAW where there is no mistake of fact.

APPEALS from a decree in equity. The bill was filed by the receiver of the North American Trust and Banking Company, an association organized under the general or "free" banking law of New York, enacted April 18, 1838. The object of the bill was to have certain notes which had been made by the bank to creditors in London, and also a trust deed which it had given to secure the notes, set aside. The circumstances under which the notes and deeds were issued, and the nature of the objections urged against them, are stated in the opinion. See also the report of the case in the supreme court: *Leavitt v. Blatchford*, 5 Barb. 9.

S. Beardsley, for the receiver.

C. O'Connor, for Palmer.

By Court, BRONSON, J. I shall assume, but without intending to express any opinion on the subject, that the purchase of the five thousand shares of the capital stock of the bank, and all the acts of the bank, its officers and agents, relating to that transaction, down to the time of executing the trust deed and the accompanying securities, were legal in their nature, and within the legitimate powers of the corporation. The case, then, so far as it will come under consideration, and speaking of it from the face of the papers, is shortly this: The bank, on the second of March, 1840, gave Thomas E. Davis a letter of credit on Messrs. Palmers, Mackillop, Dent & Co., of London—of whom, for the sake of brevity, I shall hereafter speak as the Palmers, or Palmers & Co.—for forty-six thousand eight hundred and seventy-

five pounds sterling; for which sum Davis was to draw bills on the Palmers at ninety days' sight, which were to be covered by him at maturity, with the right of renewal in a certain event. Davis drew the bills, and they were accepted by the Palmers: they were twice renewed, and the third set was running at the time the trust deed was executed. The bank was not then a debtor to Palmers & Co. on account of this transaction; but was under a contingent liability, which would make it a debtor in case the bills should not be provided for by Davis at maturity. In this state of things, the bank, on the thirtieth day of November, 1840, made forty-eight negotiable promissory notes, amounting in the aggregate to forty-nine thousand five hundred and seventy-five pounds sterling, payable twelve months after date, with interest, to the order of William R. Cooke, a teller in the bank, who indorsed the notes, and they were then delivered to the Palmers on account of the liability which has been mentioned. The bank at the same time, and as part of the same transaction, executed the trust deed, and assigned the stocks, bonds, and mortgages mentioned in the schedule to the deed, for the purpose of securing the payment of the forty-eight promissory notes. These undertakings and securities the complainant seeks to set aside as illegal and void.

The first question which I shall consider is upon the validity of the notes. And I feel no difficulty in agreeing with the supreme court, that the notes are illegal and void. They were issued in direct violation of a statute, which provides, that "no banking association" "shall issue or put in circulation any bill or note of said association," "unless the same shall be made payable on demand, and without interest;" and every violation of the section by any officer or member of a banking association is made a misdemeanor, punishable by fine or imprisonment, or both, in the discretion of the court: Stat. 1840, p. 306, sec. 4.

The notes were not made payable "on demand," nor "without interest;" but had a year to run, and were then payable with interest. It is said on the part of the defendants, that the prohibition only applies to bills and notes which are capable of circulating as money. But the statute contains no such qualification. In terms, it extends alike to all bills and notes issued by a banking association; and there is no reason to suppose that the legislature intended it should have a more restricted application. And besides, negotiable promissory notes and bills of exchange payable at a future day, when issued by a bank in good credit, may perform, to a great extent, the office of a circulating

medium. This has never been doubted by those who have considered the subject: *Safford v. Wyckoff*, 1 Hill (N. Y.), 11; *Smith v. Strong*, 2 Id. 241; *Bank of Orleans v. Merrill*, Id. 295; *Attorney General v. Life and Fire Ins. Co.*, 9 Paige, 470; *Ontario Bank v. Schermerhorn*, 10 Id. 109; *Bank of England v. Anderson*, 3 Bing. N. C. 589; *Pooth v. Bank of England*, 6 Id. 415. Indeed, the fact that such paper may enter into the currency of the country is matter of history. Witness the post notes of the late Bank of the United States, and the negotiable notes and bills of some of our own banks, which followed, though on a more humble scale, both the frauds and the bankruptcy of the national institution. The issuing of such paper belongs to mercantile and commercial transactions; and not to the business of banking. Experience has shown that the banks which engage in such enterprises are rotten, and sooner or later will end in defrauding the community. In addition to the North American Trust and Banking Company, several others of the general law banks had been engaged in issuing such paper before the act of 1840 was passed; and such of those institutions as had not already failed, were soon afterwards in a state of bankruptcy. Great frauds upon the public had been committed. The legislature saw the evil; and evidently intended to cover the whole ground, by using the most general and comprehensive terms: "No banking association shall issue or put in circulation any bill or note," unless, etc. There had long been a similar statute in relation to the safety fund banks: Stat. 1829, p. 178, sec. 35; and the act of 1840 was passed to extend the express prohibition to the general law banks, which had come into existence at a later period. That these statutes extend to negotiable promissory notes and bills of exchange payable at a future day has been decided both here and elsewhere: *Swift v. Beers*, 3 Denio, 70; *Tylee v. Yates*, 3 Barb. 222; *Root v. Godard*, 3 McLean, 102; *Hayden v. Davis*, Id. 276; and see *Ontario Bank v. Schermerhorn*, 10 Paige, 113. No judge has, I think, ever expressed a different opinion. Although the judgment of the supreme court in the case of *Safford v. Wyckoff*, 1 Hill (N. Y.), 11, which was upon a bill of exchange drawn in 1839, was reversed by the court of errors, no one seems to have doubted that the future issue of such paper was prohibited by the act of 1840: *Safford v. Wyckoff*, 4 Id. 442, 454, 460, 461. And it probably never would have been doubted, had it not been for the bold and reckless manner in which the officers of the North American Trust and Banking

Company continued to issue such paper after the statute was passed, and the impunity which they have since enjoyed.

As the issuing of the notes was expressly prohibited by law, it is impossible to maintain that they are valid securities. To hold that they can be enforced against the bank, would be going very far towards defeating the end which the legislature had in view. That they are void has been adjudged in several of the cases already cited; and I am not aware of any authority to the contrary. The legal liability on account of which the notes were issued still remains; but the notes themselves are void.

The trust deed does not speak of promissory notes *eo nomine*; but recites that the company had on that day executed and delivered to Palmers & Co. their certificates of deposit, payable in twelve months from date, with interest. Such instruments, whatever names the parties may give them, are promissory notes. They are engagements to pay certain sums of money to the persons therein named, at a specified time, and at all events. A promissory note imports a consideration, and none need be mentioned.

But though a consideration be mentioned in a written promise to pay money, whether it be done in general terms, as by the words "for value received," or by specifying the kind of value, as a deposit of money, it is still a promissory note. And if certificates of deposit, payable to the Palmers at a future day, had been issued in lieu of the notes which were actually delivered, they would have been promissory notes, coming equally within the prohibition of the statute, and being equally void: *Bank of Orleans v. Merrill*, 2 Hill (N. Y.), 295; *Southern Loan Co. v. Morris*, 2 Pa. St. 175 [44 Am. Dec. 188]; and see *Craig v. State of Missouri*, 4 Pet. 433. Indeed, I did not understand the defendants' counsel to deny that certificates of deposit payable at a future day are promissory notes: but it was said not to appear that the certificates were to be made negotiable. I will not stop to inquire whether the statute extends to notes which are not negotiable: See *Ontario Bank v. Schermerhorn*, 10 Paige, 113, 114; for I think it quite evident that the certificates were to be negotiable. The notes actually issued with the trust deed were negotiable; and the statement at the foot of the notes that they were issued in pursuance of a trust deed, and that the payment of them was guaranteed by the assigned securities, shows that it was intended they should pass beyond the hands of the Palmers. And although the fact does not expressly appear, it is plainly inferable that all the various written en-

gements to pay money which the bank had before made and sent abroad for sale in foreign markets were in a form to pass from hand to hand by mere delivery. In a letter of the president of the bank to the Palmers, dated the twenty-second of October, 1838, he speaks of the certificates of deposit issued by the company as a part of its "course of banking"—as "representatives of money" issued "upon the credit of the company:" and several of those instruments, amounting in the aggregate to twenty-two thousand five hundred pounds sterling, were sent to the Palmers, with the letter, "to be sold" to other persons than the payees named in them, with an assurance that the capital of the bank would "afford an abundant indemnity to the holders." There are many other things in the case going to show that all of the engagements of the bank to pay money which were sent abroad were in a negotiable form. But without looking into other transactions, it sufficiently appears from the trust deed, that the obligations which were to accompany it, by whatever name they might be called, were to be made negotiable. The trust was not created for the security of the Palmers alone, to whom the certificates were to be executed and delivered; but after a default in payment, the trustees were to stand possessed of the assigned securities in trust for the "holders" of the certificates; and were to proceed to the realization of the securities, by sale or otherwise, and pay over the moneys "unto the said Palmers, Mackillop, Dent & Co., or any other parties who may then be the holders of said certificates, until the amount owing to the holders of the said certificates of deposit shall be fully paid." A subsequent clause in the deed is in nearly the same words; and other parts of the instrument show that the certificates were to pass beyond the hands of the payees. It is impossible not to see that the parties intended the certificates should be negotiable instruments. If, therefore, certificates of deposit, instead of post notes, had been issued, they would, as negotiable promissory notes, have been open to the same objection which overturns the instruments which were actually issued.

The next question is upon the validity of the trust deed; and I am unable to separate that instrument from the fate of the notes or certificates of deposit. Both were executed at the same time, and as parts of one and the same transaction. The deed was made to give the greater credit and circulation, and secure the ultimate payment of the illegal notes or certificates of deposit; and I do not see how the deed can stand, when the other

instruments must fall. It is true that both had a good consideration, in the existing liability of the bank to indemnify the Palmers against the bills which had been drawn and accepted under the letter of credit. But neither a prior debt nor any other good consideration, will support a new contract which is in itself contrary to the provisions of law. And although it is true in this case that the payment of the notes would have the effect of discharging the prior liability of the bank to the Palmers, yet the deed was made to secure the performance of the new contract.

The recitals in the deed show an intention to indemnify the Palmers, as acceptors, against the bills which Davis had drawn under the credit: but the parties intended to effect the object in an illegal manner: to wit, by issuing prohibited certificates of deposit, and assigning certain property to secure the payment of the certificates. A legal purpose must be carried into effect by legal means. When we get beyond the recitals, and come to the covenants and stipulations in the deed, there is not a single word about the prior liability of the bank; but the whole is about the certificates of deposit. The trustees are to hold the assigned securities until the certificates of deposit shall be paid: to hold the securities in trust for the bank until default shall be made in the payment of the certificates of deposit; and after default, in trust for the holders of the certificates of deposit. And the trustees are thereupon to proceed to the realization of the assigned securities, and to pay over the moneys to Palmers & Co., or to the other holders of the certificates of deposit. And so the parties proceed to the end of the instrument, at every step making stipulations concerning the certificates of deposit, without any covenant, grant, or even allusion to or concerning any other liability on the part of the bank. The transaction amounted to this—neither more nor less—there was a promise, which, though founded on a good consideration, was forbidden by law, and therefore void; and an assignment of property in trust to secure the performance of the illegal promise. Such a trust can not be supported.

It is undoubtedly true, that where a deed or other contract contains distinct undertakings, some of which are legal, and some illegal, the former will in certain cases be upheld, though the latter are void: and if there had been an additional provision in this deed, that the assigned property should be held as a security for the original liability of the bank, that part of the deed might be allowed to stand, though the trust for the pay-

ment of the certificates should fail. But there is no agreement or stipulation in the deed for securing the original liability of the bank—nothing of the kind.

Again: although it appears from the recitals in the deed, that one object of the arrangement of the thirtieth of November, 1840, was to secure the performance of the original undertaking of the bank, it was, as I have already remarked, to be done in an illegal manner; to wit, by issuing prohibited notes or certificates, and assigning property to secure the performance of the new and vicious contract. A legal end can not be attained by illegal means.

The ground on which the counsel for the defendants seemed mainly to rely was, that the deed should be reformed, so as to make it a security for the original liability of the bank. His printed point touching the question is as follows: "The company having agreed with Palmers, Mackillop, Dent & Co. for a new and valuable consideration, to pledge to them the securities in question, and having actually assigned and delivered the securities, equity will reform any defects, arising from mistake or accident, in the written instruments." There are several difficulties standing in the way of this argument. So far as relates to the notes or certificates of deposit, it was of no practical importance, as we have already seen, which should be issued; for both would be alike void. As to reforming the deed, there is no bill or application for that purpose: not even an allegation in the answers, that there was any mistake or accident in preparing the instrument, or that it does not express the real intention of the parties. If we could see that there had been a mistake in drawing up the deed, it could not be reformed without filing a bill for that purpose; nor could we read and enforce the instrument as though it had been properly drawn. We should be obliged to follow the deed as it is. But what is, if possible, still more conclusive, there is not a particle of evidence to show that there was any mistake or accident in preparing the deed, or that it is not just what the parties intended it should be; and it could not be reformed in equity, if a bill had been filed for that purpose. It is true that the parties intended to secure the original liability of the bank; but so far as appears, they intended to do it in the very way it has been done; and that way is illegal. If they mistook the law, we can not grant relief by making a new contract for them. This question was very fully considered in the case of *Hunt v. Rousmaniere*, 2 Mason, 342; 8 C., 8 Wheat. 174; 3 C., 3 Mason, 294; S. C., 1 Pet. 1; and

see 1 Story's Eq., secs. 114, 115; which underwent a great deal of discussion, and is directly in point.

There were separate assignments of the several securities mentioned in the schedule to the trust deed; but they were all made to Blatchford and Murray as trustees; were executed and delivered simultaneously with the execution and delivery of the deed; and were made for the purposes expressed in that instrument. Those purposes were to secure the payment of the certificates of deposit. The reason for making separate assignments probably was, greater convenience in recording in the proper counties, and in making subsequent transfers and discharges. But, however that may be, the assignments are but a part of one entire act; and can not be separated from the fate of the deed and promissory notes which were executed at the same time, and as parts of the same transaction.

I have purposely avoided the expression of any opinion on the several important questions which were so ably discussed at the bar, touching the purchase of the five thousand shares of the capital stock of the bank, and the means which were used to raise the necessary funds for that purpose. I have done so, because in the view which has been taken of the case, it was not necessary to consider those questions; and for the further reason, that after this bill was filed, an order of the court of chancery was made, by the consent of these parties, in the suit of Tracy against the bank, referring it to a master to take proofs, and report upon the claim of the Palmers to be creditors of the bank. The master was also to ascertain what part of their claims, if any, was secured by trusts, and what preferences they claimed under the trusts; but he was not to report on the validity of the trusts, or the right to a preference under them. Those questions were to be settled in other suits then pending. This is one of those suits; and the view which has been taken of the case, disposes of this trust, and the preference claimed by Palmers & Co. under it. If it has not already been done, it will be settled in the Tracy suit, whether the Palmers are creditors of the bank; and if they are, they will come in with other creditors, and share in a ratable distribution of the assets of the bank; or will receive the whole of their debt, if the assets are sufficient to satisfy all of the creditors. The opinion which I have expressed does not, in its consequences, go beyond denying to Palmers & Co. the preference which they claim over other creditors.

I am of opinion that so much of the decree of the supreme

court as declares the forty-eight notes illegal and void, and directs them to be delivered up to be canceled, should be affirmed, and that the residue of the decree [unless the clauses which relate to the special receivers John J. Palmer and Fisher Howe should be excepted] should be reversed; and that a decree should be made declaring the trust deed, the further agreement following the deed, and the several separate assignments of the securities mentioned in the schedule to the deed, illegal and void, and requiring them to be delivered up to be canceled. The trustees must assign and deliver to the receiver all the securities which yet remain in their hands; and render an account, and pay over to the receiver all the moneys and other things which have come to their hands under the trust, except what they may have paid over to the Palmers. If anything has been received by the Palmers under the trust, they must account, and pay over the same to the receiver.

The decree must be so drawn up as not in any manner to affect the question whether Palmers & Co. are creditors of the bank.

Such are my views of the case, and such is the judgment of the court.

Ordered accordingly.

CONTRACT BY CORPORATION FORBIDDEN BY CHARTER or by other statute is void: *New York etc. Ins. Co. v. Ely*, 13 Am. Dec. 100; *Bank of Chillicothe v. Swayne*, 32 Id. 707; *Bank of Michigan v. Niles*, 41 Id. 575, and notes. See, however, *Rivanna etc. Co. v. Dawsons*, 46 Id. 183. And generally a corporation has only such powers as are expressly conferred by its charter or as are necessarily implied in the powers so conferred, and its contracts beyond that are *ultra vires* and void, and their invalidity may be alleged by either of the contracting parties: *New York etc. Ins. Co. v. Ely*, 13 Id. 108, note briefly discussing this subject. See also *People v. Utica Ins. Co.*, 8 Id. 243; *Leggett v. New Jersey etc. Co.*, 23 Id. 728; *People v. Albany*, 27 Id. 95; *State v. Woram*, 40 Id. 378; *Blair v. Perpetual Ins. Co.*, 47 Id. 129, and notes. In *Underwood v. Newport Lyceum*, 41 Id. 260, it is held that though a corporation is forbidden by law to engage in the banking business, *assumpsit* will lie against it for work and labor in engraving bank bills for it. And in *Gist v. Drakely*, Id. 426, it is held to be no defense to the surety for a corporation that the contract upon which he is surety was beyond the powers of the corporation. In *Bissell v. Michigan etc. R. R. Co.*, 22 N. Y. 302, Selden, J., refers to *Leavitt v. Palmer*, as an "important case" which was "elaborately argued," distinctly presenting the question whether a corporation can avoid its own contracts by showing that it was made in contravention of a public statute, which question was unanimously decided against the validity of such contracts as against the corporation. The case is cited to the same point by James, J., dissenting, in *Buffett v. Troy etc. R. R. Co.*, 40 N. Y. 178, speaking of it as "a case with which the bench and the bar of this state are quite familiar." And generally, that bills or notes issued by a bank in violation of

its charter, or of a general banking law, such as the New York statute of 1840, are invalid, is held, citing the principal case, in *Bank of Peru v. Farnsworth*, 18 Ill. 564; *Bank Commissioners v. St. Lawrence Bank*, 7 N. Y. 515; *Leavitt v. Blatchford*, 17 Id. 539, a case affecting the same banking association; and *Oneida Bank v. Ontario Bank*, 21 Id. 495.

In the latter case, Comstock, C. J., admitting that the soundness of this position must be assumed upon the direct authority of the principal case, says: "If the question were now a new one, I should entertain the opinion, certainly with diffidence, that the decision here referred to went far beyond the intention of the legislature." Then, after quoting the prohibitory words of the statute of 1840, he goes on to say: "There is, no doubt, a principle of the common law, that illegal and prohibited contracts are void, without being so expressly declared by any statute. But there is also another principle, equally well ascertained, and more beneficent in its results, that no party shall set up his own illegality or wrong, to the prejudice of an innocent person. He can set it up when the legislative power not only forbids to make the contract, but declares it to be void. But the logic of the law, and certainly its morality, are not opposed to the doctrine that the legislature may prohibit the contract and punish the guilty parties, and leave the contract to stand in favor of innocent persons not included in the terms of the prohibition. This, I think, is a just result from the decision of this court in *Tracy v. Tallmadge*, 14 N. Y. 162, and of the principles which underlie that decision. In regard to the statute now in question [Stat. 1840, before referred to], reading the whole of the prohibitory section, it seems to me the intention of the legislature was to forbid bankers, and officers and members of banking associations, to issue contracts of a certain description, and to punish them if they violated the law, but not to enable them to take advantage of their own wrong by repudiating their own obligations."

These considerations are not without force as applied to contracts of natural persons which they are prohibited by law from making, but which, upon their face, convey no intimation that they were made in violation of the prohibition. But where a corporation, whose powers are derived from and limited by law, makes a contract in violation of a statutory prohibition, such contract gives notice upon its face of its invalidity, since all persons dealing with a corporation, or receiving its obligations, are legally presumed to have knowledge of its powers and their limitations. In a legal sense, a person taking such a contract can not be deemed "innocent." He is a party to the violation of law. If the corporation ought not to be permitted to take advantage of its own wrong to resist the contract, he ought not to be permitted to take advantage of his wrong to enforce it. They are *in pari delicto*. Besides, in the case of a corporation, a valid statutory prohibition to contract destroys the capacity to contract, and does not, as in the case of a natural person having a general original power of contracting, without the aid of any statute, simply make the prohibited contract unlawful. The contract of a corporation not authorized by law is no contract. It would be a strange rule that, on any ground whatever, would hold a corporation bound by a contract which it had no capacity to make.

In *Curtis v. Leavitt*, 17 Barb. 319, the principal case is also cited to the point that the notes therein passed upon were void because prohibited by law; but Roosevelt, J., intimates that sufficient attention was not paid to the magnitude of the notes, and to the fact that they were payable in England and in English money, so that in fact the transaction amounted in reality merely to a sale or transfer of the specified amount of foreign coin. In the

same case also, at page 340, Roosevelt, J., again cites *Leavitt v. Palmer*, and expresses the opinion that the prohibition in the statute of 1840 applies only to "circulating notes." The same point was directly decided in *Pelham v. Adams*, Id. 386, where it was held that a certificate of deposit issued by a bank, payable on demand, with interest, was not within the prohibition of the statute, if not intended for circulation, and the principal case was distinguished as one in which the notes were designed for circulation. But, as appears from the foregoing opinion of Bronson, J., it was expressly declared that there was "no such qualification in the statute." In *Beers v. Phoenix Glass Co.*, 14 Id. 362, the principal case is cited on the question as to the implied power of a corporation to borrow money to carry on its business. This, doubtless, refers to what was said on that point in the court below: *Leavitt v. Blatchford*, 5 Id. 9.

In *Stewart v. National Bank of Maryland*, 2 Abb. (U. S.) 424, 431, it is held, that where a corporation makes a loan in excess of the amount allowed by law, and the contract has been executed, equity, although it would not enforce it, will not relieve against it, nor cancel the transaction and compel a return of the securities, but will leave the parties as it finds them, distinguishing the principal case as not touching the question of the validity of the original loan.

CONTRACT ORIGINATING IN TRANSACTION FORBIDDEN BY STATUTE under penalty is void, though not expressly declared to be so, and can not be enforced: *Mitchell v. Smith*, 2 Am. Dec. 417; *Seidenbender v. Charles*, 8 Id. 682; *Sharp v. Teese*, 17 Id. 479; *Johnson v. Cooper*, 24 Id. 502; *O'Donnell v. Sweeney*, 39 Id. 336. And generally, contracts in violation of law are void, and can not be enforced, where the parties are *in pari delicto*: *Wilson v. Spencer*, 10 Id. 491; *Hibernia T. Corp. v. Henderson*, 11 Id. 593; *Gulick v. Ward*, 18 Id. 389; *Linn v. State Bank*, 25 Id. 71; *Norris v. Norris' Adm'r*, 36 Id. 138; *Gravier's Curator v. Carraby's Executor*, 36 Id. 608; *Webb v. Fulchire*, 40 Id. 418; *Howell v. Fountain*, 46 Id. 415; *Boutelle v. Melendy*, 49 Id. 152, and notes. But if the contract has been executed, the law will not aid or relieve either of the parties: *Black v. Oliver*, 35 Id. 38; *Norris v. Norris' Adm'r*, Id. 138; *Webb v. Fulchire*, 40 Id. 419. If, however, the parties are not *in pari delicto*, the innocent party may recover money paid upon the contract: *Gray v. Roberts*, 12 Id. 383. To the point that an unlawful contract can not be enforced while executory, nor set aside if executed, nor made the foundation of an implied *assumpsit*, the principal case is cited in *Gillet v. Phillips*, 13 N. Y. 119. And generally, that no contract founded upon or growing out of an unlawful act can be enforced, the case is cited in *Jackson v. Shawl*, 29 Cal. 271. As to what is to be deemed an illegal contract, the principal case is cited in *Porter v. Havens*, 37 Barb. 348.

RECEIVER OF INSOLVENT CORPORATION MAY IMPUGN ITS ACTS for fraud or illegality, because he represents both the corporation and the creditors: *Porter v. Williams*, 9 N. Y. 150, citing the principal case. That point, it will be noticed, however, is not expressly decided, but rather assumed, in the case. In *Potter v. Clark*, 12 How. Pr. 113, the case is also cited as one of a large number of authorities in favor of the receiver's power to impugn contracts which the parties themselves could not. In general, however, the receiver of a corporation is bound by its valid acts as fully as the corporation itself: *Hyde v. Lynde*, 4 N. Y. 392, distinguishing the principal case.

CERTIFICATE OF DEPOSIT, NATURE AND NEGOTIABILITY OF: See *O'Neill v. Bradford*, 42 Am. Dec. 574, and the note thereto, discussing this subject at length: See also *Southern Loan Co. v. Morris*, 44 Id. 188. That a certificate

of deposit is, in legal effect, a promissory note, is a point to which the principal case is cited in *Poorman v. Mills*, 35 Cal. 120. And in *Pardee v. Fish*, 67 Barb. 407, 410; S. C., in court of appeals, 60 N. Y. 268, the case is cited to the same point, and it is held that the indorsee of such an instrument may sue the indorser, after due demand upon the bank and notice of dishonor, as in the case of a bill or note.

CONTRACT PARTLY ILLEGAL OR VOID, or founded on a consideration part of which is illegal or void: See *Woodruff v. Hinman*, 34 Am. Dec. 712; *Sargent v. Webster*, 46 Id. 743; *Filson v. Himes*, 47 Id. 422, and cases cited in the notes thereto. It *Arnol v. Pittston etc. Coal Co.*, 2 Hun, 594; S. C., 5 Thomp. & C. 145, the principal case is cited to the point that if one promises, upon a valid consideration, to do two things, one of which is legal and the other illegal, he is bound to perform that which is legal, unless the two are so mingled that they can not be separated, in which case the whole promise fails. It is cited to the same point, substantially, in *Jackson v. Shawl*, 29 Cal. 272; and is cited and commented upon in *Saratoga Co. Bank v. King*, 44 N. Y. 91. In *Hardin v. Hyde*, 40 Barb. 441, Allen, J., dissenting, held, citing the principal case, that where a mortgage given to secure several debts was illegal in form as to one of them, and the trust for its payment was therefore void, it was nevertheless good as to the other debts which were valid, because the trusts were not only separable but actually separated, and a distinct trust was created as to each debt. In *Curtis v. Leavitt*, 15 N. Y. 9, a case arising against the same corporation as in the principal case, where a loan of a large sum of money was made to the corporation by certain Philadelphia banks, and certain interest-bearing certificates were issued to the banks, and a written agreement was executed, reciting the fact of the loan and of the issuance of the certificates, and pledging certain bonds of the company as collateral security for the payment of the certificates, it was held, that although the certificates were void as having been issued contrary to the prohibition of the statute of 1840, yet the pledge was a valid security for the money lent, and was not affected by the illegality of the certificates, because the contract disclosed the existence and cause of the debt, and although the terms of the instrument might confine it to the certificates, the law nevertheless instantly annexed the pledge to the debt. Cornstock, J., says, page 101: "This question, although it would seem a very plain one, is nevertheless supposed to be embarrassed by the decision of this court in *Leavitt v. Palmer*, 3 Id. 19. That decision very probably proceeded in part upon views of illegality, and its consequences as affecting the entire transaction, somewhat stronger than we might now feel inclined to sanction. But the cases differ widely. If they did not differ, we might be led to believe that principles quite familiar had somehow been overlooked." He then proceeds to comment at length upon the principal case, and to point out the differences between it and the case at bar.

EQUITY WILL RELIEVE ON GROUND OF MISTAKE IN INSTRUMENT, WHEN: See *Newcomer v. Kline*, 37 Am. Dec. 74; *Willis v. Henderson*, 38 Id. 120; *Evarts v. Strode's Adm'r*, Id. 744; *Juzan v. Toulmin*, 44 Id. 448; *Osborn v. Phelps*, 48 Id. 133, and cases cited in the notes thereto. See, particularly, as to mistake or ignorance of law as a ground of relief in equity, *McNaughten v. Partridge*, 38 Id. 731; *Evarts v. Strode's Adm'r*, Id. 744; *Trigg v. Read*, 42 Id. 447; *Juzan v. Toulmin*, 44 Id. 448, and cases cited in the notes to those decisions. In *Fellows v. Heermans*, 4 Lans. 244, it is held, citing the principal case, that a mistake of law, if the facts are known, is no ground for equitable relief where a contract was fairly made. So, in *Lambert v. Leland*, 2 Sweeny, 223, and in

Upton v. Tribilcock, 13 Nat. Bank. Reg. 176, 177, the case is cited to the point that equity will not grant relief on the ground of a mistake of law, as to the effect of a contract or writing. If the instrument is drawn precisely as intended, the court will not interfere with it: *Beers v. Hendrickson*, 6 Robt. (N. Y.) 77. The equitable jurisdiction to reform an instrument does not extend to an alteration of the contract, but only to conforming it to what was actually agreed on, if, by mistake, it was differently drawn: *Garnar v. Bird*, 57 Barb. 287. Even in a direct suit for that purpose, a written instrument will not be reformed on the ground of mistake, unless the mistake is clearly and satisfactorily proved, and is mutual: *Ramsay v. McMillan*, 5 Abb. N. C. 255; all citing the principal case.

BLOT *v.* BOICEAU & RUSCH.

[3 NEW YORK (3 COMSTOCK), 78.]

FACTOR WHO RECEIVES GOODS UNDER INSTRUCTIONS to sell for not less than a specified price can not sell below that price because he has made advances, until he has demanded repayment of them from his principal.

FACTOR WHO WRONGFULLY SELLS GOODS of his principal below the price limited in his instructions is presumptively liable for damages as if the limited price were the true value of the goods; but evidence that the limited price could not have been realized, and that the market value at the time of sale and after was less than that price, is competent to reduce the recovery to such market value with interest.

WHETHER PRINCIPAL IS ENTITLED TO HIGHEST MARKET VALUE down to the time of the trial, or only to the commencement of the action for a wrongful sale of goods by his factor, *quære*.

ERROR to the New York superior court to review a judgment for plaintiff in *assumpsit*. The declaration showed that the plaintiff, Andrien Blot, a manufacturer in France, consigned goods to the firm of Boiceau & Rusch (the defendants, who were commission merchants in New York city), for sale, at net prices at least equal to those given in the accompanying invoices; but that defendants had wrongfully sold them for less, and demanded damages. The plea was the general issue, with notice that defendant would claim, to recoup for services and expenses in making sales, and for money they had advanced to the plaintiff. On the trial, the plaintiff's counsel put in evidence a series of letters relating to the consignment (the substance of which is given in the opinion of Ruggles, J.), which, he claimed (and the court so held), amounted to instructions from the plaintiff not to sell below invoice prices, net. These letters also showed that the defendants had advanced money to the plaintiff on the consignment, but did not show that he had requested it, or that they had demanded repayment before selling. A motion for

nonsuit, made on the ground, among others, that a factor who has made advances is at liberty to sell in the ordinary course of business, and even contrary to instructions, for the reimbursement of his advances, having been denied, the defendants offered to prove that they made prompt and earnest efforts to sell the goods at invoice prices, but this could not be done; that the goods would have depreciated by delay; and that the defendants at length sold them for the best prices possible, and accounted to the plaintiff for the sum realized. The presiding judge excluded this evidence, and directed a verdict for plaintiff, subject to the opinion of the court; and the court, after hearing argument, directed judgment in his favor "for the difference between the invoice price, adding freight, charges, duties, and commissions, and the amount which the defendants have paid and advanced to the plaintiff:" 1 Sandf. 111; and defendants brought error.

Griffin and Larocque, attorneys, and *J. W. Gerard*, of counsel, for plaintiffs in error, the factors.

Henry Nicoll, for defendant in error, the principal.

By Court, RUGGLES, J. The letters from the plaintiff to the defendants, containing invoices of the goods in controversy and instructions in relation to their sale, were received before the defendants made any advances of money on the goods. The goods must therefore be considered as received and held by the consignees subject to such instructions: *Brown v. McGran*, 14 Pet. 495. The goods had not then arrived, and the advances were made upon the invoice prices, before the quality and value of the goods had been ascertained by the consignees; and it turned out that the sums advanced were greater than the actual value of the goods in the New York market, but there is no ground for supposing that the goods were fraudulently overvalued for the purpose of procuring the advance. The advance, although it may have been expected, was not demanded by the consignor, nor its amount suggested. The consignor was probably mistaken with respect to the value of the goods in this country. The consignees being therefore bound by the instructions, it becomes necessary to ascertain what they were.

In the letter containing the first invoice of three cases of goods, the plaintiff Blot wrote to the defendants, "We mean to get back at least the principal sum. If you can obtain a profit on these prices it will give me much pleasure. Be careful to make the merchandise bear all the expenses incurred by them,

as well for freight as for duties. I desire that all I send you should be sold this season." This letter was received on the eighteenth of July, 1844. The goods, which came by the ship *St. Nicholas*, had not yet arrived.

On the second of August, and before the arrival of that ship, the defendants received a second letter, containing an invoice of three additional cases of goods amounting to five thousand four hundred and ninety-one francs and forty-two centimes. In that letter the plaintiff says, "You will please credit me with that amount in account, and sell at least at the prices invoiced, adding thereto the expenses, duties, and commissions. For greater clearness, I mean to get back on this account the same as in the value of my first consignment, which I now confirm. It is also my wish that you should dispose of all these goods this season. I do not like to have goods lying over from one season to another."

The first letter does not contain an explicit order not to sell the goods for less than the invoice prices and expenses. The plaintiff says only, "we mean to get back at least the principal sum," desiring in the same letter that the goods should be sold that season. From this letter the consignees might well have supposed the plaintiff's intention was to have the goods sold for the specified price, if they could be sold at that price during the season, and if not, that they should be sold at all events. But the second letter contains a positive direction to sell at least for the specified prices; and although in the same letter the consignor says, "it is his wish" that the goods should be sold that season, he gives no positive order to that effect. The defendants could not have failed to understand that the instructions contained in the last letter would have protected them in keeping the goods on hand, if they could not be sold at the invoice prices with the expenses added. They appear to have so understood the directions; for in their letter to the plaintiff, dated thirtieth of August, 1845, they do not complain of any obscurity in their instructions, nor do they pretend that they were authorized by their tenor, to sell for the prices actually obtained; but they undertake to justify the sales on the ground, that having made advances on the consignments, they were authorized to sell for their own reimbursement, although at less than the specified prices. In this they were mistaken. Having received the invoices and instructions before they made the advances, they must be deemed to have assented to the instructions; and were bound by them until after having found that the goods could not be

sold at the limited prices, and after due notice and request, the consignor had refused or neglected to repay the advances. The defendants were therefore liable to the plaintiff for the damages consequent upon the sale without authority.

The question then arises, By what rule are the damages to be estimated? The plaintiff claimed to recover the difference between the amount of the invoices with charges and interest, and the net proceeds of the goods. The defendants insist that the plaintiff is entitled to recover, if at all, only according to the actual value of the goods after deducting the proceeds and charges. *Prima facie* the invoice prices with the charges and interest ought to be regarded as the actual value, and if no other evidence of value had been given or offered, the plaintiff should have recovered, according to his claim: *Stevens v. Low*, 2 Hill (N. Y.), 132.

But the defendants proved that the goods were fairly sold at auction, on due notice with the usual publicity, and that they produced full auction prices. They offered to prove that the goods could not be sold at private sale at the invoice prices after diligent efforts for that purpose; that the goods were of inferior quality, not worth during the season more than they actually sold for at auction; and that they were likely to become unfashionable and unsalable if kept over to another season. This evidence was excluded by the court; and the judge charged the jury that the plaintiff was entitled to recover the difference between the invoice prices with charges and interest and the net proceeds. Exceptions were taken to these decisions.

We are of opinion that the court erred in excluding the evidence of actual value offered by the defendants, and in the rule of damages stated to the jury. In all cases, excepting those of willful or malicious wrong, the recovery should be such as to give the plaintiff a just compensation for the wrong done or the right withheld, and nothing more. This rule applies as well to actions brought by a principal against his agent as to other cases. Where, in the action against the agent, the breach of duty is clear, it will, in the absence of all evidence of other damage, be presumed that the party has sustained a nominal damage. But to recover more, there must be proof of real loss, or actual damage: Story on Agency, sec. 217 c. It is a good defense that the misconduct of the agent has been followed by no loss or damage to the principal, for then the rule applies that, although it is a wrong, yet it is without any damage, and to maintain an action both must concur, for *damnum absque injuria*, and *injuria*

absque damno, are in general equally objections to any recovery: Id., sec. 236. Assuming as true, what the defendants offered to prove, that the goods in question sold for their full value, the plaintiff has sustained no loss, and should have recovered nominal damages only. If this verdict should be upheld, he will recover damages without having sustained injury, and be placed in better condition than if his instructions had been obeyed.

I am not aware that any considerations of public policy require the application to the present case, of a rule which produces such a result. It seems to have been thought in the court below that if the consignor were not allowed to recover according to this rule, it would render his instructions nugatory, and practically annul the power of the owner of property to fix a price below which it should not be sold. But if the proof offered by the defendants had been admitted, the plaintiff would have been allowed to show that he could have sold the goods to better advantage by reshipping them to France or elsewhere, and in that case would have been entitled to recover accordingly. Or if the market price of such goods had risen after the sale made by the defendants, they would have been liable to pay according to such increased value. A factor thus selling goods in violation of his instructions takes upon himself the hazard of loss from the fluctuations in the market without the possibility of gain; and this is practically a sufficient security against the disobedience of his principal's order. There is no need of subjecting him to a higher penalty.

There is a direct adjudication on this point in 12 N. H. 239, 242, in the case of *Frothingham v. Everton*. Everton delivered a quantity of wool in the month of March, to be sold at not less than twenty-four cents the pound. Frothingham made advances. The price of wool fell soon after the consignment, and continued to fall until October, when Frothingham, without calling on his principal to refund the advances, and without notice to him, sold the wool at fourteen cents the pound, which was all it was then or afterwards worth. It was held, in an able opinion delivered by Chief Justice Parker, that the measure of damages was the amount of injury sustained by the sale contrary to the orders of the principal, and that no actual loss appearing to have been sustained by the wrongful act of the factor, the principal was entitled only to nominal damages. The present case should be governed by the same principle.

The judgment of the superior court should therefore be reversed, and a new trial awarded.

BRONSON, J. (concurring). The consignees had no right to sell the goods below the price mentioned in their instructions from the consignor, without first calling on him for the reimbursement of their advances. As no such demand was made, the defendants are liable to an action, and must pay nominal damages at the least. In settling the amount of damages in such cases, if there is no proof to the contrary, the price mentioned in the instructions should, I think, be deemed the true value of the goods. But the consignor would be at liberty to enhance the damages by proving that the goods were worth more than the minimum price which he had put upon them; and I see no reason why the consignees should not be allowed to reduce the damages, by showing that the goods were of less value than the price mentioned in the instructions. If the goods were sold at their full value, the consignor has sustained no damage, and should recover only a nominal sum. The factor should be required to give strong proof for the purpose of showing the market value to be less than the instruction price; but he may, I think, give the proof if he can. Clearly the consignor has sustained no damage beyond the difference between the actual value and the price obtained on the sale; and I see no ground for making this case an exception to the general rule, which gives the injured party compensation for the pecuniary loss which he has sustained, and nothing more. In *Frothingham v. Everton*, 12 N. H. 239, the court held that the measure of damages in cases of this kind is the amount of injury which the consignor has sustained by selling contrary to orders; and if there has been no actual loss, he will only be entitled to nominal damages. I think this a sound rule; and am not aware of any case which holds a different doctrine.

It is said, that this rule of damages will enable factors to violate the instructions of their principals with impunity. But that is a mistake. If they sell below the instruction price, though at the then market value, they will take the peril of a rise in the value of the goods at any time before an action is brought for the wrong; and, perhaps, down to the trial. The owner has a right to keep his goods for a better price; and if the market value advances after the wrongful sale, the increased price will form the standard for ascertaining his loss, which the factor, who has departed from instructions, must make good.

If it be a matter of any moment in this action, there is no

room for doubt that the defendants, though they mistook the law, intended to act in entire good faith towards their principals. And if the evidence which they offered had been received, it would have appeared that the plaintiff, instead of suffering loss, was benefited by the sale.

When the consignment is of articles which have no market value, such, for example, as antique paintings, statues, or vases, the rule which has been mentioned will not apply. In this case, the goods had a market value, which could easily be ascertained.

I am of opinion that the court erred in rejecting evidence, and in the rule which it gave concerning the measure of damages.

Judgment reversed.

FACTOR SELLING BELOW PRICE NAMED IN INSTRUCTIONS liable, when and when not: See *George v. McNeill*, 26 Am. Dec. 498. See, as to the liability of a factor selling on credit in violation of instructions, *Bliss v. Arnold*, 30 Id. 467. In *Scott v. Rogers*, 4 Abb. App. Dec. 163, in an opinion of Balcom, J., a synopsis of which is given in the note, the principal case is cited as an authority for the position that an offer of sale made by a factor contrary to instructions is unauthorized, and not binding on the principal.

MEASURE OF DAMAGES FOR SALE BY FACTOR AT LOWER PRICE than that limited in his instructions is the actual damage or loss to the principal, and not the difference between the price at which the goods were in fact sold and the price at which the factor was instructed to sell: *Hinde v. Smith*, 6 Lans. 466, citing the principal case. See also *George v. McNeill*, 26 Am. Dec. 498. In *Romaine v. Van Allen*, 26 N. Y. 315, it is held, adopting the rule suggested by Bronson, J., in the principal case, that where a factor sells at a price less than that at which he is instructed to sell, he will be liable for any increase in the market price down to the time of trial, or at least to the commencement of action, and the same rule is applied to a case of wrongful conversion of shares of corporate stock. In an action against a telegraph company for damages resulting from an incorrect transmission of a dispatch sent to the plaintiff's agent at Oswego, New York, by his agent at Chicago, whereby the former was induced to purchase and ship a large quantity of salt, which had not been in fact ordered, and the salt after arrival was sold at a loss, the difference between the price at which it was sold and the market price at the point of shipment, together with the expense of transportation, allowing nothing for storage, was held to be a measure of damages sufficiently favorable to the defendants: *Leonard v. New York etc. Tel. Co.*, 41 N. Y. 573, citing the principal case. In *Mills v. Gould*, 10 Jones & S. 123, the principal case was cited to the point that nominal damages at least must be allowed for a breach of a valid contract. See, as to the measure of damages for a wrongful sale of stock by a pledgee thereof, *Wilson v. Little*, ante, 207, and note.

The principal case is cited in *Devendorf v. West*, 42 Barb. 229, to the general proposition that when a valid contract and a breach are proved, the plaintiff is entitled at least to nominal damages.

HARRIS v. CLARK.

[3 NEW YORK (3 COMSTOCK), 93.]

GIFT IN VIEW OF DEATH, equally with a gift between the living, requires for validity that either the thing to be given, or some sufficient means of reducing it to possession, should be delivered to the donee.

DRAFT DOES NOT OPERATE AS AN ASSIGNMENT UNTIL ACCEPTED, although drawn for a specific sum and against funds of the drawer in the hands of the drawee. The delivery of such draft unaccepted is, therefore, inoperative as a gift in view of death; and the draft can not be enforced against the personal representatives of the drawer.

GIFTS CAUSA MORTIS ARE NOT FAVORED, but are against the policy of the law.

ERROR to the supreme court, to review a judgment for plaintiff, against executors, on a draft drawn by their testator; reported, 2 Barb. 94. The case appears from the opinion.

B. F. Rexford, attorney, and *John C. Spencer*, of counsel, for the plaintiff in error, the donee.

Charles O'Connor, for the defendants in error, the executors.

By Court, **RUGGLES, J.** The plaintiff's claim is founded on a bill or draft in these words:

"**MESSRS. R. CLARK & Co.**

"Please to pay *Nancy Harris* or order, thirty thousand dollars, and place the same to my account.

"New York, 9th July, 1844.

SIDNEY SMITH.

"(Indorsed.) Pay to the order of *Levi Harris*.

"**NANCY HARRIS.**"

This draft was made at New York, during *Sidney Smith's* last illness, and was intended to take effect only in case of his death before he should be able to reach the residence of his sister, *Mrs. Harris*, in Chenango county. It was not intended nor can it be supported as a gift *inter vivos*; and the question is, whether it is valid as a *donatio mortis causa* to entitle her to recover the money mentioned in it against the representatives of the drawer.

If the draft had been accepted by *Clark & Co.*, the drawees, before or after the death of *Sidney Smith*, the drawer, it would have operated from the time of *Smith's* death, as an assignment to *Mrs. Harris*, of so much money in the hands of *Clark & Co.*, and it would have afforded to the plaintiff a remedy against that firm. In that case, it would have been like a gift of a promissory note, or other chose in action against a third person; and the delivery of possession would have been sufficient to make the gift valid, because, although there was no actual de-

livery of the money, there was a delivery of the means of obtaining the money. Thus far, the law seems to be settled and understood by both parties. The cases cited at the bar, and the able and learned opinion given in the supreme court, leave no doubt on this point.

But the defendant insists that the draft, unaccepted, did not operate as an appropriation or transfer of a title to or lien upon the money in the hands of Clark & Co., the drawers; that it afforded to the plaintiff no remedy legal or equitable against them; that it amounted only to a promise by Smith, the drawer, to pay in case Clark & Co. should fail to do so; that the gift was therefore imperfect and invalid because it was a gift of a promise to pay only, without consideration and without delivery of the thing given. If this was the effect of the draft, the case stands on the same footing, as if the donor had made and delivered to Mrs. Harris his promissory note, as a voluntary gift, in expectation of death; and if such a gift is valid, the plaintiff is entitled to recover in the present case, otherwise not. This question was presented to the supreme court, in the case of *Wright v. Wright*, 1 Cow. 598. The plaintiff in that case, brought his action on such a note against the executors of the donor, and had a verdict, the defendants being unable to prove the facts on the trial. Soon after the trial, the defendants discovered evidence of the fact that the note was a gift by the testator during his last illness; applied to the circuit judge for a stay of proceedings, in order to move for a new trial, which the circuit judge refused; the defendants appealed from the decision, and the case came before the court on a special motion. The court, in the reported opinion, said it was clearly inferable from the facts presented in the affidavits, that the note was a *donatio causa mortis*, and in that respect was distinguished from the case of *Fink v. Cox*, 18 Johns. 145 [9 Am. Dec. 191], cited by the defendant's counsel. They denied the motion on that ground. From the manner in which that case came before the court, it is fairly to be presumed, that the point on which the case turned was not argued by the counsel with any careful preparation, or examined by the court with the same deliberation as if the question had been presented on a bill of exceptions, or a case made. The granting of new trials on newly discovered evidence, rests in some degree in the discretion of the court. The circuit judge appears to have denied the order for a stay of proceedings, on the ground that the defense was of a nature not to be favored, and although the court put their decision on the ground that

the note was valid, they may have adopted that conclusion with less caution than if the defense had been of a different character.

Independent of authority, my own judgment would have led me to the conclusion which the supreme court in that case adopted. In natural justice, I see no reason why he who freely and deliberately makes his note or bond to another for the payment of a sum of money, by way of voluntary gift, should not be compelled to perform his engagement. For, although the giver in such case receives nothing in return, for what he agrees to give, the breach of his promise may, by creating unfounded expectations, cause an injury to the donee, which never would have happened if the promise had not been made. But upon a careful examination of the previous and subsequent cases, I am satisfied that a voluntary promissory note without consideration is not, as the law now stands, the subject of a valid gift by the maker, either as a present donation or as a gift to take effect at the death of the donor.

Pearson v. Pearson, 7 Johns. 26, was an action of *assumpsit* on a promissory note; and the court said that the validity of the note could not be supported on the ground taken at the trial, of its being a gift; for a gift is not consummate and perfect until a delivery of the thing promised, and until then, the party may revoke his promise. A promise to pay money as a gift, is no more a ground of action, than a promise to deliver a chattel as a gift. It is the delivery which makes the gift valid. In *Fink v. Cox*, 18 Johns. 145 [9 Am. Dec. 191], a father gave a note to his son for one thousand dollars, payable in sixty days. It was a gift founded on the consideration of natural love and affection only. After the father's death, the son brought his action against his father's executors. It was held that although such a consideration is sufficient in a deed, against all persons except creditors and *bona fide* purchasers, it was not so in a personal action on an executory contract, and the plaintiff on that ground failed. This was regarded as an intended gift *inter vivos*. The same point was decided in *Holliday v. Atkinson*, 5 Barn. & Cress. 501.

Gifts, however, are valid without consideration or actual value paid in return. But there must be delivery of possession. The contract must have been executed. The thing given must be put into the hands of the donee, or placed within his power, by delivery of the means of obtaining it. The gift of the maker's own note is the delivery of a promise only, and not of the thing promised, and the gift therefore fails. Without delivery, the transaction is not valid as an executed gift; and without com-

sideration, it is not valid as a contract to be executed. The decision in *Wright v. Wright*, 1 Cow. 598, was founded on a supposed distinction in this respect, between a gift *inter vivos* and a *donatio mortis causa*. But there appears to be no such distinction. A delivery of possession is indispensable in either case. In *Noble v. Smith*, 2 Johns. 56 [3 Am. Dec. 399], Kent, C. J., declares, that delivery in both kinds of gifts is equally requisite, on grounds of public policy and convenience, and to prevent mistake and imposition. Abbott, C. J., in *Holliday v. Atkinson*, which was the case of a gift of the maker's own note, says that a promissory note is not good as a *donatio mortis causa*. In *McDowell v. Murdock*, 1 Nott & M. 239 [9 Am. Dec. 684], Mr. Justice Nott declared, that after examining all the cases brought to the view of the court, he had not been able to discover any foundation for the distinction made between a *donatio causa mortis* and any other parol gift in respect to the necessity of actual delivery. In New Hampshire, Vermont, Massachusetts, and Connecticut, it has been expressly decided that a gift by the maker of his own promissory note can not be sustained as a *donatio causa mortis*: *Copp v. Sawyer*, 6 N. H. 386; *Holley v. Adams*, 16 Vt. 206 [43 Am. Dec. 508]; *Parish v. Stone*, 14 Pick. 198 [25 Am. Dec. 378]; *Raymond v. Sellick*, 10 Conn. 485. And in *Craig v. Craig*, 3 Barb. Ch. 116, published since the argument of the present case, the late Chancellor Walworth concurs in overruling the case of *Wright v. Wright*. So far, therefore, as this point may affect the question in controversy in this case, it must be regarded as settled against the decision in *Wright v. Wright*, and that the gift of the draft in question must fail, if it is to be enforced only as an executory contract against the representatives of the donor.

A *donatio mortis causa* takes effect from the time the gift is made, but it is revocable during the life of the donor. If not revoked during his life, the title of the donee becomes absolute at his death; and by relation, from the time of the delivery: 1 Williams on Executors, 552. There was no revocation of the gift in controversy by the donor, and it became absolute at his death, if there was a sufficient delivery of the thing given during his life; and this depends on the question, whether the draft without acceptance gave to Mrs. Harris a remedy against Clark & Co., either in law or equity, to recover the money. In other words, did the draft operate as an assignment or appointment to her of so much money in the hands of Clark & Co., or create a lien upon it, to be enforced against them? If so, the delivery

was sufficient, because the instrument delivered was the means by which the money could be obtained from a third person. It is on this reason that the gift of a bond or other evidence of debt due from a third person is valid: *Snellgrove v. Bailey*, 3 Atk. 214; *Coutant v. Schuyler*, 1 Paige, 316; *Wells v. Tucker*, 3 Binn. 366; *Gardner v. Parker*, 3 Mad. 184.

The draft in question is not a check on a bank or on a banker, but an inland bill of exchange. One of the characteristics which distinguish a check from a bill of exchange is that a check is always drawn on a bank or banker: *In the Matter of Brown*, 2 Story, 502. R. Clark & Co. were the late partners of Sidney Smith, but they do not appear to have been bankers. The instrument in question has the form and requisites of an inland bill of exchange. It is payable absolutely and at all events, and not out of a particular fund, to the order of Mrs. Harris, and is indorsed by her. It is not necessary for the purpose of giving it the character of a bill of exchange that a time should be specified for the payment of the money. Bills of exchange, foreign or inland, may be drawn payable on demand; and a bill in which the time of payment is not expressly specified is, by implication of law, payable on demand: Story on Bills, sec. 50. It is clearly settled that no action at law will lie in favor of the holder of a bill of exchange against the drawee unless he accepts the bill: 2 Story's Eq. Jur. 1043. The research of the counsel for the plaintiff has not enabled me to find a case where it has been held that upon a negotiable bill of exchange the drawee has been made liable in equity to the holder of the bill without his acceptance or assent. Such an instrument gives to the holder no lien upon the funds in the hands of the drawee. It is said by Mr. Chitty, in the first page of his treatise on bills, that a bill of exchange operates as an assignment to the holder of the debt due from the drawee; and the same observation is to be found in several adjudged cases. But the true doctrine will be found stated in *Mandeville v. Welch*, 5 Wheat. 286. In delivering the opinion of the supreme court of the United States, Mr. Justice Story, in that case, observed, that it had been said "that a bill of exchange is in theory an assignment to the payee of a debt due from the drawee to the drawer. This is undoubtedly true when the bill has been accepted, whether it be drawn on general funds, or a specific fund, and whether the bill be in its own nature negotiable or not; for in such case the acceptor, by his assent, binds and appropriates the funds for the use of the payee. But where

an order is drawn on a general, or on a particular fund for a part only, it does not amount to an assignment of that part, or give a lien on the drawee, unless he consent to an appropriation by an acceptance of the draft."

In *Tieman v. Jackson*, 5 Pet. 580, an attempt was made to charge the drawee of a bill of exchange with the payment of its amount after it had been protested and dishonored. The circumstances were special. On the day of the date of the bill, the drawer assigned to the drawee for the payment of this bill and others the proceeds of a shipment of tobacco, then on its way, and consigned to the drawee, which the drawee afterwards received and converted into cash. But the drawee being a creditor of the drawer of the bill, had the property attached and sold, and instead of paying the bill applied the proceeds to his own use. It was held that the plaintiff was not entitled to recover. The bill was drawn by Fletcher upon Tieman in favor of Johnson, and the ground of the decision was that, although Tieman was accountable to Fletcher for the proceeds of the cargo, Fletcher could not make him the debtor of Johnson, without his own consent. There was in that case, not only a bill of exchange, but an express assignment of the fund besides; and yet it was held that the action would not lie in favor of the assignee without a promise by the debtor to pay him instead of the original creditor. An attempt was made also in *Luff v. Pope*, to recover against the drawee of a bill of exchange without acceptance, on the ground, substantially, that the instrument was not a bill of exchange, but intended as an order on a special fund; but the attempt failed. The instrument was in form a bill of exchange. And Mr. Justice Bronson, in the opinion of the court, says: "It would be enough to say that a written instrument which is perfectly plain and explicit on its face can not be changed into something else by any inquiry into extrinsic facts. It must speak for itself." He further said that the debt due from the drawee to the drawer of the bill was a chose in action which could not be transferred so as to give the assignee the right to sue in his own name, except in the form of an accepted bill of exchange.

These were actions at law; but it is said that a different rule prevails in equity, and we are referred to 2 Story's Equity, sec. 1041, to show that the holder of a bill of exchange has an equitable lien on the funds in the hands of the drawee, which may be enforced against him without his acceptance or assent. This is undoubtedly true with respect to drafts on a special fund,

which are not bills of exchange; and it will be found on a careful reading of the section referred to, and of the cases quoted in the notes, that the commentator is speaking of orders to pay over particular debts, and drafts on particular funds, and not of bills of exchange proper. The cases cited on the argument are of the same description excepting a few mere *dicta*. In *Peyton v. Hallett*, 1 Cai. 363, the point arose on an order by the plaintiff to pay White, a witness, a certain sum out of the money to be recovered in that suit. *Cutts v. Perkins*, 12 Mass. 206, was the case of a draft made by Abbott, the owner and master of a ship, payable out of certain freight and primage due him from the defendant. The draft was accepted and paid by the defendant. Afterwards the administrator of the drawer brought an action for the freight. The draft was held to be an assignment of Abbott's claim for the freight. *Row v. Dawson*, 1 Ves. 331, was the case of a draft made by Gibson, for certain sums payable out of certain moneys due him from the exchequer. In *Yeates v. Groves*, 1 Ves. jun. 281, the first observation of the lord chancellor in giving his opinion is, "the order was not a bill of exchange being payable out of a particular fund." *Lett v. Morris*, 4 Sim. 607, was the case of a draft payable out of moneys due on a building contract. In *Weston v. Barker*, 12 Johns. 276 [7 Am. Dec. 319], there was an assignment of certain policies of insurance in trust to hold the balance of money payable thereon, subject to the order of the assignor. The trust was accepted in writing, and the assignor ordered the trustee to account for the balance to the plaintiff. It was not the case of a bill of exchange. *Clarke v. Adair*, cited in *Master v. Miller*, 4 T. R. 343, was the draft by an officer on the agent of his regiment, payable out of the first money which should become due to him for arrears.

These cases establish the rule that a draft payable out of a particular fund operates as an assignment *pro tanto* to the drawee; that an accepted bill of exchange operates in the same way; but none of them go the extent of giving that effect to a bill not accepted. The only case I have been able to find, favoring a different doctrine, is that of *Corser v. Craig*, 1 Wash. C. C. 424, concerning which it is only necessary to say, that so far as it might affect the question now in hand, it is overruled by the case of *Mandeville v. Welch*, heretofore referred to; and the principle appears to be firmly established that a bill of exchange does not of itself give to the holder either at law or in equity a lien upon the funds of the creditor in the hands of the debtor,

until after acceptance by the latter. A different rule would be inconvenient and dangerous, because it would enable the creditor, by drawing bills, to entangle his debtor in litigation with a stranger (and not only with one, but with any number of strangers), in regard to the accounts and transactions between him and his creditor.

The authority on which the plaintiff's counsel mainly relied, upon the argument, was the case of *Lawson v. Lawson*, 1 P. Wms. 441. In that case the testator on his death-bed drew a bill upon his goldsmith to pay one thousand pounds to his wife, and declared in a note in his own handwriting on the bill that the money was to buy her mourning and to maintain her until her jointure should become due: See *Tute v. Hilbert*, 2 Ves. jun. 120. The master of the rolls held the gift valid as a *donatio causa mortis*, and to operate as an appointment; and he further said that being for mourning, it might operate like a direction given for his funeral, which ought to be observed, although not in his will. Lord Loughborough afterwards, in *Tute v. Hilbert*, 2 Ves. jun. 121, says that the decision in *Lawson v. Lawson* was right, but that the report in Peere Williams is inaccurate, and does not show the *ratio decidendi*; and that "taking the whole will together, it is an appointment of the money in the banker's hands to the extent of one thousand pounds for the particular purpose expressed in a written appointment, which is a purpose that necessarily supposes death. Therefore that case is perfectly well decided." The obscurity in regard to the true reason of the decision, is not perhaps entirely removed by the observations of Lord Loughborough. If by the word "appointment" is meant a direction which the executors were to carry into effect, then the paper was testamentary.

But the master of the rolls could not have regarded it in that light, for he did not require the paper to be proved in the ecclesiastical court. In this state it would be a palpable violation of the statute concerning wills, to hold the gift valid on the ground of its being testamentary in its nature. But if an "appointment" meant an appropriation of the money to a specific purpose for the benefit of the wife, then it was in effect an assignment or transfer to her for that purpose, and that is the sense in which I understand the word to have been used. It was so understood by Chancellor Walworth in *Craig v. Craig*, 3 Barb. Ch. 118. And yet Lord Loughborough, in *Tute v. Hilbert*, says, "But upon that decision, *Lawson v. Lawson*, I can

not say that in all events drawing a cash note upon a banker is an appointment of the money in his hands."

The report of the case in *Peere Williams* is obscure in another respect. It does not show who was the plaintiff nor who were defendants. But it is to be gathered from Lord Loughborough's statement of the case, from the register's book, that the bill was filed by the executors against the wife and the banker. The object of the bill, therefore, must have been to restrain the banker from paying the money to the wife upon the draft. It was not therefore a bill by the wife to enforce the performance and completion of the gift, in which case the decision might well have been against the donee on the established principle that a court of equity will not lend its aid to give effect to an imperfect voluntary conveyance. But it was a suit for the purpose of stopping the payment by the banker of money in his hands which had been "appointed," appropriated, or assigned to the wife, and which was about to pass into her hands without the aid of any legal proceeding. In such a case a court of equity might justly refuse to interfere either for the purpose of restraining or of enforcing the completion of an imperfectly executed gift.

But assuming that the judgment in *Lawson v. Lawson* was founded on the principle that the draft in that case operated as an immediate assignment of so much of the testator's funds in the hands of his banker, and as a delivery of the money, the decision does not support the plaintiff's claim which, on the evidence in the case, appears to be founded on an unaccepted bill of exchange, and not on a check on a banker, as in the case last cited. The former instrument is clearly not an assignment of the fund in the hands of the drawee so as to create a lien upon it in favor of the holder; while a check on a bank is said in many cases to operate as a transfer from the time of its presentment or notice to the bank. There are plausible, if not solid, reasons for this distinction, arising out of the course of business and the mutual understanding between banks and their customers. The customer deposits his money in a bank for safe keeping, with the understanding that he may draw by checks in such sums, and at such times, as may suit his convenience. The bank or banker receives it on that condition, and undertakes to keep the amount and pay the money accordingly. Checks are used and treated as cash, and by the course of business they are paid by the bank or banker on whom they

are drawn, with the same punctuality and certainty as if the deposits were specifically the money of the customers. Checks are therefore practically equivalent to a transfer of so much of the fund deposited.

Bills of exchange on persons of other occupations are not always paid or expected to be paid with the same precision or punctuality. There may be more uncertainty with respect to the amount of funds in the hands of the drawee: the funds may not be in cash or convertible immediately into cash. Bills are usually drawn at longer time, and are frequently taken more on the general credit of the drawer, and with less certainty of acceptance and payment by the drawee, than checks on a bank or banker, where the credit is founded on actual cash in deposit. There is moreover no such obligation, on the part of debtors in general, as in the case of banks and bankers, to pay their debts in parcels, and in such sums, and at such times upon such drafts as may suit the convenience of their creditors.

But whether a bank check operates in favor of the holder as an assignment of the fund, so as to give him a remedy against the drawee, who refuses to accept or pay, is perhaps yet unsettled: See *In the matter of Brown, a bankrupt*, 2 Story, 516; *Dykens v. The Leather Manuf. Bank*, 11 Paige, 617. And it is not necessary to determine it with a view to the case under consideration. We have already seen that the plaintiff has no remedy, legal or equitable, upon his bill of exchange against the drawer: and that as against the representatives of the drawer it is without consideration.

Assuming, as we must in this case, that the draft is genuine, there is no doubt of the intention of Mr. Smith to give the money in question to his sister—and I come to a conclusion against her right with reluctance—a reluctance qualified, however, by the belief that the clear policy of the law is against the encouragement of gifts of this nature. They are essentially testamentary; they are to take effect only in case of the testator's death, and they are revocable during his life. The same considerations of prudence and caution which induced the legislature to require wills of personal estate to be executed, published, and attested with great formality, would seem to forbid these informal dispositions of property in expectation of death. The temptation to fraud and imposition in regard to these gifts is as powerful and as dangerous as in the case of wills, and yet has been left unchecked and unregulated by statute: and they ought not to be tolerated by the courts, unless they are attended

by all the requisites which the common law prescribes to give them validity.

JEWETT, C. J., and GARDINER and HOYT, JJ., concurred.

CADY, SHANKLAND, and STRONG, JJ., were for reversal.

Judgment affirmed.

GIFTS CAUSA MORTIS, VALIDITY OF, IN GENERAL: See *Holley v. Adams*, 42 Am. Dec. 508, and note referring to prior cases in this series: *Brown v. Brown*, 46 Id. 328. That the policy of the law is against such gifts is a point to which the principal case is cited in *Delmotte v. Taylor*, 1 Redf. 423; *Kenney v. Public Administrator*, 2 Bradf. 321. But if such a gift is perfected by delivery during the donor's life, it is good: *Williams v. Fitch*, 18 N. Y. 548, citing the principal case. See also cases cited *post*, under "Delivery."

GIFTS OF NOTES AND OTHER CHoses IN ACTION CAUSA MORTIS: See *Bradley v. Hunt*, 23 Am. Dec. 597, and the note thereto, discussing this subject; *Grover v. Grover*, 35 Id. 319; *Brown v. Brown*, 46 Id. 328, and citations in the notes thereto. That the note of a third person may be so given, see *Fulton v. Fulton*, 48 Barb. 592, and *Penfield v. Thayer*, 2 E. D. Smith, 309, citing the principal case.

GIFT OF DONOR'S OWN NOTE NOT VALID AS DONATIO CAUSA MORTIS: See *Holley v. Adams*, 42 Am. Dec. 508, and note. The same doctrine is laid down, citing the principal case, in *Penfield v. Thayer*, 2 E. D. Smith, 309; *Howland v. Fort Edward Paper Mill Co.*, 8 How. Pr. 511; *Whitaker v. Whitaker*, 52 N. Y. 373. In *Brock v. Barnes*, 40 Barb. 531, it is held, upon the same principle, that an instrument giving an annuity is not a valid gift.

DELIVERY IS ESSENTIAL TO VALIDITY OF GIFT CAUSA MORTIS or *inter vivos*. See on this point, and also as to what is a sufficient delivery, *Noble v. Smith*, 3 Am. Dec. 399; *Bullock v. Tinnen*, 6 Id. 582; *Reid v. Colcock*, 9 Id. 729; *McDowell v. Murdock*, Id. 684; *Blake v. Jones*, 21 Id. 530; *Priester v. Priester*, 23 Id. 191; *Bradley v. Hunt*, Id. 597; *Gilmore v. Whitesides*, 31 Id. 563; *Hall v. Howard's Adm'rs*, 33 Id. 115; *Borneman v. Sidlinger*, Id. 627; *Sims v. Sims*, Id. 293; *In re Campbell's Estate*, 47 Id. 503. That such delivery is necessary to consummate a gift, whatever may be the subject or nature or purpose of it, is held, citing the principal case, in *Geary v. Page*, 9 Bosw. 298; *Hunter v. Hunter*, 19 Barb. 636; *Allen v. Cowan*, 23 Id. 101; *Brink v. Gould*, 7 Lans. 427; *Phelps' Ex'r v. Pond*, 23 N. Y. 78; *Basket v. Hassell*, 107 U. S. 612. A mere promise to give is not enough: *Geary v. Page*, 9 Bosw. 298; *Phelps' Ex'r v. Pond*, 23 N. Y. 78. This is the ground upon which a gift of the donor's own note can never be valid. It is the gift of a mere promise. The thing given must be placed absolutely in the donee's control: *Curry v. Powers*, 70 N. Y. 215. But a written assignment is not essential whether the thing given is a chose in action or not: *Pierce v. Boston Savings Bank*, 129 Mass. 431; especially in the case of a gift *causa mortis*: *Johnson v. Spies*, 5 Hun, 470. A gift of a depositor's bank-book without an assignment is a good gift of the deposit: *Pierce v. Boston Savings Bank*, 129 Mass. 431. That an assignment is not essential, see also *Grover v. Grover*, 35 Am. Dec. 319; *Brown v. Brown*, 46 Id. 328. And generally, whatever is sufficient to place the thing or fund given under the donee's control, so that nothing further is necessary on the part of the donor to give possession, is enough: *Fulton v. Fulton*, 48 Barb. 592. An assignment of bank stock, reserving the right to

the assignor to collect the dividends for life, is held, in *Crawford v. Doe*, 5 Hun, 510, to be a good gift.

DRAFT AS ASSIGNMENT.—In *Gibson v. Cooke*, 32 Am. Dec. 194, it is held that a draft by a creditor upon his debtor for the whole debt is a valid assignment of it, but that a draft for part of it is not a good assignment unless assented to by the debtor. In *Payne v. Mayor etc. of Mobile*, 37 Id. 744, it is held that an acceptance by the payor is not essential to an assignment of a claim. That an unaccepted bill or draft not drawn upon a particular fund is not a valid assignment, and creates no liability upon the drawee, and no lien in favor of the payee at law or in equity, is held, citing the principal case, in *Lent v. Bank of North America*, 49 Barb. 229; *Hall v. Buffalo*, 2 Abb. App. Dec. 307; S. C., 1 Keyes, 199; *Winter v. Drury*, 5 N. Y. 530; *Chapman v. White*, 6 Id. 416; *Attorney General v. Continental Life Ins. Co.*, 71 Id. 330; *Randolph v. Canby*, 11 Nat. Bank. Reg. 301, 303. So in the case of a check: *Etna National Bank v. Fourth National Bank*, 46 N. Y. 87; *Duncan v. Berlin*, 60 Id. 153. But when a draft is drawn on a particular fund specified, it is a good equitable assignment even without acceptance: *Shuttleworth v. Bruce*, 7 Robt. (N. Y.) 162; *Alger v. Scott*, 54 N. Y. 16, *per Earl, C.*, dissenting; *Munger v. Shannon*, 61 Id. 258.

CASES AT LAW
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

STATE v. HILDRETH.

[9 LINDSELL'S LAW, 429.]

UPON THE SUPPOSITION OF THE TRUTH OF THE FACTS AS BEING AGREED ON Found by the jury, in a prosecution for homicide, it is the province and the duty of the court to inform the jury what the degree of the homicide is.

WHETHER THERE WAS EXPRESS MALICE ON PART OF ACCUSED, in case of a homicide, is a question of fact to be determined by the jury. And whether or not previous malice on his part continued up to the time of the killing is not a fact to be proved by witnesses, but an inference to be drawn by the jury.

LAW PRESUMES MALICE FROM FACT OF HOMICIDE, and matter of extenuation must arise out of the evidence of the killing itself, or must be otherwise proved by the accused.

WHERE TWO PERSONS ENGAGE IN SUDDEN COMBAT, and after they become heated thereby, one of them seizes a deadly weapon, or uses one in his hands, having no intention to use it when the combat commenced, and slays his adversary, his offense is manslaughter only. But where an armed man attacks a feeble unarmed man, who seeks to avoid the conflict, and gives a mortal blow with a weapon prepared beforehand, he is guilty of murder.

COURT IN WHICH TRIAL TAKES PLACE IS THE PROPER ONE TO JUDGE of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial.

INDICTMENT for murder. The prisoner, at whose instance the place of trial had once been removed, applied for a second removal, on his affidavit, which stated certain matters which led him to believe that he could not have a fair trial. The court refused this motion, and also a motion for a continuance on account of the absence of witnesses. Upon the evidence introduced on the trial, the prisoner's counsel asked the court to

instruct the jury that it was a case of mutual combat, in which the offense was extenuated from murder to manslaughter. This the court refused to do, but instructed them that if two persons engage in a sudden combat, and after they have become heated by the combat, one of them seizes a deadly weapon, or uses one in his hands, having no intention to use it when the combat commenced, and slay his adversary, it is but manslaughter. The jury convicted the defendant of murder, and he appealed.

Attorney general, for the state.

No counsel for the defendant.

By Court, RUFFIN, C. J. The court finds no error in the record. It is the undoubted province and duty of the court to inform the jury, upon the supposition of the truth of facts, as being agreed or found by the jury, what the degree of the homicide is: *Fost.* 255; *State v. Walker*, Term (N. C.), 231. If it were not so, there would be no rule of law by which a killing could be determined to be murder, but the whole matter of malice or alleviation would fall to the discretion and decision of the jurors in each particular case, and there would be no mode of reviewing it, so as to reverse the decision, though erroneous. There could be no tyranny more grievous than that of leaving the citizen to the prejudices of jurors, or the discretion of judges, as to what ought to be deemed an offense which should, or should not, deprive him of his life. The only security for the accused is for the law to define, *a priori*, what shall constitute a crime, and, in the case of capital punishment, when it shall be inflicted. It is one of the praises of our law, that such have always been its provisions. The presiding judge, therefore, did not transcend his power, but performed simply his duty, in directing the jury upon the point whether the killing here amounted to murder or manslaughter, taking the facts to be as deposed to by the witnesses. The truth of the evidence, as far as appears, was not indeed contested on the part of the prisoner. On the contrary, he assumed it to be true, when he prayed an instruction upon it, in general terms, that this was one of those cases of mutual combat in which the law holds a killing to be but manslaughter. The only question, then, is, whether the court ought to have given the instruction asked, or whether that given was wrong; for an error, in either respect, would entitle the prisoner to a *verdict de novo*. But we are of opinion that there is no such error. For, upon the supposition that the evidence was true, the court holds clearly that the prisoner was guilty, not merely

of manslaughter, but of murder, in point of law; and that the malice, necessary to constitute the killing murder, was implied by the law and was properly declared by the court. It is true, there was evidence given of express malice, that is, of a previous ill-will of the prisoner towards the deceased and threats of killing him, and some evidence tending to show that the prisoner, up to the period of the homicide, harbored such ill-will, and went to the place for the purpose of killing Taylor, or doing him great harm. It may be that the evidence on that point might have been thought by the jury to establish the inferences to which it tended.

Whether it was or not, it is purely a matter of fact whether, after such an interval between the threats and the killing, the prisoner acted on the old grudge on this occasion, as well as whether such previous malice existed, and neither the presiding judge nor this court has authority to form an opinion upon it. His honor, indeed, left it to the jury whether the evidence was true or not, and gave his instruction upon the hypothesis that the jury found it to be true. They have said it was; but that only goes to the facts of the previous ill-will and threats, because to those alone did the witnesses depose. They did not, and could not, testify to the continuing of the ill-will up to the homicide, and that the prisoner acted on it in slaying. That is not capable of being directly proved by witnesses, but is an inference as to the actual state of the party's mind and intention, upon which the act of killing was done; and it was therefore proper for the jury and not the court to draw it. If the case depended on that inquiry, and the killing would not be, or, rather, was not murder, without any reference to the evidence of express malice, we should hold, it was erroneous to direct the jury that the prisoner was guilty of murder, without submitting to the jury the inquiry as to the continuing existence of the express malice. But we conceive that, independent of that point, and without any regard to such parts of the evidence as are relevant to it simply, the prisoner is guilty of murder upon the facts and circumstances attending the homicide, by themselves implying malice. From the admitted fact of the homicide the law presumes malice, and the matter of extenuation must arise out of the evidence of the killing itself, or must be otherwise proved by the prisoner. Here the whole turns on the testimony of Edmund Taylor, the only witness present at the fact, and upon the number and nature of the wounds. That must be assumed to be true, because the judge founded his

instruction upon the supposition that all the evidence was true. Taking it to be true, the prisoner can not deduce from it any alleviation of guilt short of murder. That, which was insisted on for him, is not tenable: namely, that it was a case of mutual combat, and therefore the offense was extenuated. There is no such rule of law; for, although in many cases of mutual combat, a killing is but manslaughter, because done upon sudden heat, yet there are many others in which a killing in such a combat is murder, because the circumstances show that the slayer was from the beginning actuated by malice, or in other words, intended to take or endanger the life of the other by an undue advantage in an unequal combat.

And the rule on the point was, we think, laid down with substantial correctness in this case. Here was provoking language and behavior on both sides; so that it would matter not, which gave the first blow, if the fight was fair and intended by the prisoner, at the first, to be fair. But, if one, upon a sudden quarrel, draws his sword and makes a pass at the other, whose sword is then undrawn, and then the latter draw his sword and a combat ensue in which he is killed, it is murder; for, by making his first pass, when the adversary's sword was not drawn, the assailant showed he sought the other's blood, and the endeavor of the other to defend himself, which he had a right to do, will not excuse the killer: *Fost. 295*. Mr. East states the rule to be, that, if on any sudden quarrel blows pass, without any intention to kill or injure materially, and in the course of the scuffle, after the parties are heated by the contest, one kill the other with a deadly weapon, it is but manslaughter; but that, when an attack is made with a dangerous weapon, the party assailing, without sufficient legal provocation, must put the party assaulted upon an equal footing in point of defense, at least at the onset: 1 *East's P. C.* 242, 243. So *Russell* says, that, although the use of a deadly weapon after the combat began will not make the offense more than manslaughter, if the combat was equal at the onset, yet the conclusion is different, if there be any previous intention, or preparation, to use such a weapon in the course of the affray: 1 *Russ. Cr. L.* 446, 497. In those positions he is supported by the cases cited by him. In *Whiteley's Case*, 1 *Lew. C. C.* 173, Mr. Justice Bayley states the law thus: "When persons fight on fair terms, where life is not likely to be at hazard, if death ensue, it is manslaughter: and if persons meet originally on fair terms, and, after an interval, blows having been given, a party draws in the heat of blood

a deadly instrument and inflicts a deadly injury, it is manslaughter only; but if a party enter a contest, dangerously armed, and fights under an unfair advantage, though mutual blows pass, it is not manslaughter, but murder." In *Anderson's Case*, the prisoner and Levy quarreled and went out to fight, and the latter was found to be stabbed in many places and died immediately, and it appeared that the prisoner had a knife, and that nobody else could have given the stabs, and the jury were told, it was murder, if the prisoner used his knife privately from the beginning, or if, before the fight began, he placed the knife so that he might use it during the affray and used it accordingly.

These principles and cases fully establish the correctness of the direction in this case. The prisoner, without exhibiting his knife or giving any notice of it, prepared the knife beforehand, or, at all events, drew it before any blow had passed, and in the dusk of the evening he pressed on the deceased, an infirm and weakly old man, who retreated eight or ten yards, and, as soon as the prisoner got near enough to strike, he gave the mortal stab. That he must have drawn the knife at the beginning, or, at least, before any blow on either side, is absolutely certain, if Edmund Taylor told the truth; for the witness did not see the prisoner draw the knife, nor, indeed, see it at all until after the killing, and he says the stroke by the prisoner immediately followed that given by the deceased, and that the deceased then exclaimed that he was killed. That the deceased made defense as he did, can make no difference; for, against such an assault, as Mr. Justice Foster says, he had a right to endeavor to defend himself. It does not appear that the weapon with which the deceased struck was of a nature that was likely to do much bodily harm, but, from the description of it and its effects, quite the contrary. It is a case, therefore, of an attack by an armed upon a feeble unarmed man, in which the latter endeavored throughout to avoid the conflict, and the former gave a mortal blow, with a deadly weapon, as soon as he was able to give a blow at all—the weapon not being drawn in the course of the scuffle, but being prepared before any actual scuffle, or a blow on either side. The impulse to give the mortal stroke was not excited during and by a combat. It is clear, that the prisoner sought and took that undue advantage in the fight which prevents the law from attributing the act of killing his fellow-man to human frailty and the sudden transport of passion, excited by the provocation of a blow, or during an affray, and lays it to that malignity of heart which seeks the life of another

without any legal provocation. The court, therefore, holds that in point of law there was no error in either the instruction given, or, of course, in refusing that asked.

It is the province of the court, in which trial takes place, to judge of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial. It must be so; else it would be in the power of a prisoner to postpone a conviction indefinitely, however clear his guilt, by making affidavits with the requisite matter on the face of them. The temptation to perjury is so strong in capital cases, that it is an established practice on the circuits to distrust affidavits after one continuance or removal, and scrutinize them narrowly. The presiding judge must dispose of such applications in his discretion; and, as in other cases of discretion, his decisions can not be reviewed here, but are final.

Ordered to be certified accordingly to the superior court of law of Richmond county.

FACT OF KILLING IS PRIMA FACIE EVIDENCE OF MALICE: *McDaniel v. State*, 47 Am. Dec. 93, note 101; *McWhirt's Case*, 46 Id. 196, note 210; *Commonwealth v. York*, 43 Id. 373, note 395, where prior cases are collected.

MATTER OF EXTENUATION MUST BE PROVED BY ACCUSED: See *Commonwealth v. York*, 43 Am. Dec. 373, note 395.

STATE v. HILDRETH.

[9 IREDELL'S LAW, 440.]

TO INSTRUCT JURY ON MATTERS NOT IN EVIDENCE IS ERROR.

ONE IS NOT GUILTY OF AIDING AND ABETTING in the commission of a felony merely because he is present and sees that it is about to be committed and does not in any manner interfere. To make him an aider and abettor, he must do or say something showing his consent to the felonious purpose, and contributing to its execution.

DECLARATIONS OF ACCUSED IN HIS OWN FAVOR, made after the commission of the crime with which he is charged, are generally not admissible evidence in his favor.

INDICTMENT for murder in being present, aiding, and abetting. The facts are sufficiently stated in the opinion.

Attorney general, for the state.

Strange, for the defendant.

By Court, RUFFIN, C. J. In the case of Robert Hildreth at the present term, the court had occasion to give an opinion on the degree of the guilt of that person, according to the evidence

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given by the witness, Edmund Taylor; which was in accordance with the instruction given in the present case, in which the court confined the attention of the jury, upon that question, to the testimony of that witness only. The facts deposed to by him are substantially the same in both cases; and therefore there is nothing for this court to add on that point. The only material difference in the cases is, that on Robert's trial, there was no attempt to discredit that witness, while on David's, there was evidence given both of his weakness, and of a falsehood or a mistake in his testimony. But no error, as we think, was committed by the presiding judge in respect to that part of the case; for he expressly avoided expressing any intimation of opinion on the credit due to the witness, and as expressly told the jury, that it was exclusively for their consideration; and we hold, that it was clearly within the appropriate powers and duties of the judge to lay distinctly before the jury the various considerations, arising out of the evidence, tending to sustain or impeach the credit of the witness—leaving it, all the while, to the jury exclusively to judge of their weight.

The court likewise agrees, that aiding and abetting was properly explained to the jury, and that they might have found the prisoner guilty, accordingly, if he used the words deposed to with either of the intentions supposed; provided, there had been a previous understanding between the brothers, that one of them should kill the deceased, or do him great bodily harm, and that the other should abet it by his presence and encouragement. If it could be seen that the verdict was founded on that ground, we should deem it undoubtedly correct in point of law. But that can not be assumed; because the case was also left to the jury upon a supposition, that there was no such previous understanding, and that Robert was guilty of murder upon the malice implied by the circumstances, merely, of the killing—in which case the jury was instructed, in the alternative, that the prisoner was guilty of murder, if, after he entered the field, he discovered that his brother intended to use the knife, in time to have prevented him. The jury may have given their verdict on this latter instruction; and, therefore, if it ought not to have been given, the conviction ought not to stand. The court is of opinion, that it ought not to have been given.

It is to be observed, in the first place, that, upon the evidence, there was no opportunity for the prisoner to discover, "after he entered the field," that his brother had prepared or meant to use a deadly weapon, until the rencounter commenced; for

the two brothers came in opposite directions, and had not been together in the field, until the prisoner rode up and stopped eight or ten steps on one side of the stack, when Robert and Taylor were on the other. Again, it is apparent that he could not then have made the supposed discovery, until after the fight began, when Taylor retreated past the stack and Robert pursued, so as to bring the parties on the same side of the stack with the prisoner, and in his view. Such is the state of facts to which the instruction is to be applied; and, thus applied, we think it inaccurate. For supposing the prisoner to have no previous concert with his brother, and that, during the combat, he first discovered that the other intended to use a deadly weapon, we think he was not guilty of murder, although he made the discovery in time to have prevented Robert from actually giving the stabs. For one, who is present and sees that a felony is about being committed and does in no manner interfere, does not thereby participate in the felony committed. Every person may, upon such an occasion, interfere to prevent, if he can, the perpetration of so high a crime; but he is not bound to do so at the peril, otherwise, of partaking of the guilt. It is necessary, in order to have that effect, that he should do or say something, showing his consent to the felonious purpose and contributing to its execution, as an aider or abettor. Therefore the proper instruction, in the case supposed, would have been, that if the prisoner, after discovering the deadly intention of his brother, instead of preventing its execution, deterred others from preventing it, or incited his brother to go on, then he would be guilty of murder. If the case had been so put explicitly to the jury, it seems highly probable they could not have convicted the prisoner of murder.

For, upon the hypothesis assumed that the prisoner discovered the fatal purpose of Robert, for the first time, during the combat, there is nothing to show that he used the expression, "Hush! or I'll whip you," after such discovery, or in any other way gave his sanction to the attempt or the deed. His presence did in no way contribute to the fact; or, at all events, it did not appear that he could so have intended. It is true that he uttered no expression of surprise or regret at the fact; which might, indeed, with other things, have some weight in inducing a belief of some concerted action between the brothers. But, of itself, it affords no evidence that the prisoner assented to or meant to encourage the perpetration of a murder, which he at that time first discovered. Even the witness, Edmund Taylor,

expressed no such surprise or regret, though he says the event was unexpected by him, and that he endeavored to avenge it. Indeed it seems to the court, upon a clear consideration of the circumstances, that there was no evidence upon which the case should have been left to the jury on the question whether the prisoner did aid and abet, after his discovery of Robert's intention to use the knife, as already supposed; or, even, on the other question, whether the prisoner knew of such intention of Robert before he actually used the knife in giving the mortal blow. For the witness was in a much better situation to discover it than the prisoner was; and it appears that from the imperfect light, the cautious concealment of the instrument by Robert, and his sudden onset, the witness was unable to perceive the knife, although he looked particularly for that purpose. How, then, can it be inferred, without other evidence, that the prisoner, on the other side of the stack, and further off, saw the knife and immediately knew the extremity to which the assailant would go with it? Upon these grounds the court deems the conviction erroneous, and directs a *venire de novo*.

As the case may be brought to another trial upon the allegation of express malice and preconcert between the brothers, it seems proper to dispose of a question of evidence, which arose on the former trial, and might possibly be made on another. The point was this: The prisoner offered to prove by his sister that, after dark, on the night of the homicide, she heard Robert and David in conversation near their father's, and about three or four miles from Taylor's; and that, before they perceived her, and when the prisoner had no reason to think he was overheard, she heard the prisoner say to Robert, "You ought not to have done so," and that, from his voice, she knew that he was crying. The court rejected the evidence. We concur in the decision. The general rule is, that a person's own declarations are not admissible for him. The rule is not founded on the idea, that they would never contribute to the ascertainment of truth; for very often they might be entirely satisfactory. But there is so much danger, if they were received, that they would most commonly consist of falsehoods, fabricated for the occasion, and so would mislead much oftener than they would enlighten, that it was found indispensable, as a part of the law of evidence, to reject them altogether, except under a few peculiar circumstances. This case does not fall within any established exception. It is impossible to ascertain whether the prisoner had or had not perceived his sister; or whether he had no reason to

believe that he was overheard by her or some other member of the family, or some one else; or whether his tears were sincere or feigned. It was merely a declaration, subsequent to the event alluded to—if the allusion was to this occurrence—and not forming part of the transaction; and, therefore, the objections, on which the general rule rests, apply with full force against its admissibility.

This opinion ordered to be certified to the court below, that they may proceed accordingly.

AIDING AND ABETTING CRIME, WHAT IS.—Persons who are present at the commission of a crime only for the purpose of aiding, countenancing, or encouraging its perpetration, were, by the most ancient writers on the common law of England, described as accessories *at the fact*. They could not, therefore, be brought to trial until the principal offenders had been convicted or outlawed: *Fost.* 347; 4 *Bl. Com.* 34; 3 *Greenl. Ev.*, sec. 40. This circumstance, together with the fact that the distinction between an aider and abettor and a principal was found to be a distinction without a difference, long since led to the classifying of aiders and abettors as principals in the second degree: *Fost.* 347; 4 *Bl. Com.* 34; 2 *Steph. Hist. Cr. L. of Eng.* 230; 1 *Bish. Cr. L.*, sec. 648; *State v. Arden*, 1 *Bay*, 487. Bouvier's law dictionary defines aiding and abetting as "the offense committed by those persons who, although not the direct perpetrators of a crime, are yet present at its commission, doing some act to render aid to the actual perpetrator." The distinction between an accessory before the fact and an aider and abettor, at common law, is that the latter must be present at the commission of the offense. But his presence need not be an actual bodily presence, it may be what the law terms a constructive presence. If he is in a situation to give assistance or encouragement to the person who is actually engaged in the commission of the crime, that fact is sufficient to make him an aider and abettor. "In order to render a person a principal in the second degree, or an aider and abettor, he must be present aiding and abetting at the fact, or ready to afford assistance if necessary; but the presence need not be a strict actual immediate presence, such as would make him an eye or ear witness of what passes, but may be a constructive presence. So that if several persons set out together, or in small parties, upon one common design, be it murder or other felony, or for any other purpose unlawful in itself, and each takes the part assigned him, some to commit the fact, others to watch at proper distances and stations to prevent a surprise, or to favor, if need be, the escape of those who are more immediately engaged, they are all, provided the fact be committed, in the eye of the law present at it; for it was made a common cause with them, each man operated in his station at one and the same instant, towards the same common end, and the part each man took tended to give countenance, encouragement, and protection to the whole gang, and to insure the success of their common enterprise." 1 *Russ. Cr.* 40; 1 *Chit. Cr. L.* 256; *Fost.* 350; *Hale's P. C.* 439; 1 *Whart. Cr. L.*, sec. 211, 8th ed.; 1 *Bish. Cr. L.*, sec. 650; 3 *Greenl. Ev.*, secs. 40, 41; *Rex v. Bigley*, *Russ. & Ry.* 446; *Rex v. Lockett*, 7 *Car. & P.* 300; *Regina v. Howell*, 9 *Id.* 437; *Regina v. Vanderstein*, 10 *Cox C. C.* 177; *People v. Bearss*, 10 *Cal.* 68; *People v. Jamarillo*, 57 *Id.* 111; *State v. O'Neal*, 1 *Houst. C. C.* 58; *Doan v. State*, 26 *Ind.* 495; *Williams v. State*, 47 *Id.* 568; *Commonwealth v. Lucas*, 2

Allen, 170; *State v. McGregor*, 41 N. H. 407; *State v. Squaires*, 2 Nev. 226; *State v. Hamilton*, 13 Id. 386; *McCarney v. People*, 83 N. Y. 408; *Breese v. State*, 12 Ohio St. 146; *Mitchell's Case*, 33 Gratt. 845; *United States v. Never-son*, 1 Mackey, 152. And if a person is present with an intention to give assistance, if necessary, in the commission of the crime, he will be an aider and abettor, and a principal in the second degree, although his assistance may not be called into actual requisition, because his presence gives encouragement to the commission of the deed: 1 Russ. Cr. 26; *United States v. Henry*, 4 Wash. C. C. 428; *Commonwealth v. Knapp*, 20 Am. Dec. 491; *McCarty v. State*, 26 Miss. 299; *Rex v. Borthwick*, 1 Doug. 207. And the advice or encouragement may be given by words, acts, signs, or motions: *Brennan v. People*, 15 Ill. 511.

But when the existence of a particular intent forms part of the definition of an offense, a person charged with aiding and abetting the commission of the offense must be shown to have known of the existence of such intent on the part of the person so aided and abetted. A common purpose must be proved in order to justify a conviction for aiding and abetting: Hale's P. C. 443; 1 Russ. on Cr. 53; Steph. Dig. Cr. L., art. 37; *Rex v. White*, Russ. & Ry. 99; *Rex v. Hawkins*, 3 Car. & P. 392; *Rex v. Cruse*, 8 Id. 546; *Regina v. Hilton*, Bell C. C. 20. But when the common intent is proved, all the confederates acting in pursuance of the common plan will be considered as constructively present at the place where the crime is perpetrated, although some of them may have acted their parts at points quite distant from that place: *State v. Hamilton*, 13 Nev. 386; *Breese v. State*, 12 Ohio St. 146. The question to be determined in ascertaining whether or not a person is in a position to aid and abet in the commission of an offense, is not so much where he may happen to be, as whether or not he is in a position to render aid and encouragement to the actual perpetrator, with a view of insuring the success of the common purpose: *Green v. State*, 13 Mo. 382; *McCarney v. People*, 83 N. Y. 408. In the case of *Rex v. Kelly*, Russ. & Ry. 421, it was decided that going towards a place where a felony is to be committed, in order to assist in carrying off the property, and assisting accordingly, did not make the prisoner a principal, if he was at such a distance at the time of the felonious taking as not to be able to assist in it. In this case, the prisoner, Kelly, went with one Whinroe to steal horses. Kelly staid at a place about half a mile from where the theft was committed. Whinroe stole two horses and brought them to where Kelly stood, when the two rode away with them. The prisoner was held to be an accessory only, and not a principal. Stephen thinks this case "perhaps marks the line between a principal in the second degree and an accessory:" Steph. Dig. Cr. L., art. 37, note.

MERE PRESENCE OF PERSON AT PLACE OF COMMISSION OF CRIME is not of itself sufficient to justify the conclusion that he assents to it. There must be some evidence of his participation in the offense to render him guilty either as an accessory or as an aider and abettor. His presence is, of course, a circumstance which may be taken into consideration in determining whether or not he is guilty of aiding and abetting. But "in order to render a person an accomplice and a principal in felony, he must be aiding and abetting at the fact, or ready to afford assistance if necessary; and, therefore, if A. happeneth to be present at a murder, for instance, and taketh no part in it, nor endeavoreth to prevent it, nor apprehendeth the murderer, nor levyeth hue and cry after him; this strange behaviour of his, though highly criminal, will not of itself render him either principal or accessory:" Fost. 350; 1 Russ. Cr. 50; *Rex v. Borthwick*, 1 Doug. 207; 1 Whart. Cr. L., sec. 211, 8th ed.,

Smith v. State, 37 Ark. 274; *People v. Woodward*, 45 Cal. 293; S. C., 13 Am. Rep. 176; *State v. Maloy*, 44 Iowa, 104; *Plummer v. Commonwealth*, 1 Bush, 76; *Brown v. Perkins*, 1 Allen, 89; *United States v. Jones*, 3 Wash. C. C. 209; *United States v. Neversom*, 1 Mackey, 152. Bigelow, C. J., delivering the opinion of the court, in *Brown v. Perkins*, 1 Allen, 98, said: "It is not accurate to say that all those present at the commission of a trespass are liable as principals, who make no opposition or manifest no disapprobation of the wrongful invasion of another's person or property."

IN CASES OF MISDEMEANORS, all who are concerned in aiding and abetting, as well as those who perpetrate the act, are principals: *United States v. Gooding*, 12 Wheat. 460; *Stevens v. State*, 67 Ill. 587; *Brown v. Perkins*, 1 Allen, 89; *Williams v. State*, 20 Miss. 58; *People v. Erwin*, 4 Denio, 129; *Lovenstein v. People*, 54 Barb. 299; *State v. Cheek*, 13 Ired. 114; *Dunman v. State*, 1 Tex. App. 593.

ONE WHO COUNSELS ANOTHER TO COMMIT SUICIDE, and is present at the time when the self-murder is committed, is guilty as a principal in the second degree: *Rex v. Dyson*, Russ. & Ry. 523; *Regina v. Alison*, 8 Car. & P. 418; 1 Bish. Cr. L., sec. 652; 1 Whart. Cr. L., sec. 216.

ONE INCAPABLE OF COMMITTING OFFENSE AS PRINCIPAL in the first degree, by reason of not being of a particular age, sex, condition, or class, may nevertheless be punished as a procurer, or as an aider and abettor: *Rex v. Potts*, Russ. & Ry. 352; 1 Whart. Cr. L., 8th ed., sec. 211; *United States v. Bayer*, 4 Dill. 407; *United States v. Snyder*, 14 Fed. Rep. 554; *Boggus v. State*, 34 Ga. 275; *State v. Comstock*, 46 Iowa, 265; *State v. Jones*, 83 N. C. 605; S. C., 35 Am. Rep. 586; *State v. Sprague*, 4 R. I. 257. Thus, in *Rex v. Potts*, Russ. & Ry. 352, a woman was convicted as a principal in the second degree for aiding and abetting a man who falsely personated a sailor, who was entitled to an allowance of money. In *Boggus v. State*, 34 Ga. 275, a man who was unmarried at the time he committed the offense, was convicted for aiding and abetting another man to commit the crime of bigamy. And in *State v. Jones*, 83 N. C. 605; S. C., 35 Am. Rep. 586, it was held that a female who aids and abets a male assailant in an attempt to commit a rape becomes thereby a principal in the offense.

AIDERS AND ABETTERS, HOW INDICTED.—If those who aid and abet the commission of a crime are required by the statute to be indicted as principals, the indictment must be the same as though they were principals: *State v. Hessian*, 58 Iowa, 68. One aiding and abetting in the commission of manslaughter may be convicted under an indictment for aiding and abetting in the commission of murder: *Goff v. Prime*, 26 Ind. 196. And an abettor may be guilty of murder, though his principal be guilty of manslaughter only: *State v. Crank*, 23 Am. Dec. 117. Where several persons are jointly indicted for murder, one as principal in the first degree and the others as aiders and abettors, each defendant may be tried as principal, either in the first or second degree: *State v. Ross*, 29 Mo. 32. Evidence that a party was present aiding and abetting in the commission of a murder will support an indictment charging him with having committed the crime with his own hand: *Commonwealth v. Chapman*, 11 Cush. 422. Where an indictment against a husband and wife, for murder, charges that the mortal wound was given by the husband, and that the wife was present aiding and abetting in the commission of the offense, and the husband is found guilty of manslaughter, the wife may be convicted of the same offense: *Freel v. State*, 21 Ark. 212. In an indictment for murder, which charges several persons as principals, one as principal perpetrator and the others as present aiding and abet

ting, it is not material which is charged as principal perpetrator, for the mortal injury done is, in legal contemplation, done by each and every one of them: *State v. Fley*, 4 Am. Dec. 583. Under the California statute, a principal in the second degree may be properly indicted, tried, and punished as a principal in the first degree: *People v. Outeveras*, 48 Cal. 19; *People v. Shepardson*, Id. 189; and one charged in an indictment as a principal in the first degree may be convicted upon proof that he was present aiding and abetting: *People v. Ah Fat*, Id. 61.

MISCELLANEOUS.—At the common law, aiders and abettors might be punished, although the principals in the first degree were acquitted: *People v. Bearss*, 10 Cal. 68; *People v. Newberry*, 20 Id. 439. On the trial of one charged with aiding and abetting, parol evidence is admissible to show the guilt of the principal perpetrator. But one can not be convicted as principal in the second degree, where there is no evidence of the guilt of the principal in the first degree: *Jones v. State*, 64 Ga. 697. The Ohio crimes act makes aiding and abetting in the commission of a felony a substantive felony, and the supreme court of that state holds, that the presence, either actual or constructive, of the accused at the commission of a felony, is not a necessary ingredient in the offense of aiding, abetting, or procuring another to commit it: *Warden v. State*, 24 Ohio St. 143. In *United States v. Snyder*, 14 Fed. Rep. 554, it was decided, that all aiders and abettors in statutory offenses are punishable as principals, under the statute, although not referred to therein. In *Stamper v. Commonwealth*, 7 Bush, 612, it was decided, that where a statute creates a felony and prescribes a particular punishment therefor, or where a statute provides a punishment for a common-law felony by name, those who were present aiding and abetting in the commission of the crime are held to be included in the statute, although not mentioned as such in it. But where the punishment is imposed by statute upon the person alone who actually committed the acts constituting the offense, and not in general terms upon those who are guilty of the offense according to common-law rules, mere aiders and abettors will not be deemed to be within the act. It was accordingly held, in *Bland v. Commonwealth*, 10 Bush, 622, that a person merely present, aiding and abetting in the commission of the statutory offense of willfully and maliciously shooting at and wounding another with intent to kill, was not liable to the same punishment as the person who committed the act. And in *Commonwealth v. Patrick*, 1 Ky. L. R. & J. 660, it was decided, that where two persons were charged with this offense, neither could be indicted as aider and abettor until the other was charged with the commission of the felony.

DEN EX DEM. SMITH v. FORE.

[10 BREDELL'S LAW, 87.]

WHERE LAND IS SOLD UNDER VENDITIONI EXPOSAS, the levy becomes thereby *functus officio*, and a second *venul. ex.* issued thereupon is invalid, and the purchaser thereunder acquires no title.

EXECUTION DEBTOR MAY RESIST RECOVERY IN EJECTMENT BY PURCHASER at the sheriff's sale, unless the purchaser can show a valid execution.

EJECTMENT. A verdict was taken for the plaintiff, subject to the opinion of the court. It was agreed that the verdict should

be set aside and a nonsuit entered, in case the court was with the defendant on the questions reserved. The court set aside the verdict and ordered a nonsuit, and from this judgment the plaintiff appealed. The other facts appear from the opinion.

J. W. Woodfin, for the plaintiff.

Avery, for the defendant.

By Court, PEARSON, J. It is only necessary to notice one objection, as that is fatal to the plaintiff's right to recover. The lessor is a purchaser at a sheriff's sale, under a *venditioni exponas*, issuing upon a constable's levy. The land had been before sold under a *venditioni exponas* issuing upon the same levy, and one Davis had become the purchaser, and taken the sheriff's deed. This rendered the levy *functus officio*, and there was no authority to issue the second *venditioni exponas*, under which the lessor purchased. As the price given by Davis did not satisfy the debt, a judgment might have been taken in the county court, upon which a *fiery facias* might have issued.

The principle that the debtor is not at liberty to resist the recovery in ejectment, by the purchaser at a sheriff's sale, does not apply, because the lessor has not shown himself to be a purchaser within the meaning of that rule. Such a purchaser must show a valid execution. The lessor has failed to do so in this case, and is not entitled to the rights of a purchaser at a sheriff's sale.

Judgment affirmed.

THE PRINCIPAL CASE again came before the supreme court, and is reported in 1 Jones, 488, where this decision is cited as having settled the point that an execution debtor may resist a recovery in ejectment by a purchaser at a sheriff's sale, unless such purchaser can show a valid execution.

MCNEELEY v. HART.

[10 IREDELL'S LAW, 63.]

ONE WHO CULTIVATES ANOTHER'S LAND FOR SHARE OF CROP CAN NOT TRANSFER his share to a third person, before a division of the crop is made. Nor is the owner of the land estopped from denying such assignee's right.

TROVER to recover damages for the conversion of certain oats and corn. One Irwin agreed with the defendant to crop with him on the defendant's land for the year 1844. And the defendant agreed to give him one fifth of all the oats and corn raised

on the farm during that year. Irwin transferred this interest to the plaintiff by a bill of sale, before any part of the crop was gathered. The court was of opinion that the bill of sale did not vest such a title in the plaintiff as to enable him to sustain this action. The plaintiff submitted to a nonsuit, and appealed. Other facts appear from the opinion.

H. C. Jones and Osborne, for the plaintiff.

Clarke and Boyden, for the defendant.

By Court, PEARSON, J. We concur in the opinion of the judge below, for the reasons given by him. Irwin, the cropper, had a mere executory contract, a chose in action, which could not be assigned: *State v. Jones*, 2 Dev. & B. L. 544.

It was very ingeniously argued for the plaintiff, that, yielding the question as to the corn, he was entitled to recover for the oats, upon the doctrine of estoppel; for although the bill of sale was executed before the oats were cut, yet, as Irwin's share was afterwards allotted and stacked to itself, it thereby became vested in Irwin. This act of appropriation fed the estoppel, and thus the right of property vested in the plaintiff.

When one sells property which does not belong to him, he and his privies are estopped from alleging that the vendee did not acquire the title; but the estoppel does not extend to third persons. If the vendor afterwards acquires the title, it feeds the estoppel, and vests in the vendee a right of property, not only against the vendor and his privies, but against third persons. Thus the sale has a double operation; first, to conclude the parties and privies, until the title is acquired; and then to pass the right of property: *Fortescue v. Satterwhite*, 1 Ired. 566; *Christmas v. Oliver*, 2 Sm. L. Cas. 417, 458. Unfortunately for the plaintiff, there is no estoppel in this case. So the learning about feeding an estoppel is not applicable.

Unless the party professes to have such an interest as could be passed by the conveyance, if he had it, there is no estoppel; for the plain reason that a matter of law can always be insisted on, as, that a chose in action is not assignable, and estoppels are restricted to matters of fact. In *Right v. Bucknell*, 2 Barn. & Adol. 278, it is said: "There is no estoppel, when it is apparent, from the face of the deed or the averment of the party, who relies upon it in interest, that, according to the fundamental doctrine of common assurances, the deed could not have sufficed to pass the estate, which he claims to hold under its operation." Lord Coke says, in Co. Lit. 352 b, "one shall not

be estopped, where the truth appears by the same instrument, as that the grantor has nothing to grant, or only a possibility," and he might have added, "or only a chose in action."

Judgment affirmed.

CULTIVATION OF LAND ON SHARES: See note to *Putnam v. Wise*, 37 Am. Dec. 317, where this subject is discussed at length.

BROWN v. RAY.

[10 IREDELL'S LAW, 72.]

CONSIDERATION FOR PROMISE MAY BE GOOD THOUGH NO BENEFIT BE RECEIVED or expected by the party making the promise; it is sufficient that the other party be subjected to loss or inconvenience.

TRUST REPOSED BY REASON OF UNDERTAKING TO DO AN ACT is a sufficient consideration to support an action on the promise.

CASE to recover a lot of corn from the defendant. The defendant had a crib of corn, which the sheriff levied upon and sold to different purchasers. After the sale, the defendant agreed to measure out and deliver the corn to the respective purchasers, but when the plaintiff applied to him for the part that he had purchased, he refused to deliver it. On the trial, the court charged the jury, "that to entitle the plaintiff to recover, he must not only prove a promise made by the defendant to deliver the corn, but he must also prove a consideration to support the promise." The jury found for the defendant, and the plaintiff appealed.

N. W. Woodfin, for the plaintiff.

J. W. Woodfin, for the defendant.

By Court, PEARSON, J. As an abstract proposition, it is true there must be a consideration to support a promise, but, to make the charge in this case pertinent, it must be understood that the judge assumed that the evidence did not show a consideration. In this, we think there was error, for, in our opinion, the evidence did show a consideration, and the jury should have been so charged. To make a consideration, it is not necessary that the person, making the promise, should receive or expect to receive any benefit. It is sufficient, if the other party be subjected to loss or inconvenience. A trust or confidence reposed, by reason of an undertaking to do an act, is held to be a sufficient consideration to support an action on the promise; as if one

voluntarily undertakes to deliver a cask of wine safely at a cellar, although he is to receive no pay for it, an action will lie upon the promise, if he be guilty of negligence, and *a fortiori*, if he retain the wine and refuse to deliver it: *Coggs v. Bernard*, 2 Ld. Raym. 909, 919. Lord Holt says: "The owner's trusting him with the goods is a consideration. The taking the trust upon himself is a consideration, though nobody could have compelled him to undertake the trust. As he entered upon it, he must perform it."

So, in this case, nobody could have compelled the defendant to undertake to measure out and deliver the corn, when applied for; but as the trust was reposed in him, and he kept the corn, and undertook to deliver it, he is bound to do so, and is liable to this action for refusing, whether he had used the corn or still had it in his crib.

In the language of Lord Holt, "the owner trusted him with the goods, and he entered upon the trust."

But for this promise, the plaintiff would have required the sheriff to deliver the corn. This puts the plaintiff to inconvenience, and there is an expressed trust, and an undertaking to do the act. If one undertakes to lead my horse to Statesville, and turns him loose on the road or refuses to deliver him, he is liable, although no compensation was to be given; for he has entered upon the trust, and I have been put to inconvenience by reason of his undertaking.

"The confidence induced by undertaking any service for another is a sufficient legal consideration to create a duty in the performance of it:" 1 Sm. L. Cas. 169, where the question is fully discussed in the valuable notes of Mr. Smith, and of the American annotators, Hare and Walker.

Judgment below reversed, and a *venire de novo* awarded.

LOSS TO PROMISOR OR BENEFIT TO PROMISOR is sufficient consideration for a promise: *Adams v. Wilson*, 45 Am. Dec. 240, note 242; *Holley v. Adams*, 42 Id. 508, note 511, where other cases are collected.

DOE EX DEM. WALLACE v. MAXWELL.

[10 IREDELL'S LAW, 110.]

DOCTRINE OF ESTOPPEL DOES NOT APPLY EITHER TO THE SOVEREIGN or to its assignee.

LAW PRESUMES GRANT TO ONE WHO HAS HAD FOR THIRTY YEARS continuous adverse possession of land up to known and visible boundaries, and the jury caught, under such circumstances, to presume a grant.

ACTS OF OWNERSHIP WHICH MUST ACCOMPANY ACTUAL POSSESSION. of land in order to justify the presumption of a grant are such acts as persons usually exercise over their own lands.

EJECTMENT. The plaintiff claimed under a grant to him from the state in May, 1842. The defendant proved that one Black had claimed the whole of the land in controversy for forty years. He offered in evidence a grant issued by the royal government to one Selwyn, to the reading of which the plaintiff objected, on the ground that the defendant claimed title under the state, and could not prove title in any one else. To sustain this objection, he gave in evidence a grant of this same land, issued by the state to the defendant, in June, 1842. The court overruled the objection, and a witness proved that the grant to Selwyn covered the land described in the plaintiff's declaration. The other facts are stated in the opinion.

Alexander, Wilson, and Boyden, for the plaintiff.

Osborne, for the defendant.

By Court, NASH, J. We concur with his honor, the presiding judge, who tried the cause below, both in admitting the testimony objected to, and in his charge. The evidence objected to was the grant by George III. to Selwyn; and upon the ground that the state had granted the same land to the defendant in June, 1842. The sovereign can not be estopped. It acts by agents and is a trustee for the people, and for their benefit, the truth may always be shown: *Taylor v. Shufford*, 4 Hawks, 132 [15 Am. Dec. 512]. *Candler v. Lunsford*, 4 Dev. & B. 407, is to the same effect, with the additional principle, that when the sovereign is not bound his assignee is not. These authorities only sustained his honor in this part of the case. The charge delivered by the court divides itself into two branches, and in each his honor was correct. The first was, that as the defendant and Black had for thirty years had a continuous adverse possession of the land in question, up to known and visible boundaries, they ought to presume a grant, that is, that the law presumed a grant and they ought so to find. The case of *Fisrandonph v. Norman*, Term (N. C.), 131, which is the leading case in this state, states that such a possession for thirty-five years raises the legal presumption of a grant, and that of *Candler v. Lunsford* cuts down the time to thirty years. Less time than thirty years has never been permitted in this state to raise this presumption of law, nor are we disposed to admit it under a shorter period. The case states that the boundaries of the

tract were well known and visible; that Black had opened and cleared up different portions of the land and inclosed them, and had been in the actual adverse possession for thirty years and upwards, and had continually claimed up to the boundaries, by using the woodland as his own, and that the defendant, who had married his daughter, had, since his death, continued the possession. Under these circumstances, if the jury believed them, they were instructed to find that the law presumed a grant. In the second place, his honor instructed the jury, that if they should not be satisfied that the possession of the defendant and Black had continued for thirty years, but only for twenty-five, yet if it were a continued adverse actual possession for that length of time, accompanied by a continued claim of ownership, up to the known and visible boundaries, for five years more, they were at liberty to find, as a matter of fact, that a grant had been issued, if from the circumstances they were satisfied such was the fact. We see no error in this portion of his charge. It is in strict accordance with the decision of this court in this case when before us heretofore: 7 Ired. L. 135. This court on that occasion said, that the actual possession of Black, for twenty-five or thirty years, accompanied with a claim and the exercise of acts of ownership and of dominion up to a well-defined boundary, was evidence that ought to have been left to the jury to presume a grant of the land to Black or those under whom he claimed. This was done by his honor in this case. His honor was careful to tell the jury what he meant as to the acts of ownership which were to accompany the actual possession. They were such acts as persons usually exercise over their own land—such as cleaning and cultivating new fields, and turning out old ones, when worn out, and cutting timber promiscuously. These directions were an answer to the second and third objections made by the plaintiff.

Judgment affirmed.

DOCTRINE OF ESTOPPEL DOES NOT APPLY TO GRANT FROM STATE so as to pass an after-acquired title: See *Casey's Lessee v. Inloes*, 39 Am. Dec. 658.

GRANT PRESUMED FROM ADVERSE POSSESSION, WHEN: See *Casey's Lessee v. Inloes*, 39 Am. Dec. 658, note 686, where prior cases are collected. The principal case is cited in *Mason v. McLean*, 13 Ired. 264; in *Baker v. McDonald*, 2 Jones, 246; and in *Davis v. McArthur*, 78 N. C. 359, to the point that from thirty years' uninterrupted possession a grant will be presumed.

HISE v. FINCHER AND WIFE.

[10 IREDELL'S LAW, 139.]

REVOCATION OF WILL MUST BE SHOWN BY SOME OVERT ACT apparent in another writing or on the paper itself, and can not be established by parol proof merely.

WHERE ONE ORDERED BY TESTATOR TO BURN WILL DECEIVES HIM by pretending to burn it, while it is in fact preserved, there is no revocation.

APPEAL from the superior court of law of Burke county. The will propounded by George W. Hise was, on the trial, admitted to have been executed by the testator, George Hise. The caveators opposed its probate, on the ground that it had been revoked. To establish a revocation, they called a witness, who stated that George W. Hise, the propounder, had made to him the following declaration concerning the paper writing in issue: "My father was lying sick in bed, and requested us to bring him the will; the will was brought to him, and he requested us to throw it into the fire and burn it; but I held the will and another paper in my hand at the same time, and, for the purpose of deceiving my father, I threw the other paper into the fire in his presence, instead of the will, and put the will in my pocket." The jury found the revocation. The other facts appear from the opinion.

Avery and Gailher, for the plaintiff.

N. W. Woodfin, Craig, and J. W. Woodfin, for the defendants.

By Court, **RUFFIN, C. J.** Upon the supposition, that the evidence of George W. Hise's declarations were admissible to affect the interests of the other devisees, the court is of opinion, that there was, yet, error in the effect given to them, as establishing, if true, a legal revocation. The act of 1819, revised statutes, chapter 122, sections 12 and 13, contains substantially the same provisions on this subject with those of statute 29 Charles II., and therefore is to receive the like construction. No devise of lands nor will of personalty, is revocable, otherwise than by some other will, or writing declaring the same, or by burning, canceling, tearing, or obliterating the same by the deviser or testator, or in his presence and by his direction or consent, and all devises of land and bequests of personal estate "shall remain and continue in force, until the same be burnt, canceled, torn, or obliterated by the deviser or testator, or in his presence and by his consent and direction, or unless the same be altered," etc. It is obvious, that the main purpose of the act is to alter the rule of law, by which the revocation of

a written will, duly attested, could formerly be established by parol proof merely; and that is done, by requiring the intention to revoke to appear, not merely from the mouths of witnesses, but also by some overt act, apparent in another writing, or on the paper itself, alleged to have been revoked. It is to be done by another will or writing, or by the destruction of the paper by burning, canceling, tearing, or obliterating. Now it is impossible to say here, that the paper was burnt, canceled, torn, or obliterated. It is true a great fraud was practiced on the dead man by his son's pretending to burn the will, while he in fact preserved it; that is, if it can be assumed upon the evidence, that such were the facts. But the very question is, whether upon this parol evidence, by itself, an intention to revoke can be found, or, if the intention be granted, whether the law will allow such intention to burn and revoke to be, in fact and law, a burning and revocation. The statement of the question seems to furnish an answer to it in the negative. The statute positively requires things to be done, and not merely said or intended to be done.

The court can not dispense with those acts, upon the ground, that, in requiring them, the statute put it in the power of a bad man to deceive and defraud a testator. That was for the consideration of the legislature; which body has, nevertheless, used language on the subject which is clear and explicit, and which, therefore, the judiciary must observe, though, in a few very extraordinary cases, it admits the possibility of fraud and imposition. For it is clear, the legislature deemed it the better policy to submit to that inconvenience, in a solitary instance, now and then—since human sagacity is not competent to guard perfectly against fraud of every kind—than to let in the more extensive and frequent mischief, arising from perjuries committed in proving verbal directions to burn or cancel a will, and a supposed belief of the testator that it had been done. We conceive the words of the act are diametrically opposed to the hearing of any evidence of the kind, and that, to effect a revocation of a will, there must be deeds, within some one of the definite words used. The counsel opposed to the will have adduced but one case having any analogy to the present, and that is very slight. It is that of *Bibb v. Thomas*, 2 W. Black. 1043, where the will was slightly torn by the testator, and thrown by him into the fire and slightly burned, and it was held that it was revoked, notwithstanding another person took it out of the fire, and preserved it, without the knowledge of the testator. But

the reason given for it was, that the case fell within two of the specific acts described in the statute, namely, tearing and burning; for, though the burning was very slight, yet, having come from the act of the testator in throwing the paper on the fire, with intent to burn it, that was sufficient within the statute. In *Doe ex dem. Reed v. Harris*, 6 Ad. & El. 209, Lord Denman, in speaking of that case, expresses a doubt whether the proof there would now be deemed sufficient. But it is not necessary to question it at present, as our case is essentially different in the very facts on which *Bibb v. Thomas* was put, since here neither tearing nor burning happened in the slightest degree.

And on the contrary, the case of *Doe v. Harris* is directly in point to the question before us. There, an old and infirm man threw his will, inclosed in an envelope, into the fire, and a devisee in the will snatched it off, a corner of the envelope only being burnt, but promised the testator to burn it, and pretended to have burnt it. Yet the court was unanimous that the will remained in full force, and that very devisee recovered under it in ejectment. It was so held, by force of the words, requiring the palpable acts of burning, and so forth, in exclusion of intentions and unexecuted attempts, shown merely by parol, which it was the policy of the law not to hear by itself. The judgment in that case proceeds, we think, upon a sound interpretation of the statute, and it is decisive of the question here. Indeed, Mr. Justice Williams, in his argument, puts, by way of illustration, the very case stated in this bill of exceptions. His words are these: "It is argued, that, if a testator throws his will on the fire, with the intention of destroying it, and some one, without his knowledge, takes it away, that is a fraud, which ought not to defeat his act. But so it might be said that, if a testator sent a person to throw it on the fire and he did not, the revocation was still good. Where would such constructions end? The effect would be to defeat the object of the statutes, which was to prevent the proof of cancellation from depending on parol evidence." That case is the stronger, because, in a subsequent case, the court held, upon the same facts, that as to copyhold lands, which are not embraced in the statute of frauds, this will was revoked: *Doe ex dem. Reed v. Harris*, 6 Ad. & El. 209.

Judgment reversed and *venire de novo*.

REVOCATION OF WILL: See *Floyd v. Floyd*, 49 Am. Dec. 626; *Cooper's Estate*, 45 Id. 673, note 675; *Marston v. Marston*, 43 Id. 611; *Bennett v. Sherrod*, 40 Id. 410, note 411; *Wiggin v. Swett*, 39 Id. 716, note 724; *Malone's Adm'r*
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v. *Hobbs*, Id. 263; *Brown's Will*, Id. 174, note 176; *Dickey v. Malechi*, 34 Id. 130, note 139; *Bohanon v. Walcot*, 29 Id. 630, note 635; *Sneed v. Ewing*, 22 Id. 41; *Wells v. Wells*, 16 Id. 150; *Graves v. Sheldon*, 15 Id. 653, note 659, where the subject of implied revocation is discussed at some length; *Greer v. McCracken*, 14 Id. 755, note 761; *Gains v. Gains*, 12 Id. 375, note 377, where this subject is discussed at length.

THE PRINCIPAL CASE IS DISTINGUISHED in *White v. Caster*, 1 Jones, 201.

CABE v. JAMESON.

[10 IREDELL'S LAW, 193.]

ACCORD AND SATISFACTION EXECUTED, THOUGH IN PAROL, IS GOOD DEFENSE to an action on a covenant in a sealed instrument, which sounds altogether in damages, although secured by a penalty.

DEBT on a covenant. Defendant's intestate, Douglass, contracted by deed to purchase from the plaintiff a tract of land. The covenant was executed by both parties, and each was bound to the other in the penal sum of three thousand dollars. The breach assigned was that the intestate did not perform his part of the contract, and the damages sought were for his failure to do so. The defendant relied on the plea of accord and satisfaction, and proved that when called upon by the plaintiff to perform his contract, the defendant declared his inability to do it, and offered to pay to the plaintiff one hundred dollars on account of his disappointment, which offer he accepted as a satisfaction. The court instructed the jury, that if they believed this testimony they should find for the defendant. Verdict for the defendant.

N. W. Woodfin and J. W. Woodfin, for the plaintiff.

Gaither, for the defendant.

By Court, NASH, J. As a general proposition it is true, that where a certain duty arises under a sealed instrument, merely accord and satisfaction by parol is no sufficient answer, for a deed ought to be avoided by a matter of as high a nature: *Blake's Case*, 6 Co. 44. As in an action of debt upon a single bill, for the payment of money only, for there the debt is ascertained: *Preston v. Christmas*, 2 Wils. 86. But when the covenant sounds altogether in damages, though secured by a penalty, accord and satisfaction executed, though in parol, is a good defense. This doctrine is clearly established by the case of the *State v. Cordon*, 8 Ired. L. 179. There the action was in debt, on a guardian bond, and satisfaction pleaded. Upon settling his accounts,

the guardian fell largely in debt to his ward, the relator, and, in satisfaction, transferred, by assignment to him, several promissory notes on third persons, which were accepted in satisfaction of the balance. This court decided, that the suit was substantially for damages, that the duty did not accrue to the relator in certainty by the bond, but from a wrong or default subsequent, which gave him his action to recover damages from the defendant, and consequently a plea of satisfaction of those damages is good. This case covers the whole ground, taken on the defense.

Judgment affirmed.

ACCORD EXECUTORY IS NO BAR: See *Mitchell v. Hawley*, 47 Am. Dec. 260, note 263; *Brooklyn Bank v. De Grauw*, 35 Id. 569, note 571, where other cases are collected.

In *Mitchell v. Hawley*, 47 Am. Dec. 260, it was decided that an accord and satisfaction can not discharge a specialty, although they will discharge damages arising from a breach of the specialty.

PERRY v. PHIPPS.

[10 IREDELL'S LAW, 259.]

ONE HAS NO RIGHT TO KILL DOG ON OWNER'S PREMISES, on the pretense that he is a nuisance, because he has on former occasions bitten other persons.

PERSON IS LIABLE FOR KILLING DOG ON OWNER'S PREMISES, after the owner has driven the dog away, so that there is no longer any danger of his biting him at that time.

TRESPASS for killing a dog. The pleas were, that the dog was a nuisance, and that any person had a right to kill him; and that the defendant killed him to prevent him from worrying and biting him. The jury found for the plaintiff. The other facts appear from the opinion.

Boydén, Clarke, and H. C. Jones, for the plaintiff.

Bynum and Craig, for the defendant.

By Court, RUFFIN, C. J. We doubt not that a dog may be a nuisance, so as to authorize any person to kill him, as if he be mad and at large; for, in such a state, he is no longer *mansuetæ naturæ*, and the consequences of a bite from time to time, to either man or beast, may be so dreadful and so general, as to justify his destruction as soon as possible. But dogs are in many respects useful, and, with many persons, favorite animals; and we are not aware, that fierceness, merely, and attempts to

bite, or even the actual biting of one or more persons, have ever been held to empower another person, at a different time, to kill them, and especially to go to the owner's yard for that purpose. As a watch-dog, his value is constituted by his being sharp and dauntless; and therefore it would seem those properties can not, in themselves, convert him into a nuisance. Hence, the evidence rejected was irrelevant. If, indeed, the defendant had been bitten by the dog, it might have been proper to show the savageness of the brute, and to insist that the owner, if he had knowledge of his worrying people, ought to have confined him, so that he could not set on people passing, or bite a person lawfully going to the owner's house; and to that purpose his biting twice or even once has been held sufficient to make the owner liable, if he did not kill or confine the dog: *Smith v. Peulah*, 2 Stra. 1264; Bul. N. P. 76. But here the question, as to that point, is entirely different; that is, whether a person can kill a dog in the owner's house or yard, upon the pretense that he is a nuisance, because he had at a former period chased or bitten some one else; and we hold, that he can not. Then as to the second plea, the instructions appear to the court to be unexceptionable. A person is not bound to stand quietly and be bitten by a dog, nor to give him what might be called a fair fight among men. But if a fierce and vicious dog be allowed to go at large, and he runs at a person, as he lawfully goes to a house, or is passing along the road, apparently to set on the person, or, for example, on the horse he is riding, it seems but reasonable the person should protect himself from the injury of a bite to himself or his horse, by killing the dog; for, although a man has a right to keep a dog for the protection of his house and yard, yet he ought to keep him secured, and not let him loose and uncontrolled at such hours and in such places, as will endanger peaceable and honest people engaged in their lawful business.

If therefore this dog were one of the kind supposed, and the defendant had shot him, as he came at him, and when he had reasonable grounds to think that the dog could not be restrained by the owner or his family, and would bite him, we should hold that he did no more than he had a right to do. But when the plaintiff's family were at home, and, by their immediate interference and commands and punishment, governed and drove away the dog, so as not only to prevent him from biting the defendant at that time, but also to save the defendant from all danger then, by driving the dog away, the killing of the dog,

after that, and against the urgent entreaties of the family, could have been only on the pretense, and not on the reality, of protecting the defendant from an attack at that time, and the circumstances were properly left to the jury, as evidence on which they might find that the defendant did not act on the defensive. Judgment affirmed.

VICIOUS DOG, LIABILITY OF OWNER FOR INJURY DONE BY: See *Kittredge v. Elliott*, 41 Am. Dec. 717, note 720, where other cases are collected; *Pickering v. Orange*, 32 Id. 35, note 36.

FEROCEOUS DOG, WHEN A NUISANCE: See note to *Loomis v. Terry*, 31 Am. Dec. 310.

SIKES v. PAINE ET AL.

[10 IREDELL'S LAW, 280.]

PERSONS OF SKILL ARE PERMITTED TO GIVE THEIR OPINIONS IN EVIDENCE on questions of science or trade, on the ground that they are conversant with the business to which they are called to testify, and have, therefore, peculiar knowledge concerning it.

PERSONS WHO HAVE OWNED, COMMANDED, AND REPAIRED VESSELS are, although not ship-carpenters, competent to testify as to the difference between the value of a vessel repaired in a certain way, and her value had she been repaired in the manner called for by the contract under which the repairs were made.

TIME FROM WHICH DAMAGES FOR BREACH OF CONTRACT for the repair of a vessel are to be computed is the time when the contract was broken, although the vessel may not have been called for until after that time.

APPEAL from the superior court of law of Tyrrell county. The question concerning which the witnesses mentioned in the opinion were asked their opinions was, what was, in their opinion, the difference in value between such a vessel as was stipulated for in the contract, and such an one as a previous witness had described this to be. The other facts appear from the opinion.

Heath, for the plaintiff.

A. Moore, for the defendants.

By Court, NASH, J. In the admission of this evidence, we perceive no error. In general, witnesses must speak to facts, and their opinions are not evidence. There are, however, exceptions to the rule. On questions of science, or trade, and others of a similar character, persons of skill are permitted to give their opinions in evidence. Medical men are suffered to

give their opinion as to the state of a patient, whom they have seen; and they are often called on to listen to a description, given by other physicians, of the symptoms of a patient, whom they have not seen, and then to give their opinion. In the case of *Beckwith v. Sydebotham*, 1 Camp. 117, ship-carpenters were permitted to state their opinion of the seaworthiness of a vessel from examining a survey, made by others, at which they were not present. In *Beverly v. Williams*, 4 Dev. & B. L. 836, a witness was permitted to give his belief, as to the identity of persons. In all these cases of science and skill, the opinion of the witness is admitted as evidence, upon the ground, that he is conversant with the business, to which he is called to testify, and has, therefore, peculiar knowledge concerning it. The court must first be satisfied from the examination of the witness himself, or of others, that he stands in that situation, which renders his opinion in the case evidence—the degree of weight to which it is entitled, belongs exclusively to the jury. In the present case we think the evidence was competent. Neither of the witnesses was a ship-carpenter, but one had worked part of a year in a ship-yard, and had been the owner of vessels for many years, and thought himself well acquainted with their value. The other “had been the owner of a vessel fifteen years, and had worked considerably in repairing old vessels.” The court judged rightly in permitting the testimony to go to the jury, to be judged of by them as to its importance.

It was insisted by the defendants, that, as the plaintiff did not call for the vessel until the fifth of July, he was entitled to recover only what she was worth from that time until the seventeenth, when she was delivered; and that interest upon the value was a matter of discretion with the jury. His honor instructed the jury, that, as by the contract, the repairs were to be finished by the first of June, if she was not then ready, the plaintiff had a right to recover what the freight of the vessel was worth from that time until the seventeenth of July, when she was delivered, with interest, etc. We concur with his honor, as to the time, at which the plaintiff's right to recover damages commenced. The defendants were bound by their contract to have her ready on the first of June. She was not then ready, and at that time the contract was broken, and his right of action accrued. As to the interest, we give no opinion, as the plaintiff has remitted it, and moved that the judgment be affirmed upon the payment of the costs of this court. The defendants do not except to the rule stated by the court, by which they were to be governed in assess-

ing the plaintiff's damages, to wit, the freight of the vessel, but to the time. This objection has already been noticed.

Judgment affirmed.

EXPERT TESTIMONY, ADMISSIBILITY OF: See *Clark v. State*, 40 Am. Dec. 481; *Watson v. Cresap*, 36 Id. 572; *Barron v. Cobleigh*, 35 Id. 505, note 511; *Jefferson Ins. Co. v. Cotheal*, 22 Id. 567, note 574, where other cases are collected.

EXPERT TESTIMONY AS TO HANDWRITING: See *May v. State*, 45 Am. Dec. 548; *People v. Spooner*, 43 Id. 672, note 676, where other cases are collected.

DEN EX DEM. HOUSER ET AL. v. BELTON.

[10 IREDELL'S LAW, 358.]

WHERE CORNER OF TRACT OF LAND IS, BY MISTAKE, DESCRIBED in the deed as on the east side of a creek, competent testimony is admissible to show that the corner is in fact on the west side of the creek; and if the proof shows the corner tree to be on the west side, the marked tree must control the word in the deed.

EJECTMENT. The lessor claimed under a deed, in which the land was described as beginning at a white-oak on the east side of Loven's creek. The plaintiff claimed that the beginning corner was at a white-oak stump on the west side of the creek, and that it was by mistake described as being on the east side. If the corner was at this stump, the plaintiff was entitled to recover, otherwise his title did not cover the land in dispute. The second, third, and fourth corners were established. The point of intersection, by running from the fourth corner west, and from the second corner north, was at the white-oak stump, and the distances of these two lines gave out a few feet from the stump. A witness testified that many years ago his father had pointed out a white oak which was marked for a corner, and told him that was the corner of the lessor's land. The corner now contended for by the lessor was the stump of that tree which had been since cut down when the land was cleared. The defendant objected, on the ground that the calls of the deed could not be controlled by such testimony. The court charged the jury that if the evidence satisfied them that the white oak, of which the stump was the remains, was marked as the corner of the lessor's land, it would control the word "east," and fix the lessor's corner on the west side of the creek, and the plaintiff was entitled to recover. Verdict for the plaintiff.

Iredell, for the plaintiff.

No counsel for the defendant.

By Court, PEARSON, J. The opinion of his honor is fully sustained by many decisions. The question is simply, whether a party is a liberty to show, by the kind of proof offered in this case, that there was a mistake in using the word "east" instead of the word "west." It is not a question between a marked tree and a natural boundary, but between a marked tree and a mere word.

When a creek is called for as a boundary, it will control course and distance, and even marked lines and corners, because it is permanent and fixed, and a thing about which there can be no mistake. It is a natural boundary. Marked lines and corners control course and distance, because a mistake is less apt to be committed in reference to the former than the latter. Indeed, the latter is considered as the most uncertain kind of description; for it is very easy to make a mistake in setting down the course and distance, when transcribing from the field book, or copying from the grant or some prior deed, or a mistake may occur in making the survey, by losing a stick, as to distance, or making a wrong entry as to course. For these reasons, when there is a discrepancy between course and distance and the other descriptions, the former is made to give way.

All the reasons for making course give way to a natural boundary, or to the lines of another tract, or to marked lines and corners, apply with full force to the present question. The deed describes the beginning corner as being on the east side of the creek; the proof shows the corner tree to be on the west side. The marked tree must control, because there is less liability to mistake about it, than in the case of one word for another, and the discrepancy shows there must be a mistake in the one or the other.

In the leading case of *Person v. Roundtree*, note to — v. *Beatty*, 1 Hayw. 378, the course of the first line was "north" from a creek, so as to put the whole tract on the north side. The marked line ran "south" from the creek, so as to put the whole tract on the south side. It was held, that the course of the first line had been written "north" instead of "south" by mistake, and the marked lines controlled. There is the same reason for holding in this case, that "east" had been written instead of "west," and the marked course must control.

Judgment affirmed.

CITED in *Marshall v. Fisher*, 1 Jones, 119, to the point that a tract of land described in a deed as on the east side of a creek may be shown by parol evidence to be on the west side.

KEATON v. BANKS ET AL.

[10 FREDELL'S LAW, 381.]

COURT IN WHICH JUDGMENT IS RENDERED MAY VACATE IT, on motion, at any time, upon parol proof that it was entered irregularly and not according to the course of the court.

JUDGMENT RENDERED AGAINST PARTY NOT IN COURT IS VOID.

MOTION to vacate a judgment. The court refused to hear the parol evidence referred to in the opinion, and the plaintiff appealed.

Heath, for the plaintiff.

Ehringhaus, for the defendants.

By Court, NASH, J. We do not concur in the opinion of the court below. The error seems to have originated in not advert-
ing to the difference between receiving parol testimony to impeach a judgment collaterally, and to receiving it on a motion to vacate it, made in the court where the judgment is. In the former case, it is certainly incompetent; in the latter, it is competent. Upon the appeal from the judgment of the county to the superior court, the trial was to be had in the latter, as it was had in the former. And, if the evidence offered to his honor was such as would have been proper in the county court, it ought to have been admitted by him. In the writ, William F. Keaton is called the guardian *ad litem* of Benjamin, and the record is upon its face regular, according to the course of the court. The service of the writ appeared to have been admitted by William F. Keaton; the court must have then considered the infant Benjamin in court. The fact was otherwise. According to the evidence offered, William F. Keaton never was appointed the guardian of the infant, and never consented to be so, and did not defend the action. If this was so, the judgment was in reality irregular, and contrary to the course of the court. If an action had been brought to recover the property sold under it, however, evidence could not have been received to impeach it. It was the judgment of a court having jurisdiction of the matter. But, according to the fact, Benjamin F. Keaton was no party to the proceedings either by himself or his guardian. And the judgment is void, for there can be no judgment against a person not in court: *Den ex dem. White v. Albertson*, 3 Dev. L. 242 [22 Am. Dec. 719]. The question then presents itself, Could the county court set aside this judgment at a term subsequent to that at which it was rendered, by petition or motion, and receive parol evidence to show the truth of the transaction? It apper-

tains to every court, as a necessary part of its functions, to set aside an irregular judgment. The ends of justice often require it: *Bender v. Askew*, Id. 152 [22 Am. Dec. 714]. In that case, it is stated by the court that the power so to do is not confined to the term in which the judgment is rendered. The judgment against *Bender* was rendered at January term, 1838, and set aside at August term, 1839.

The first case presenting the question is that of *Pearson v. Nesbit*, 1 Dev. L. 135 [17 Am. Dec. 569]. There the judgment was obtained at fall term, 1820, and the motion, on affidavit, not filed until fall term, 1827, when the judgment was vacated because Jesse A. Pearson was both plaintiff and defendant. In *Crumpler v. Governor*, Id. 52, a final judgment obtained at one term of the court, was at a subsequent one, on motion founded on affidavit, set aside for irregularity. In all these cases the motion was made in the court, where the judgment was, and directly upon it: *Tidd's Pr.* 614; *Bing. on Judgment*, 21, 22. It has been insisted, however, that the original case continued in court two terms, before the judgment was entered against Benjamin Keaton, and the court thereby recognized William F. Keaton as his guardian, and Benjamin was in court. For this position the case of *Den ex dem. White v. Albertson*, 3 Dev. L. 242 [22 Am. Dec. 719], was cited. The attempt there was to impeach the judgment collaterally. Judge Henderson put it upon that ground exclusively. It is true that the case was in court the time specified, and the record does speak of William F. Keaton as the guardian of Benjamin. But on motion to vacate the judgment, as irregular, the court is not precluded from inquiring into the truth, whether William F. Keaton was the guardian of Benjamin, and whether the latter did appear or not: *Bender v. Askew*, Id. 152 [22 Am. Dec. 714]. The vacating such judgments proceeds upon the grounds, "that a judgment has been signed upon the record, which was not in fact the judgment of the court, which the court ought not to have given, and which the plaintiff or his attorney knew the court would not give or allow."

The judgment of the superior court is reversed and the case remanded.

Ordered accordingly.

SETTING ASIDE JUDGMENT: See *Bank of Monroe v. Widner*, 43 Am. Dec. 768, note 772; *Dial v. Farrow*, 36 Id. 267, note 268; *Pendleton v. Galloway*, 34 Id. 434; *Winslow v. Anderson*, 32 Id. 651; *Binsse v. Parker*, 23 Id. 720; *Bender v. Askew*, 22 Id. 714, note 717; *Bank of Carlisle v. Hopkins*, 15 Id.

113; *Morgan v. Hays*, 12 Id. 147, note 148. The principal case is cited in the following cases to the point that an irregular judgment may be set aside at any time by the court in which it was rendered: *Williams v. Beasley*, 13 Ired. L. 114; *Dick v. McLaurin*, 63 N. C. 186; *Mason v. Miles*, Id. 565; *Cowles v. Hayes*, 69 Id. 410.

JUDGMENT AGAINST PARTY WITHOUT NOTICE IS VOID: See *Flint River Steamboat Co. v. Foster*, 48 Am. Dec. 248, note 270, where this subject is discussed at length; *Dearing v. Bank of Charleston*, Id. 300, note 320.

HERRING v. WILMINGTON & RALEIGH R. R. Co.

[10 IREDELL'S LAW, 402.]

WHAT AMOUNTS TO NEGLIGENCE IS A QUESTION OF LAW.

WHERE SLAVE WHILE ASLEEP ON RAILROAD TRACK IS RUN OVER and killed by a train running at the usual speed, the law will not attribute negligence to the engineer because he does not act on the assumption that the slave has lost his faculties by being drunk or asleep. He has a right to presume that the slave, being a man, will get out of the way; and if, after he gets near enough to see that the slave is drunk or asleep, he uses due care and precaution to avert the accident, the railroad company will not be liable to the owner of the slave.

CASE to recover damages of the defendants for the negligent management of their cars, whereby one of the plaintiff's slaves was killed and another badly wounded. The facts are stated in the opinion.

Strange and D. Reid, for the plaintiff.

W. Winslow, for the defendants.

By Court, PEARSON, J. The *gravamen* of the action is negligence on the part of the defendants through their agent, and the question is, Was there evidence of negligence?

It was proven, that the cars ran over two negroes of the plaintiff, killing one and injuring the other: and the plaintiff insists, that, from this fact, the law implies negligence. The position is not tenable, that whenever damage is done, the law implies negligence. The bare statement of the proposition shows its fallacy. The case of *Ellis v. Ports. & Roan. R. R. Co.*, 2 Ired. L. 138, and *Piggot v. East. Co. Railroad*, 54 Eng. Com. L. 229, were relied on as supporting this position. In both cases fire was communicated to the property of the plaintiffs—in the one case, a barn—in the other a fence was set on fire by sparks from the cars. It was proven in both cases, that the cars had been running for a long time without doing any damage, and things remaining in the same condition, the

fact, that fire was communicated on a particular occasion, was properly held to be *prima facie* evidence that it was the result of negligence. Judge Gaston, in the case of *Ellis*, lays down the rule in these words: "Where the plaintiff shows damage resulting from the act of the defendants, which act with the exertion of proper care does not ordinarily produce damage, he makes out a *prima facie* case of negligence, which can not be repelled, but by proof of care, or some extraordinary accident, which makes care useless." In other words, as the cars had been running under the same circumstances time after time without setting fire to the fence, if on a particular occasion the fence is set on fire, it must be ascribed to negligence, unless it can be accounted for, as by showing there was a sudden gust of wind, or some other unusual cause. In this case, the cars had been running for years without injuring a negro, because no negro had fallen asleep upon the track. That was itself an unusual circumstance, and repels any inference of negligence, from the mere fact, that damage was done, and therein this case differs from the cases of the fence and the house, which had remained stationary. The question of negligence then is open for inquiry.

What amounts to negligence is a question of law. Admitting the facts to be as contended for by the plaintiff, there was no evidence of negligence. The cars were running at the usual hour and at the usual speed, not through a village, or over a crossing place, or turning a point, but upon a straight line, where they could be seen for more than a mile. The negroes might have been seen at the distance of half a mile. Whether the engineer saw them or not until he was too near to stop, does not appear. There is no evidence that he was not in his place and on the lookout. It can not be inferred from the fact, that he made no effort to stop until he got within twenty-five or thirty yards of the negroes; for that is entirely consistent with the supposition, that he had seen them for half a mile; because, seeing them to be men, he naturally supposed they would get out of the way before the cars reached, and might well have continued under this impression, until he got near enough to see, that they were either drunk or asleep, which he was not bound to foresee, and his being then too near to stop, so as to save them, was their misfortune, not his fault.

If there had been a log of wood on the track, running over it would amount to negligence; for, if the engineer did not see it, there was negligence in not keeping a lookout, and if he did see it, there was negligence in not stopping in time, as wood

has neither the instinct of self-preservation nor the power of locomotion. If there had been a cow on the track, the case would not be so clear, for the animal has both the instinct of self-preservation and the power of locomotion; but, on the other hand, it is known, that such animals lose their natural apprehension of danger by frequently seeing and hearing the cars. But as the negroes were reasonable beings, endowed with intelligence, as well as the instinct of self-preservation and the power of locomotion, it was a natural and reasonable supposition, that they would get out of the way, and the engineer was not guilty of negligence, because he did not act upon the presumption that they had lost their faculties by being drunk or asleep. If a deaf-mute, while walking on the track, be unfortunately run over, it would certainly not be negligence, unless it was proven that the engineer knew the man and was aware of his infirmity. If the cars are to be stopped, whenever a man is seen walking on the road, lest perchance he may be a deaf-mute, and whenever negroes are seen lying on the track, lest they may be drunk or asleep, a knowledge of this impunity would be an inducement to obstruct the highway and render it impossible for the company to discharge their duty to the public, as common carriers.

We concur with his honor as to the competency of the captain as a witness for the defendants. He was in no wise responsible. But we do not concur in the opinion, "that the fault of his slaves in going to sleep on the road at the time and under the circumstances stated by the witnesses was imputable to the plaintiff." No fault is imputable to the owner for not preventing his negroes from going about on Sunday and lying down where they please, nor is the amount of care required of the defendants thereby "diminished." For this reason, we should be compelled to grant a *venire de novo*, if this instruction could have influenced the decision of the case. But, as the plaintiff made out no evidence of negligence, this error was immaterial.

For the same reason it is unnecessary to notice the cases cited in the argument, as to the damage done, when there was negligence on both sides. We concur in the opinion, that, when this is the case, neither party can recover, unless one be guilty of wanton injury or gross neglect, which is much the same thing; for, if both are in equal fault, if one can recover so can the other, and thus there would be mutual faults and mutual recoveries, which would contradict the saying, "that law is the perfection of reason."

Judgment affirmed.

WHAT AMOUNTS TO NEGLIGENCE IS A QUESTION OF LAW: *Biles v. Holmes*, 11 Ired. L. 16; *Brock v. King*, 3 Jones, 47, both citing the principal case.

CONTRIBUTORY NEGLIGENCE, WHEN BAR TO ACTION: See *Irwin v. Sprigg*, 46 Am. Dec. 667, note 671, where other cases are collected; *Kennard v. Burton*, 43 Id. 249, note 255; *Johnson v. Whitefield*, 36 Id. 721; *Fleytas v. Pontchartrain R. R. Co.*, Id. 658, note 659; *Simpson v. Haul*, Id. 231, note 236, where other cases are collected and cited. The principal case is cited in *H. & T. C. R'y Co. v. Sympkins*, 54 Tex. 623, to the point that an intoxicated person who goes on a railroad track and is injured is guilty of contributory negligence.

THE PRINCIPAL CASE IS CITED in *Couch v. Jones*, 4 Jones, 408, in *Woodhouse v. McRae*, 5 Id. 2, and in *Poole v. Railroad Co.*, 8 Id. 341, to the point that reasonable beings, endowed with intelligence, may be naturally presumed and expected to get out of the way of an approaching train. It is also cited, in *Scott v. Wilmington & R. R. Co.*, 4 Id. 433, to the point that the killing of a slave by a railroad train does not necessarily show negligence on the part of the engineer. And in *Jones v. North Carolina R. R. Co.*, 67 N. C. 125, it is cited to the point that it is not the duty of an engineer to stop or slacken the speed of his train when he sees a human being on the track, unless he knows that he is asleep or drunk.

MERE FACT OF INJURY IS NOT PROOF OF NEGLIGENCE: *Bryan v. Fowler*, 70 N. C. 598; *Manly v. Wilmington & W. R. R. Co.*, 74 Id. 658, both citing the principal case.

DOE EX DEM. BRANNOCK v. BRANNOCK.

[10 IREDELL'S LAW, 428.]

DEED OF TRUST MADE TO SECURE SEVERAL DEBTS due to different individuals, some of which are usurious and some *bona fide*, is not void, but is a security for the debts not tainted with usury, where these debts are distinct from and independent of the usurious debts.

EJECTMENT. Both parties claimed under one Thompson. The defendant claimed under the deed of trust referred to in the opinion. The plaintiff claimed under a sheriff's deed, founded on judgments and executions, and levies and sales duly made. The deed of trust was prior in date to the judgments and executions. Judgment was given for the defendant. The other facts are stated in the opinion.

Morehead, for the plaintiff.

Iredell, for the defendant.

By COURT, PEARSON, J. The only question is, whether a deed of trust is void, which was made to secure several debts due to different individuals, some of which debts are usurious. It is not void. The estate passed, and is a security for the debts not tainted with usury. The declarations of trust, only in reference to the usurious debts, are void.

In *Den ex dem. Shober v. Hauser*, 4 Dev. & B. L. 91, it is held that a deed of trust, made to secure a usurious debt, is void; in that case there was but one debt secured, which debt being usurious, the deed could only operate as an "assurance for a usurious debt," and was properly held to be void.

But, in this case, there are several debts due to different individuals; some of which are not tainted with usury, and are in no wise connected with those that are. The operation of the deed was to pass the legal estate, with a separate declaration of trust, for each of the debts therein enumerated. There can be no reason, why the declaration of trust, in reference to one debt, may not stand, and the declaration of trust in reference to another be held void. So if a deed contains a declaration of trust, in favor of several debts, one of which is feigned, and there can be no connection or combination between the creditors, to whom the true debts are due, and the grantor or person for whose benefit the feigned debt is inserted, there can be no reason why the declarations of trust, in favor of the true debts, may not stand and the feigned debt treated as a nullity.

If a bond secures the performance of several covenants on conditions, some of which are legal and the others void, it is valid, so far as respects the conditions that are legal, provided they be separated from and are not dependent on the illegal. But if a contract be made on several considerations, one of which is illegal, the whole contract will be void. The difference is, that every part of the contract is induced and affected by the illegal consideration; whereas in cases where the consideration is tainted by no illegality, but some of the debts are illegal, the illegality of such as are bad, does not communicate itself to, or contaminate, those which are good, except where from some peculiarity in the contract its parts are inseparable, or dependent upon one another: 1 Sm. L. Cas. 284, note to *Coltins v. Blanton*, and the cases cited.

Here the consideration which raised the use for the purpose of the conveyance is merely nominal. The debts secured are distinct, due to different individuals, and in no way connected with or dependent on one another—the deed is valid so far as respects the good debts. It would be unreasonable and defeat the object of deeds of trust if they are to be declared void, and honest creditors deprived of their security for debts, because the debtor, without their knowledge or concurrence, may insert a usurious or feigned debt. No one would bid at a trustee's sale if he could be deprived of his title by showing that one of

many enumerated debts was tainted with usury. The case of *Harrison v. Hannel*, 5 Taunt. 780, was relied on for the plaintiff. That case is not an authority against the conclusion above announced, but tends, we think, greatly to confirm its correctness. The son of the defendant owed several debts to the plaintiffs, some of which were usurious; and wishing to get a further advance, agreed to draw three bills upon his father as a security for the whole. The bills were accepted and the first paid; but, in a suit on the second, it was held to be void, because it was a security for an amount in which were included some usurious debts. Although it was urged that the amount of the first and second bills would not exceed the amount of the good debts, the reply was, that, if the plaintiff was allowed to recover, he could apply the amount to the bad debts and sue the son on the good debts; that it was the same as if the son had given his note, with his father as security, for the whole debt. The contract was entire. The security was given as well for the illegal as the legal part; they are connected together and can not be separated, which distinguishes it from this case. Here the debts are not connected; one may be paid and another rejected. It is the duty of the trustee to pay the good and reject the bad ones. It is the same as if a separate deed of trust for each of the creditors had been executed.

Judgment affirmed.

DEED OF TRUST TO SECURE PAYMENT OF BONA FIDE DEBTS: See *Dunlap v. Burnett*, 45 Am. Dec. 269; *Dubose v. Dubose*, 42 Id. 588. The principal case is cited to the point, that where a deed of trust is given to secure several debts, some of which are usurious and some *bona fide*, the deed will be good as to the *bona fide* debts, provided they are separate and distinct from the usurious ones, in the following cases: *Palmer v. Giles*, 5 Jones' Eq. 78; *McCorlile v. Earnhardt*, Phill. L. 300; *Carter v. Cocke*, 64 N. C. 242; *McNeill v. Kiddle*, 66 Id. 294. It is also distinguished in *Stone v. Marshall*, 7 Jones, 304.

BROTHERS v. HURDLE.

[10 IREDELL'S LAW, 490.]

PARTY WHO HAS RECOVERED IN EJECTMENT CAN NOT SUE IN TROVER OF detinue for the produce of the land, which has been severed therefrom before the writ of possession was executed. His remedy is an action for damages by way of mesne profits.

IN ACTION FOR MESNE PROFITS, THE JUDGMENT IN EJECTMENT IS CONCLUSIVE as to the title.

TROVER for a quantity of corn, fodder, pease, and beans. The defendant admitted the conversion, and proved that he had re-

covered in ejectment the land on which the articles were grown, and was put in possession by the sheriff. At the time the writ was executed the corn and some part of the pease and beans were growing, the fodder had been pulled and stacked, and the balance of the pease and beans had been gathered and put into a crib on the premises. The plaintiff offered to prove that the land was his, but the court rejected the evidence, being of opinion that the recovery in the ejectment was conclusive as to the title. The jury, under the instructions of the court, found for the plaintiff as to the value of the fodder, pease, and beans that had been gathered, and the defendant appealed.

Jordan and A. Moore, for the plaintiff.

Heath and W. N. H. Smith, for the defendant.

By Court, PEARSON, J. There is no error in the instructions. The corn, etc., which was attached to the land at the time the defendant was put in possession, passed with it, and belonged to him. But the fodder, etc., which had been severed, although on the premises, did not pass with the land; for it had ceased to be a part thereof, and the defendant had no right to take it. His remedy was an action, not for the specific articles, but for damages, by way of mesne profits. If the defendant had a right to take the specific articles, he would for the same reason be entitled to recover their value in trover against the plaintiff, or any one to whom he might have sold them. The amount of which would be, when one, who has been evicted, regains possession, he may maintain trover against every one who has bought a bushel of corn or a load of wood from the trespasser at any time while he was in possession. This, especially in a country where there are no markets overt, would be inconvenient, and no person could safely buy of one whose title admitted of question. The mere statement of the proposition shocks our notions of common sense, and calls for an overpowering weight of authority to sustain it. There is no authority for it in our reports, the invariable practice having been to bring trespass for mesne profits and for damages, if there has been any destruction or injury to the freehold.

Trover for the specific articles, either against a trespasser or a third person, has never been attempted. Upon examination, it is found that there is no authority for it anywhere.

Our attention has been called to a passage in the New York edition, 1846, of Adams on Ejectment, page 347, where it is said: "Crops will pass to the lessor, although severed at the

time the writ of possession is executed, provided, the severance was after the date of the demise." This is an interpolation, and is not in any of the former editions. *Doe ex dem. Upton v. Witherwick*, 3 Bing. 11, is cited. We have examined that case—it does not sustain the position. That was a motion by a tenant, who held over after his term and was turned out by a writ of possession, for a rule that the lessor pay over to him the value of some grass and oats, which he had severed recently before the writ was executed, alleging that he was entitled to them as a way-going crop, and which the lessor had taken into possession. The court was clearly of opinion, that the motion was of the first impression; that to entertain it would offer inducements to tenants to hold over, and if the defendant had any claim to a way-growing crop, he might bring his action. The inference from this case, that crops would pass to the lessor after he regains possession, although severed at any time between the date of the demise and the execution of the writ of possession, was hastily drawn, and is not warranted by it.

The only other case cited, which has any bearing, is *Morgan v. Varick*, 8 Wend. 587. That was an action of trespass for mesne profits and *de bonis asportatis*. The plaintiff, having been let into possession after a recovery in ejectment, brought the action against the defendant in ejectment, for mesne profits and for damages, for removing certain boilers of a steam-engine which had been used in a corn-mill on the premises. The judge below held, that the plaintiff could recover mesne profits, but was not entitled to recover damages for removing the boilers. Savage, C. J., delivers the opinion of the court. It is not at all satisfactory upon the point of the case. The stress of the argument is spent upon a collateral question. The learned judge enters into a long discussion of the doctrine in one of the resolutions, in *Lifford's Case*, 11 Co. 51, and succeeds in proving by argument and authority, that after the owner regains possession, he may maintain trespass for mesne profits and for damages for any injury to the freehold as well against third persons and strangers, who had come into possession, as against the original trespasser—against such occupant for the time he was in. The relevancy of this discussion is not clearly perceived—the defendant was the original trespasser, and not a stranger. The case turned upon the statute of limitations (six years). The boilers were severed more than six years before the commencement of the action. They were removed from the

premises at the request of the defendant within six years. If the severance had been within six years, it would have been "plain sailing" for the court; for mesne profits and damages would have covered it. Such, however, was not the fact. And ingenuity was taxed to prevent the statute from being a bar to a recovery for what the judge calls "a wanton injury, as the boilers were sold for one fourth of their value." This could only be effected by holding that the boilers, after they were converted into personal property by severance, belonged as chattels to the plaintiff. Accordingly, after the long discussion above alluded to, this conclusion is announced; but it is a mere assertion, and is not supported either by argument or authority.

In this case the articles sued for were of annual production, and my Lord Coke suggests a distinction between such things as corn, etc., which come by the act and operation of the party; "for, if he had not sowed the land, no corn would have been there," and such things as come by the act of God, as trees, etc. We do not, however, put the case upon this distinction. The true distinction is, where a tenant, or one having a particular estate, wrongfully severs a tree or other thing from the freehold, it becomes personal property and immediately belongs to the landlord or remainderman, who may punish the tenant for waste and may take the thing; or may presently bring trover against the tenant or any third person who has converted it. For, as there is no possession adverse to him, the thing when severed immediately belongs to him as a chattel. Besides, he would otherwise be without remedy, as he could not bring trespass *quare clausum*, the tenant being rightfully in possession.

But when one, who is in the adverse possession, gathers a crop in the course of husbandry, or severs a tree or other thing from the land, the thing severed becomes a chattel, but it does not become the property of the owner of the land; for, his title is divested—he is out of possession and has no right to the immediate possession of the thing, nor could he bring any action until he regains possession. Then, by the *jus postliminii* or fiction of relation, he is considered as having been in possession all the time for the purpose of bringing trespass *quare clausum fregit* with a *continuando* from day to day, in which he recovers the value of the mesne profits and damages for the injury done to his freehold by the severance of any part of it, or for any other injury consequent to the breach of his close. This action can be maintained against any one who has been in possession for the time he held it, but the owner of the land can not sue for

the thing severed in trover or detinue as a chattel; for, it is not his chattel—it did not become so at the time it was severed, and the title to it as a chattel can not pass to him afterwards, when he regains the possession, by force of the *jus postliminii*. The fiction is made to enable him to recover for breaking his close and the injuries consequent thereto, but it is not made for the purpose of vesting a right to chattels.

The action of trespass *quare clausum* for the mesne profits is a continuation of the action of ejectment. Hence, the judgment in ejectment is conclusive as to the title. Originally, the plaintiff in ejectment recovered actual damages. It was only for the sake of convenience, that the courts adopted the practice of trying the title only in the ejectment with sixpence damages, and then ascertaining the actual damages in a new action for the mesne profits and damages. But if this novel application of the action of trover or trespass *de bonis asportatis* for a thing severed and made a chattel, while there was an adverse possession, be introduced, it would be difficult to find any authority for holding that a recovery in ejectment by John Doe is conclusive of the lessor's title, in an action by him for the purpose of proving his title to a chattel.

It was said for the defendant, that the plaintiff ought not to recover, because he could get the value of his fodder, etc., by way of diminution of damages in the action by him (the defendant) for the mesne profits. This idea is of the first impression. We prefer to keep rights distinct, and allow each party, when his rights are invaded, his appropriate action.

Judgment affirmed.

JUDGMENT IN EJECTMENT IS CONCLUSIVE IN ACTION FOR MESNE PROFITS: See *Drexel v. Man*, 44 Am. Dec. 195, note 200, where other cases are collected.

THE PRINCIPAL CASE IS CITED IN *Branch v. Morrison*, 5 Jones, 18, and S. C., 6 Id. 17, to the point, that a party who has recovered in ejectment can not maintain trover for the produce of the land which had been severed before the execution of the writ.

BARBEE v. ARMSTEAD ET AL.

[10 IREDELL'S LAW, 630.]

WIFE CAN NOT MAKE VALID CONTRACT WITH HER HUSBAND except through the intervention of a third person, whose duty it becomes to enforce it in her behalf; and such contract must be by deed, and signed by her.

WHERE HUSBAND ENTERS INTO WRITTEN CONTRACT WITH ONE WHO HAS ENTICED away his wife, by which it is agreed that the latter may retain

and support her, such contract amounts to a mere parol license, which either party may revoke at pleasure, and which is revoked by a demand for her restoration.

HUSBAND MAY MAINTAIN ACTION ON THE CASE FOR ENTICING away his wife.

CASE to recover damages for enticing the wife of the plaintiff to leave him, and detaining her, whereby he lost her services and the comfort of her society. The contract referred to in the opinion was in writing, and signed by the plaintiff and the defendant Armstead. The other facts appear from the opinion.

McRae and Busbee, for the plaintiff.

H. W. Miller, for the defendants.

By Court, NASH, J. That deeds, for the separation of married persons, may, by the laws of England, be valid and effectual, to many purposes, can not be doubted. The principle has been affirmed in too many cases in that country, to be now safely questioned; yet that they are at variance with sound policy, has been often declared by many of the ablest English judges—by Lord Rosslyn, in *Legard v. Johnson*, 3 Ves. 358; by Lord Eldon, in *Beard v. Webb*, 2 Bos. & Pul. 93, and in *St. John v. St. John*, 11 Ves. 526; and by Lord Ellenborough, in *Rodney v. Chambers*, 2 East, 288. But if all these cases, decided in that country, upon that subject, be sustainable, they fall very short of being authorities in this. They are decisions upon solemn deeds. To apply the principle to such a transaction as this, would be extending the evils complained of, to an alarming degree. It would be loosening another screw in the machinery of married life, marring its operations, weakening its obligations, and producing discord and confusion, when peace and concord ought to reign. Without therefore intending to express any opinion upon the doctrine of the English courts, or whether it is or is not to be introduced into this state, it is sufficient to say, the question does not arise here. A married woman can not make a valid contract with her husband, except through the intervention of a third person, to whom the duty of enforcing it, in her behalf, belongs. It must be by deed to which she must be a party—as being deeply interested in the matter: *Jones v. Waite*, 35 Eng. Com. L. 130, 142. If it were not so, she would be entirely at the mercy of her husband, and might at any moment and without notice be driven from her home and stripped of all her rights and privileges, as a wife and mother. There is no deed of separation here, and, if the contract had been reduced

to writing, it is but a parol contract between the plaintiff and defendant, to which the wife of the former was not a party; a contract, in substance, giving to the defendant liberty to harbor the wife for no definite period of time, conferring on the defendant no interest whatever, and revocable by either at any moment. It also secured to the plaintiff the right to cohabit, at the defendant's house, with his wife, at any time he pleased; and it is shown by the case, that the plaintiff did visit her at the defendant's house after the contract, as well as before, and cohabit with her. It was neither in form nor substance a contract for a separation, but simply a license to harbor the wife and child, securing the defendant against any legal responsibility for so doing, until withdrawn.

The defendant, therefore, was a wrong-doer, not only in the original act of harboring, but also for the continuance of it, after the withdrawal of the license by the defendant. But it is urged by the defendant, that if the contract was but a license, a demand of his wife by the plaintiff was no revocation. The license, being by parol, could be put an end to by parol, upon the principle of law, *Eo ligamine quo ligatur*. Nor is there any special form by which it shall be effected; anything said or done by the party giving the license, which notifies to the person enjoying it that it is revoked, is sufficient. The authorities cited by the defendant's counsel on this point do not sustain him. The reference to 1 Ch. Gen. Prac., p. 134, is incorrect as to the page; there is nothing there on that subject. The cases from the English common law reports are rather authorities against him. That of *Carpenter v. Blandford*, 8 Barn & Cress. 575, from the fifteenth volume, was in *assumpsit*, to recover a deposit of money for failing to execute a contract for the purchase of a public house and furniture, the whole to be valued by appraisers on a particular day. At the time appointed, the plaintiff's appraiser informed the defendant that he could not meet on that day, but could the next. No objection was made. On the next day, the plaintiff appeared on the premises with his appraiser, when the defendant declined going on with the business, and informed the plaintiff he ought to have come the day before—he was too late. The only point decided, that the defendant, in not notifying the plaintiff, when informed that his appraiser could not attend on the day appointed, that he would insist upon a performance of the contract agreeable to its terms, that he had waived his right to do so as a forfeiture, is *strictissimi juris*. The case of *Lewis v. Ponniford*, 34 Eng.

Com. L. 584, was an action of *quare clausum fregit*. The defendant had executed with his wife a deed of separation, but it was not executed by the trustee. The trespass consisted in entering the house of the plaintiff, against her will, in search of his wife. The court decided, that by the deed, a license was given to the wife to live where she pleased. After this license, the court say, "that he could not go to any person's house to retake her; he should at least have given notice to persons that he revoked the license." This is an authority tending to show, that, although the defendant had executed the deed, yet it operated only as a license to the wife, and could be revoked by parol. The case of *Warrender v. Warrender*, 2 Cl. & Fin. 561, is to the same effect. There Lord Brougham declares, that, notwithstanding a deed of separation had been executed, the husband had a right to reclaim his wife—his language is, "no pledge can bind the party not to reclaim his or her conjugal rights; for such pledge is against the inherent condition of the married state, and against public policy." The plaintiff in this case, his license being by parol, had a right to reclaim his wife. His demand was a revocation of his license to the defendant to harbor her, and he was a wrong-doer in refusing to do so.

Finally, the defendant insists that the plaintiff has misconceived his action, and ought to have sued in trespass. Mr. Chitty, in the first volume of his treatise on pleadings, page 91, says, that trespass is the appropriate remedy for seducing away a wife; or seducing a daughter; but he does not say that it is, in either case, the only remedy; and on the same page he states, that for the latter offense, it has been usual to declare in case.

The same principles govern the action for each injury; the legal inability of the wife or child to assent to the act. Where the injury is both immediate and consequential, either action can be supported—page 147. If there be a doubt as to the form of the action in this case, it is whether the plaintiff could have maintained trespass for a detention, even after demand.

His honor instructed the jury that for a detention of the wife before the eleventh of June, A. D. 1842, the plaintiff was not entitled to any damages, as three years had elapsed from that time, before the action was brought, which was on the eleventh of June, A. D. 1845, and that for the detention between the eleventh of June, 1842, and the making of the contract, an action would lie.

In both these points no error is perceived. He further charged that the contract was valid, and no demand, on the

part of the plaintiff, for the surrender of his wife, would give him a cause of action after its execution. In the latter part of the proposition there is error: for which a *venire de novo* ought to issue.

Judgment reversed and a *venire de novo*.

WIFE HAS, IN GENERAL, NO POWER TO CONTRACT BY THE COMMON LAW: See *Palmer v. Oakley*, 47 Am. Dec. 41; *Rogers v. Phillips*, Id. 727, note 728; *Burton v. Marshall*, 45 Id. 171, note 176, where a large number of other cases is collected.

ACTION FOR ENTICING AWAY WIFE: See *Gilchrist v. Bale*, 34 Am. Dec. 469.

THE PRINCIPAL CASE IS CITED IN *Pool v. Everton*, 5 Jones, 242, to the point that a husband may maintain an action against a person for harboring his wife, unless she has left him for good cause.

BRAZIER v. ANSLEY.

[11 IREDELL'S LAW, 12.]

TO SUSTAIN THE ACTION OF TROVER, THE RIGHT OF PROPERTY, and of possession at the time of the alleged conversion, must be united in the plaintiff, and he must prove that while the property was his the defendant converted it.

CROPPER HAS NO SUCH INTEREST IN THE CROP as can be subjected to the payment of his debts while it remains *en masse*; until a division, the whole is the property of the landlord.

DOCTRINE OF APPROPRIATION, AS CONSTITUTING DELIVERY, AND THEREBY PASSING TITLE, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel; where a less quantity out of a larger is sold, no property passes until a delivery. To constitute a delivery, the vendor may appropriate the quantity purchased, by separating it from the bulk; but the appropriation is not complete until the vendee assents to take the separated portion.

TROVER for some corn. Plaintiff nonsuited, because no part of the corn had ever vested in him. The opinion sufficiently states the other facts.

Haughton, for the plaintiff.

W. H. Haywood, for the defendant.

By Court, NASH, J. To sustain the action of trover, the right of property in the thing claimed, and of possession at the time of the alleged conversion, must be united in the plaintiff, and he must prove that, while the property was his, the defendant converted it: *Gordon v. Harper*, 7 T. R. 9; *Horwood v. Smith*, 2 Id. 750; *Lewis v. Mobley*, 4 Dev. & B. L. 323 [34 Am. Dec. 379]. In this case it is denied by the defendant, that the plaintiff

iff had any title to the corn sued for or that he has converted it. As to the title, the plaintiff urges that the facts proved show that an appropriation was made by the defendant, the landlord, of one fourth of the crop, to Brown, the cropper, which was a delivery in law, or at any rate the evidence ought to have been left to the jury, under the instruction of the court. A full and complete answer is furnished by the case to each position of the plaintiff. It is a well-settled principle of law, in this state, that a cropper has no such interest in the crop, as can be subjected to the payment of his debts, while it remains *en masse*. Until a division the whole is the property of the landlord: *State v. Jones*, 2 Id. 544; *Hare v. Pearson*, 4 Ired. L. 77. The defendant was the owner of the land, on which the corn was raised, and a man by the name of Brown cropped with him. The latter transferred his interest to the plaintiff for a valuable consideration. After the corn was matured, it was agreed between the plaintiff and the defendant, that the latter should gather the corn, and for so doing, should have five barrels. The corn was gathered by the defendant, and placed by him in two separate heaps or piles; one containing three fourths and the other one fourth. From this pile the defendant claimed to take his five barrels for gathering. To this the plaintiff objected, alleging they ought to come out of the whole crop. With this dispute we have nothing to do, as it regards the proper construction of the previous agreement. It is sufficient for our present inquiry, that a controversy did arise, and that the plaintiff would not agree to the construction put upon it by the defendant. The case states that the plaintiff "went off, saying he would have nothing more to do with it." Brown, the cropper, was present, but in no way interfered, and what afterwards became of the corn we are not informed, except that it is stated in the case, that no part of the corn was finally delivered to the plaintiff. There certainly was here no appropriation by the landlord of any specific portion of the crop to the use of Brown or the plaintiff, and therefore there was no delivery to the latter.

The doctrine of appropriation as constituting a delivery and thereby passing the title to the purchaser arises in cases of a sale of goods generally as distinguished from the sale of a specific chattel. And where a less quantity, out of a larger, is the subject of the contract, there no property passes to the purchaser until a delivery, for until then the goods sold are not ascertained. To constitute a delivery in such cases, the vendor may appropriate the quantity purchased, by separating

it from the bulk. But the appropriation is not complete until the vendee assents to take the separated portion; his assent is equivalent to accepting possession under the contract: 1 Chit. Cont. 375. In a case like this, which in principle is similar to that of a sale of a lesser part out of a larger, the appropriation by the landlord was incomplete, until ratified by the cropper or his agent and vendee, the plaintiff. It would be manifestly unjust to suffer the landlord to be the sole judge of the rights of his cropper. Not only was the assent of the plaintiff withheld, but he positively refused to receive the corn set apart for him or his principal. The title to the corn never vested in him, and he can not, under this evidence, support the action of trover. The cases cited in the argument for the plaintiff abundantly prove that a delivery may be proved, by an appropriation by the vendor, but in none of them is it said that it is complete without the assent of the vendee.

We agree with his honor that the action can not be sustained.
Judgment affirmed.

INCHOATE INTEREST OF CROPPERS, AND OTHERS, NOT SUBJECT TO EXECUTION.—The law is well settled in North Carolina, as stated in the principal case, that a cropper has no such interest in the crop as can be subject to the payment of his debts while it remains *en masse*: *State v. Jones*, 2 Dev. & B. L. 544; *Hare v. Pearson*, 4 Ired. L. 76; *Brazier v. Ansley*, 11 Id. 12 (principal case); and also in Massachusetts: *Chandler v. Thurston*, 10 Pick. 205. As stated in the words of Daniel, J., in *State v. Jones*, *supra*, the law is: "If a man engages another person to come and labor on his farm, as overseer or cropper, and stipulates with him that he shall have a share of the crop for his labor and attention, the property in the entire crop is in the employer until the share of the overseer or cropper is separated from the general mass; and then, and not until that act is done, does the title to the share vest or become executed in the laborer. Before the separation, the laborer's right rests upon an executory contract with the employer. Before separation, it could not be levied on to satisfy the laborer's debts." The cropper is a mere laborer, or servant of the owner of the land. The share allotted him is a mode of payment for his work and labor when completed. The same principle governs in other contracts for the hire of labor, besides that of cropping, where the payment is to be a share of the proceeds of the labor; as raising and caring for cattle, sheep, and other animals; cutting and chopping wood; cutting and hauling logs, or sawing them into lumber, etc. Thus, in *Lewis v. Lyman*, 22 Pick. 437, the plaintiff contracted with B. and S. to work his farm upon half-shares, each of the parties furnishing certain things, and it was stipulated that all the hay should be fed out upon the farm, and that half of the calves should be reared, and the other half killed for veal. Defendant attached one half of the hay and calves for the debts of B. and S. The court, *per Putnam, J.*, say: "The contract under consideration had a prospective operation. It was intended to embrace the crop which should thereafter be produced, and to designate and appropriate to each party his proportion of the property. It purports to provide a compensation for the labor and services of the tenants

in carrying on the farm, and not to grant the whole of the produce to them in consideration of the covenants on their part to be performed; on the contrary, it shows clearly that the plaintiff intended to keep the stuff in his own hands, as he had good right to do. He intended to grant to the tenants a certain part of the produce of the farm and of the stock for their work, and to reserve all the rest, to be specifically applied for his own use. The contract can not be understood as giving a right to the tenants to sell the hay from the farm for their own use. It can not be supposed that it was intended to be subjected to their debts, and carried away from the farm. Such a construction would be as unreasonable as it would be to suppose that the tenants were authorized to sell the land itself. The part of the produce which was granted by the plaintiff was in the nature of *wages for services*, so that all the produce, except that part which was granted to the tenants, became and remained the property of the plaintiff."

In *Smith v. Meech*, 26 Vt. 233, by the contract the owner of the land stocked it, and the tenant was to have one half of the growth of the cattle and one half of the wool produced from the sheep. It was held that before the expiration of the term of the contract, the tenant had no such interest as could be levied on and sold by his creditors. Redfield, C. J., said: "It [the interest of the tenant] was at most an inchoate interest, which rested merely in contract, and was to a great extent executory. In contracts of this kind it has often been held of late, that upon general principles, the right of the tenant does not become perfect until his part of the contract is performed." Where plaintiff, an infant, receiving a lamb as a gift, made an agreement with H. to keep the same and its increase for her, for all the wool, and the increase amounted in six years to seventeen sheep, it was held that H. had no title to the sheep that could be levied upon, and no title to the wool, until he had performed his entire contract by keeping the sheep until shearing time: *Habrouck v. Bouton*, 60 Barb. 413; S. C., 41 How. Pr. 208.

A person occupying real estate, with the right to cut and sell wood growing thereon, accounting to the owner for the receipts, after reimbursing himself for expenses out of the proceeds of such sale, has no attachable interest in such wood: *Provis v. Cheves*, 9 R. I. 53. So where B., having a license to cut logs, agreed with A. to cut and haul the logs and put B.'s mark on them, and take them to a certain place, B. to furnish supplies, pay the wages, sell the logs, and after deducting stumpage, freight, supplies, etc., pay A. the balance that might remain, A. has no interest in the logs that may be seized under execution: *Pellon v. Temple*, 12 New Bruns. 275.

We have seen above that a cropper or laborer for a share has no interest in the crop that can be levied upon until the contract has been performed and the crop divided, and that until that time the owner of the land has the whole property in the crop; that the contract is executory, and no leviable interest is acquired in the crop until the contract has been completed. Upon the same principle, it has been held that where the owner of the land has leased it, so that the lessee has the present estate in the land and the lessor only a reversion, and the lessee has contracted to pay a certain proportion of the crop, as *rent*, the property in the whole crop is in the lessee, and the lessor has not a leviable interest therein until after a segregation. That the contract to pay the lessor a share of the crop, like the contract to pay the cropper or laborer, is merely an executory contract: *Gordon v. Armstrong*, 5 Ired. L. 409; *Williams v. Smith*, 7 Ind. 559; *Deaver v. Rice*, 4 Dev. & B. L. 431.

CASES IN EQUITY
IN THE
SUPREME COURT
OF
NORTH CAROLINA.

TAYLOR v. TAYLOR.

[6 IREDELL'S EQUITY, 26.]

FAIR ARGUMENT AND PERSUASION MAY BE USED to obtain the execution of a deed or will, and do not constitute undue influence.

EQUITY. The opinion sufficiently states the case.

B. F. Moore, for the plaintiff.

Miller and Busbee, for the defendant.

By Court, PEARSON, J. Many depositions were read on the hearing. We are satisfied that Mrs. Taylor had mental capacity to make a deed, but she was very feeble, both in body and mind, and was in a condition to be easily imposed on.

There is no proof, that any fraud or circumvention was used, or any advantage taken of the old lady. The donee was her grandson; she executed the deed voluntarily and surrendered the possession of the property; the deed was registered; and she lived four years afterwards, during which time she made no complaint of having been imposed on, and expressed no wish to have the deed set aside. Indeed, it appears, that the deed makes nearly the same disposition of her property, that she had made by a will executed the year before.

Fair argument and persuasion may be used to obtain the execution of a deed or will. There is no evidence in this case, that any advantage was taken or any undue influence exercised. The plaintiff fails entirely to make out a ground to assail a will, much less a deed.

Bill dismissed with costs.

UNDUE INFLUENCE TO VITIATE AN ACT MUST AMOUNT TO COERCION destroying free agency, or harassing importunity producing compliance for the sake of peace: *Gardner v. Gardner*, 34 Am. Dec. 340; and see note thereto collecting prior cases in this series on undue influence generally. The principal case is cited and approved in *Deaton v. Munroe*, 4 Jones' Eq. 43; *Futrell v. Futrell*, 6 Id. 340.

BROWN ET AL. v. CLEGG ET AL.

[6 IREDELL'S EQUITY, 90.]

COURT OF EQUITY WILL COMPEL DISCOVERY OF A SECRET TRUST to enforce it if lawful, or declare it void if unlawful, whenever the fact of its not being declared in the conveyance, creating the legal estate, is caused by fraud or circumvention, or is the result of accident or mistake, or the omission is by design, the trust being unlawful, and the object of secrecy being to evade the policy of the law. In these cases the court proceeds upon the idea of preventing fraud.

EQUITY. The opinion sufficiently states the case.

H. Waddell, for the plaintiffs.

W. H. Haywood and Haughton, for the defendants.

By Court, PEARSON, J. A court of equity will compel the discovery of a secret trust, to enforce it, if lawful, or declare it void, if unlawful, whenever the fact of its not being declared in the conveyance, creating the legal estate, is caused by fraud or circumvention, or is the result of accident or mistake, or the omission is by design, the trust being unlawful and the object of secrecy being to evade the policy of the law; the court in all these cases proceeds upon the idea of preventing fraud.

The trust alleged in this case is an expressed verbal trust, which the parties did not choose to set out in the deed. It is not admitted by the answer. There is no allegation that fraud or accident prevented its being set out in the deed. On the contrary, the bill states, that "no written promise or other memorial of this undertaking, on the part of Carloss, was executed, the parties having an unbounded confidence in his honesty and friendship." So, the question, intended to be raised, is, Can a bill of sale for slaves be added to by parol proof, so as to show, that, although absolute upon its face, it was upon a trust, no fraud being alleged, and no reason being assigned, why the trust was not expressed in the deed?

The question is one of much interest. We do not feel at liberty now to dispose of it, because the decision of the case does not make it necessary, and we prefer to put the decision

upon another ground—especially, as the proof made of the trust is very vague and uncertain, consisting mainly of the recollection of conversations held with Carloss, in reference to the slaves, not agreeing as to the precise nature of the trust, and stating no facts or circumstances *dehors* the deed, so as to make it probable, independent of mere words, that there was a trust.

As to the plaintiff Joseph Winter, the bill must be dismissed, because he was not born until after the trust was executed; and its being for Mrs. Winter and her children would, in the absence of any words to enlarge the meaning, be confined to the two children then *in esse*.

As to the other plaintiffs, the bill must be dismissed, because there is nothing to repel the presumption, that the trust or equitable estate has been satisfied or abandoned. The intestate of the defendant held the slaves as his own for nearly twenty years; during which time there was no recognition of any right on the part of the plaintiffs. This case furnishes a strong illustration of the wise policy of the statute. It is an attempt to set up a verbal trust, after the death of the original parties, and after the lapse of twenty-one years! Mrs. Winter, now Mrs. Brown, married soon after Carloss took the slaves into possession. No reason can be assigned why she did not set up her claim; there is no saving on account of coverture in the statute, and as a husband has a right to receive satisfaction, release, or abandon an equitable estate of his wife in slaves, there is nothing to repel the presumption.

The same observation is applicable to the claim of Mrs. Marks and her sister. It may be, that, if the pleadings had been amended, so as to make the allegation of infancy and set forth the dates of their respective marriages, there might have been something to repel the presumption as to them; but there is no such allegation, and, although it is quite probable that they were both infants at the time the trust was executed, and when Carloss took possession, we are bound by the pleadings.

Bill dismissed with costs.

DISCOVERY, WHEN PARTY ENTITLED TO: See *Thompson v. Newlin*, 43 Am. Dec. 169, and note collecting cases.

JONES v. BLANTON.

[6 IREDELL'S EQUITY, 115.]

GIVING OF SECOND BOND BY GUARDIAN DOES NOT RELEASE HIS SURETIES on the first bond.

IN SUIT BY SURETY AGAINST CO-SURETIES FOR CONTRIBUTION, all the co-sureties must be joined; but if some of them are without the jurisdiction of the court, the plaintiff, by stating that fact in his bill, may proceed against those within its jurisdiction.

CO-SURETY HAS TO MAKE CONTRIBUTION WITHOUT REGARD TO THE SHARE of another co-surety who is without the jurisdiction of the court and therefore not made a defendant.

SURETY ON GUARDIAN'S BOND IS NOT OBLIGED TO PLEAD THE STATUTE OF LIMITATIONS in an action against him by the ward, and that he did not is no defense to his co-surety in a suit for contribution.

ALL BONDS GIVEN BY GUARDIAN are but securities for the same thing, but where the several bonds differ in amount, the liabilities of the sureties are not equal, but in proportion to the penalties of the different bonds.

BILL for contribution. In 1821, Benjamin Hicks was appointed guardian of the five minor children of Richard Blanton, and executed five several bonds, in the sum of six hundred dollars each, with Achilles Durham and the defendant as sureties. In 1823, Hicks, by order of the court, gave one bond in their place in the sum of three thousand five hundred dollars, with B. D. Durham, Achilles Durham, and the plaintiff as sureties. In 1842, suit was commenced against the sureties on the latter bond, a judgment recovered and execution issued thereon, which was satisfied out of the property of this plaintiff. The plaintiff now seeks contribution, and alleges in his bill the insolvency and removal of Hicks from the state, the insolvency of Achilles Durham, and the removal of B. D. Durham from the state. The opinion sufficiently states the further facts.

Guion and Alexander, for the plaintiff.

L. E. Thompson, for the defendants.

By Court, NASH, J. The defendant's objection to making contribution is not put on the ground of his not being a party to the bond of 1823, upon which the judgment against the plaintiff was obtained, but upon the three following grounds: 1. That he was discharged from all liability on the bonds, to which he was a party, by the judgment of the county court of Rutherford, when they took the bond of 1823; 2. That, as Benjamin D. Durham was one of the obligors in the bond of 1823, with the plaintiff, and is in good circumstances, and amply able to pay his share, it was the duty of the plaintiff to follow

him to the state of Mississippi, where he lived, and sue him there; 3. That more than three years had elapsed, after the wards of Hicks, or some of them, had arrived at the age of twenty-one years, before they instituted their suit against the plaintiff, and he was therefore protected by the act of the general assembly: R. S., c. 65, sec. 7; and that he had no right to file this bill.

We do not think that any of these objections can avail the defendant. As to the first, if such discharge by the judgment of the county court of Rutherford does exist, it must be a matter of record; and, without deciding whether the county court could or could not so discharge the defendant, it is sufficient to say the defendant has produced no evidence to support the allegation. The defendant was not discharged by taking the bond of 1823, but his liability continued. If it did not relieve him to the extent he expected and wished, yet it certainly did relieve him to the extent of binding the sureties to the new bond to contribute to any loss he might thereafter sustain by reason of his liability; and it has, eventually, thrown upon the plaintiff, one of the sureties to it, the first brunt of the battle: *Governor v. Gowan*, 3 Ired. L. 342.

As to the second objection. If Benjamin D. Durham had remained in this state, and was solvent, it would have been necessary for the plaintiff to have made him a party, that the court, in its final decree, might adjust the loss between all the parties: *Buller v. Durham*, 3 Ired. Eq. 589. But when one of several parties is out of the jurisdiction of the court, and others are within it, the plaintiff, by stating the fact in his bill, is at liberty to proceed against the latter alone. This is the ordinary practice in the court of chancery: *Spivey v. Jenkins*, 1 Id. 126. And the act of 1807, R. S., c. 113, sec. 2, expressly authorizes one surety to sue another, without making the principal a party, when he is insolvent and out of the state, and the equity of the act applies to this case. It was not necessary, then, for the plaintiff to pursue Benjamin Durham into the state of Mississippi. That burden will fall upon the defendant, if he wishes to lessen the liability, which, by the decree in this case, will rest upon him. Nor was it necessary to make the administrator of Hicks a party. Hicks was insolvent, and the administrator has left the state.

As to the third objection. If the wards of Hicks, as is alleged, had reached twenty-one, more than three years before they commenced their suit against the present plaintiff, he might, if he had so chosen, have protected himself under the act limiting the time

within which actions must be brought against the sureties to guardian bonds: R. S., c. 65, sec. 7. But he did not so choose. A recovery has been had against him upon a just claim, and he now seeks to make the defendant bear an equal share of that just demand. It is right and proper that the law should fix a time, beyond which the sureties to a guardian bond shall not be held liable to the claim of the wards, and the law has fixed the period at three years after their arrival at full age. The claim here is not that of the ward, but of a joint surety. There was no obligation on the plaintiff, either in law or in equity, to plead that statute or rely upon the protection it gave him. In the cases of *Leigh v. Smith*, 3 Ired. Eq. 468 [42 Am. Dec. 182], and *Williams v. Mailand*, 1 Id. 92, the court decided, that an executor may or may not, at his option, plead the statute of limitations—nor can a legatee compel him to do it, though by his neglect or refusal, a liability is thrown on the latter, from which the plea would have protected him. The plaintiff, Jones, was not compelled to plead the statute, upon which the defendant relies. The case of *Johnson v. Taylor*, 1 Hawks, 271, was correctly decided, but that was an action by the wards.

The guardian bonds, to which the defendant was a surety, amounted to three thousand dollars, and that, on which the plaintiff was surety, amounted to seven thousand dollars. All the bonds given by a guardian are but securities for the same thing, and the sureties upon each are bound to contribute; but where the several bonds differ in amount, the liability of the sureties is not equal, but in proportion to the penalties of the different bonds. In this case, the sum, for which the defendant, Blanton, is liable, when compared to that, which the plaintiff ought to pay, of the sum decreed against him, is as three thousand dollars is to seven thousand dollars, and so it must be declared: *Jones v. Hays*, 3 Ired. Eq. 502 [44 Am. Dec. 78].

Decree accordingly.

WHERE ONE OF THREE SURETIES IS INSOLVENT, and another pays the whole debt, he may recover one half thereof from the third surety: *Hender-son v. McDuffee*, 20 Am. Dec. 557; and see note thereto.

SURETY ON ONE BOND IS NOT ENTITLED TO CONTRIBUTION from a surety on another, if the latter bond was not to be pursued, unless the principal could not obtain payment from the sureties on the former: *Harrison v. Lane*, 27 Am. Dec. 607, and note referring to other cases.

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VANNOY v. MARTIN ET AL.

[6 IREDELL'S EQUITY, 169.]

WHERE PLAINTIFF IN EXECUTION PURCHASES IN THE LAND SOLD, NOT ABSOLUTELY FOR HIMSELF, but to hold as a security for his judgment and whatever other sum may be found due him on a settlement with the defendant, if the land is subsequently sold under execution against the first plaintiff in execution, the purchasers at the second sale take subject to the equities existing between the first plaintiff and defendant in execution, and the latter may redeem from them.

WHERE PLAINTIFF IN EXECUTION PURCHASES IN THE LAND SOLD, NOT ABSOLUTELY FOR HIMSELF, but to hold as security for his judgment and whatever other sum may be found due him on a settlement with the defendant, the latter's suit for a redemption is not barred by the act making void parol contracts for the sale of land.

EQUITY. The opinion sufficiently states the case.

Craige, for the plaintiff.

Guion, for the defendants.

By Court, *BATTLE, J.* The facts of this case are left in very little doubt by the testimony. The depositions of Thomas D. Kelly and William P. Waugh, the letter from the defendant, Martin, to the plaintiff, written the twenty-third of August, 1842, and the receipt given by the said defendant to the plaintiff's agent, Peden, on the twenty-fifth of December, in the same year, expressed to be towards the redemption of the land, satisfy us that the defendant, Martin, purchased the said land, under the execution in his favor, not absolutely for himself, but to hold the same merely as a security for his judgment, and for whatever other sum might be found to be due to him upon a settlement, subsequently to be had with the plaintiff. We are satisfied further, that he made representations to that effect at the time of sale, which prevented the plaintiff's lessee, Kelly, or some other friend at his instance, from stopping the sale by paying off the amount due on the executions, or buying in the land for the plaintiff, and enabled the defendant, Martin, to purchase it at an under-value. In either case, it would be a gross fraud upon the plaintiff, if the said defendant were permitted to set up an absolute title to the land, which it is the duty of a court of equity to prevent, and, in the way of preventing which, the act, making void parol contracts for the sale of land, does not stand: *Turner v. King*, 2 Ired. Eq. 132 [38 Am. Dec. 679]. The plaintiff, then, would be entitled as against the defendant, Martin, to redeem the land, upon paying him

whatever might be found to be due upon a general account. That being so, the plaintiff has the same right of redemption against the other defendants, Smith and Hackett, because they were purchasers at the sale under an execution against the defendant, Martin. They purchased the land, subject to all the equities against him, whether they had any knowledge of such equities or not: *Freeman v. Hill*, 1 Dev. & B. Eq. 389; *Polk v. Gallant*, 2 Id. 395 [34 Am. Dec. 410]; *Rutherford v. Green*, 2 Ired. Eq. 121. The plaintiff is, therefore, entitled to a decree for the redemption of the tract of land, mentioned in the pleadings, upon paying to the defendants, Smith and Hackett, whatever sum may be found to be owing from him to the defendant, Martin, with interest thereon, deducting therefrom whatever amount the said Martin and the other defendants have received from the rents and profits of the said land. And to ascertain these rents and profits, as well as the sum due and owing from the plaintiff to the defendant, Martin, there must be a reference to the clerk of this court.

Decree accordingly.

LOVE ET AL. v. CAMP.

[6 IREDELL'S EQUITY, 209.]

WHERE PERSON COVENANTS TO CONVEY TITLE TO CERTAIN LAND, a court of equity will not decline to decree a specific performance upon a mere showing that the covenantor is only a tenant in common of the land, and that "after reasonable exertion he has been unable to procure the title" of his co-tenants.

WHERE COVENANTEE KNOWS THAT THE COVENANTOR DOES NOT OWN ALL THE TITLE which he is covenanting to convey, whether equity would decree a specific performance, *quære*.

BILL in equity for specific performance. The opinion sufficiently states the case.

Guion, for the plaintiffs.

Lander, for the defendant.

By Court, PEARSON, J. We think the plaintiffs are entitled to a specific performance of the contract. The defendant says he owns one sixth part in fee, and a life estate in one other sixth part, and this he is willing to convey; but he says he does not own the other shares, and, "after reasonable exertion, since he made the contract, has been unable to procure the title of the other tenants in common, who are unwilling to sell," and he is

therefore unable to comply with his contract. The question is, under these circumstances, Will a court of equity decree a specific performance or decline to interfere, and leave the plaintiffs to their remedy at law? One who, for a valuable consideration, enters into an agreement, is bound in conscience to perform it. A court of law can only give damages for a breach—this remedy is in many cases inadequate. A court of equity will do full justice, and, addressing itself to the conscience of the party, will require a specific performance of the agreement. This jurisdiction forms one of the great heads of equity, and, in the opinion of Lord Hardwicke, “the most useful one:” *Penn v. Lord Baltimore*, 1 Ves. sen. 446. Nothing should prevent the exercise of this most useful and well-established jurisdiction but the strongest and most controlling considerations. If a husband agrees to procure his wife to join with him in a conveyance of her land, and the wife refuses to do so, it seems, by the modern cases, that a court of equity will not decree a specific performance: 1 Madd. Ch. Pr. 399; Sugd. on Vend. 151. There are cases in which the husband has been confined to the Fleet until the wife agreed to join in the conveyance; and in one case the husband, after being confined for many years, was discharged, it appearing that the wife could not be induced to make the conveyance: *Emery v. Wase*, 5 Ves. 848, and S. C., 8 Id. 505. These cases show with what reluctance courts of equity stand by and permit a party to deprive another of the benefit of his contract. But it has recently been held that the court will not interfere, upon two considerations. The vendee knew, at the time of the contract, that the husband did not own the land, and might not be able to perform his agreement; he, therefore, has no right to complain, if he is left to his remedy at law, upon its appearing that, after a *bona fide* effort, the husband is not able to procure the wife’s consent. And, in the second place, because, if the husband be decreed to perform, he will compel the wife, who is under his power, to convey; and the wife ought not to be exposed to this compulsion on the part of her husband.

It may be, but upon this we give no opinion, that where the vendee knows that the vendor has not the title, and takes a bond or covenant that a third person will be procured to make a conveyance, equity will not decree a specific performance, if it appears that the vendor has made proper exertions to procure the conveyance from such third person; because the first consideration, above referred to, applies with full force. As if a father, seised as tenant by the curtesy, sells in fee simple,

and covenants that he will procure conveyances from his children, when they come of age. If they refuse, after proper efforts on the part of the father, equity may decline to decree a specific performance, and leave the vendee to his remedy at law, this being a state of things which he might have expected, and as to which he took the chances. This result would seem to follow from the reason of the thing, but in respect to that we give no opinion upon it. No case makes such an exception to the general jurisdiction to decree specific performance, and it is only adverted to for the purpose of illustrating the next proposition, upon which this cause turns: *Oliver v. Dix*, 1 Dev. & B. Eq. 158. If the vendee does not know that the vendor has not the title, there is then no reason why he should not be decreed to perform his agreement; and if he is put to great inconvenience and expense to enable him to obey the decree, it will be the consequence of his own act, and he will not be allowed to offer such an excuse for not doing justice. When a vendee seeks to rescind a contract, because of a defect of title in the vendor, the latter is allowed time to complete his title, until the hearing: *Clanton v. Burges*, 2 Dev. Eq. 13. As a defect of the title will not excuse a vendee, provided it can be made good; upon ground of mutuality, it should not excuse a vendor. As the vendee can not discharge himself, should the land depreciate in value, so the vendor should not be allowed to discharge himself, if the value is enhanced. In this case, it does not appear that the plaintiff, Love, knew that the defendant did not have title. The bill avers, that the defendant did have title, or did have full authority from his co-tenants to sell. The defendant denies that he had title to the whole, and insists that the plaintiff had notice of his want of title; but he offers no proof of the fact, and his covenant is to convey, or cause to be conveyed, the whole in fee, and he admits that he has received the price of the whole.

As to the averment, that he had authority from his co-tenants to sell, the defendant is entirely silent; leaving the inference that he either had such authority, or was guilty of a fraud in receiving the price of the whole. But, if it be conceded, for the sake of argument, that this court will not make a decree requiring a party to do that which it is clearly out of his power to do, as it may amount to perpetual imprisonment, there is, in this case, no sufficient allegation and no proof whatever, to raise the question. The defendant avers generally, that, after reasonable exertion (and what amounts to it, he chooses to decide for

himself), he is unable to procure the co-tenants to convey. A conscientious man would not consider this a sufficient apology for the breach of an agreement, creating no legal obligation, when offered as a reason, why a court of justice should not compel the performance of a legal obligation. It is mere mockery! The defendant should have set out, what he had done—what price he had offered to pay! so that the court might judge, whether his exertions had been “reasonable,” especially as the averment in the bill, that the value of the land had been greatly enhanced, since the contract, by the location of the town of Shelby on adjoining land, creates, against him, the strongest suspicion, and impeaches his motives by the suggestion, that, if he has title, he refuses to perform his agreement for the sake of gain—or, if the title is outstanding, he is unwilling to offer his co-tenants what is now a fair price. A man of proper feeling would be unwilling to avail himself of the gain, and would be willing to submit to much loss rather than violate his solemn agreement. A court of equity acts upon the conscience, and enforces a specific performance, and will require this unconscionable gain to be given up, or this loss to be incurred, if it be necessary to enable him to do that, which he has undertaken to do, and for which he has received the full consideration. There must be a decree for a conveyance to the plaintiff, Homesby, who is the assignee of the other plaintiff, Love, and the defendant must pay the costs.

Decree accordingly.

THE PRINCIPAL CASE IS CITED AND APPROVED in *Jones v. Carland*, 2 Jones Eq. 502; S. C., Busb. Eq. 239.

CRUMP ET AL. v. BLACK.

[6 IREDELL'S EQUITY, 321.]

WHEN BOTH PARTIES ARE EQUALLY ENTITLED TO CONSIDERATION, EQUITY DOES NOT AID EITHER, but leaves the matter to depend upon the legal title.

WHERE PURCHASER GETS THE LEGAL TITLE FROM THE HUSBAND, a court of equity will not divest him of it at the instance of the wife or her heirs, unless he had notice of her rights.

NO ONE HAS SUPERIOR CLAIMS IN A COURT OF EQUITY TO A PURCHASER WITHOUT NOTICE; and a court of equity will not interfere to deprive such a purchaser of a legal advantage.

EQUITY. Crump, in 1834, being entitled in his wife's right to a distributive share of her father's estate, contracted with

Medlin for the land in controversy, in consideration of an assignment of the distributive share, and Medlin, by his direction, executed a deed to his wife, and they took possession. The deed was never registered. Several years afterwards, Crump persuaded her to hand back the deed to Medlin. He destroyed it, and executed another to Crump, who then sold the land to the defendant. Mrs. Crump knew that this was his intention. This suit is by the heirs of Mrs. Crump for a conveyance, she and her husband both being dead. Defendant had no notice of the deed to Mrs. Crump.

Alexander and Bryan, for the plaintiffs.

No counsel for the defendant.

By Court, PEARSON, J. The plaintiffs are not entitled to the relief asked for, because the defendant is a *bona fide* purchaser for valuable consideration, without notice. When both parties are equally entitled to consideration, equity does not aid either, but leaves the matter to depend upon the legal title.

The mother of the plaintiffs knew that the object of her husband, in procuring the legal title, was to enable him to sell the land, and they apply to this court, with but little grace, to lend its aid to the consummation of a fraud upon the purchaser. It is true, married women can not part with their land, unless consent be given in the form prescribed by law. And a purchaser, who has not obtained the legal title, can not come into equity for assistance, upon the ground, that he has been induced to pay his money by a fraudulent combination between the husband and his wife. But when the purchaser gets the legal title, and the wife or her heirs are obliged to come into equity, it is a different question, and he will not be required to give it up, unless he had notice of the wife's rights.

It was urged that, as the distributive share belonged to the wife, she was the meritorious cause of the consideration paid for the land, and ought not to be prejudiced by the destruction of the deed, as it was done, not only against her consent, as implied by law (she having no capacity to consent, except in a prescribed form), but against her express wish, until she yielded to importunity. The argument would have much force against a volunteer, but can not avail against the defendant. The distributive share belonged to the husband by his act of assignment; so the wife paid nothing, and we are asked, in favor of her heirs, to make a purchaser give up a valid legal title. There is no principle upon which it can be done: possibly, if the

plaintiffs were acting upon the defensive, this court would not interfere against them. But they have not the legal title; have paid nothing, and are asking aid against one, who has paid the full value without notice: *Tolar v. Tolar*, 1 Dev. Eq. 457 [18 Am. Dec. 598]; *Tate v. Tate*, 1 Dev. & B. Eq. 22; and *Tyson v. Harrington*, 6 Ired. Eq. 329, were cases against volunteers.

It was further urged, that as the deed was executed, and the ceremony of registration alone was wanting to confer a legal title, which it was not in the wife's power to have done; she had something more than a mere equity, an incomplete legal title, and therefore stands upon higher ground than the ordinary case of one who seeks to set up an equitable title. Be that as it may, no one has superior claims to the consideration of a court of equity than a purchaser without notice; and there is no case in which the court has interfered to deprive such a purchaser of a legal advantage. This principle is carried out in all the cases. If the power of appointment be defectively executed, and the appointee is a younger child, or wife, aid will be given as against the heir at law, but not against a purchaser. In *Martin v. Seamore*, 1 Ch. Cas. 170, a sale was made of copy-hold land, but there was no surrender. Afterwards the vendor devised the land to his wife and daughter, and a surrender was duly made to the use of the will, upon the death of the vendor. The vendee, who had an incomplete legal title, filed his bill against the wife and daughter, praying for a conveyance. It appearing that the husband had agreed before the marriage to settle the land upon the wife, she was considered as a purchaser, and the court refused to deprive her of the legal advantage which she had under the devise and surrender. But relief was given against the daughter, who was a volunteer.

Bill dismissed with costs.

EQUITY WILL NOT DEPRIVE BONA FIDE PURCHASER OF LEGAL ADVANTAGE: See *Jones v. Zollicoffer*, 7 Am. Dec. 708, and note. The principal case is cited in *Wilson v. Western N. C. Land Co.*, 77 N. C. 457, to the point that where a bona fide purchaser for a valuable consideration, and without notice, has acquired the legal title, a court of equity will not interfere to deprive him of his legal advantage; also citing *King v. Trice*, 3 Ired. Eq. 568.

HART v. ROPER ET AL.

[6 IREDELL'S EQUITY, 349.]

MAXIM, "IGNORANTIA LEGIS," ETC., IS FOUNDED UPON THE PRESUMPTION THAT EVERY ONE competent to act for himself knows the law, but the presumption that he knows it is not conclusive, but may be rebutted.

WHERE PLAINTIFF ALLEGES IGNORANCE OF THE LAW, IN HIS BILL, the defendant can not take advantage of it on demurrer.

WHERE PLAINTIFF ALLEGES AN IMPORTANT EQUITY, HE IS AT LIBERTY to add a small item which would not be within the jurisdiction of equity if alone, but which is connected with and tends to elucidate the main subject.

EQUITY. In 1833, one Roper died, leaving a will, a widow, and two grandchildren. The latter are the defendants in this suit. The will gave the widow certain personal property, "to her and her heirs forever," and "lent to her, for and during her natural life and widowhood," a tract of land, two negroes, Robert and Elias, and some personal property. The rest of the estate was given to the defendants. When the will was probated, the widow dissented, and the jury allotted her, in addition to the property willed, to make up her share, the absolute estate in Robert and Elias and the other personal property. The report was confirmed, and she took possession. In November, 1847, the plaintiff married the widow, and in January, 1849, she died, leaving plaintiff in possession of the property. The allegations of the bill sufficiently appear in the opinion, except "that your orator, being ignorant of his rights, did surrender Elias, and Nancy in place of Robert, who had been sold, and executed a note for fifty dollars, for rent of the land, and signed a release of all his claim to the two negroes," and that at the same time defendants gave plaintiff an instrument purporting to be a release of their claim to his wife's property, but that there was no seal thereto. The bill prays a restoration of the negroes, a cancellation of the plaintiff's release, and offers to surrender the unsealed release of defendants. Defendants demurred.

No counsel for the plaintiff.

Strange, for the defendants.

By Court, PEARSON, J. The first ground taken is, that by the plaintiff's own showing, the acts were done by him with the full knowledge of all the facts; and the whole ground for relief is, that he acted in ignorance of the law.

Admitting the bill to be liable to this objection, it may be

gravely questioned, whether advantage can be taken of it by demurrer. The maxim, *Ignorantia legis*, etc., is founded upon the presumption that every one competent to act for himself knows the law. It is necessary for the courts, whether in reference to civil or criminal matters, to act upon this presumption, however wide of the mark it may be in many cases; for, in the language of Lord Ellenborough, "otherwise there is no saying, to what extent the excuse of ignorance might not be carried;" and there would be much embarrassing litigation, and no small danger of injustice from the nature and difficulty of the proper proofs: 1 Story's Eq. 123.

But while on the one hand, whether a party knows the law, is not left as an open question for inquiry, as it is whether he knows of the existence of a fact; on the other, the presumption that he knows it is not conclusive, but may be rebutted. For instance, if there be an intention to pass a freehold estate, and the vendee accepts a deed of feoffment, without livery, he will be relieved upon the ground that he was under a mistake as to the law; for, the intention being clear, the failure to effect it makes the mistake manifest, and rebuts the presumption. So, in the case of *McKay v. Simpson*, 6 Ired. Eq. 452, decided at this term, relief was given because of a mistake of law, as to the form of a transfer of bank stock. It is different, however, when the intention is carried into effect, because, in such cases, there is nothing to rebut the presumption, and the ignorance of the party can only be shown by going into proof, which is not admissible.

As this presumption is not conclusive, it would seem to follow, that, if a defendant, by demurring, admits that the plaintiff was ignorant of the law, the court must act upon the admission, and it may be, that such would also be the case, when the answer makes the admission, so as to dispense with the necessity of any proof to rebut the presumption. That it is so in the case of a demurrer is strongly sustained by the fact that the learned and diligent counsel for the defendant has not been able to cite any case in which the objection was taken by demurrer. We put our decision upon the ground that the bill is not liable to the objection; for it does not appear that the plaintiff had a full knowledge of all the facts. A fair construction of the bill leads to the conclusion that the plaintiff "was ignorant of the extent of the interest and title which his wife had acquired and to which he had succeeded by the marriage," in consequence of his ignorance of the facts, as well as of the law, upon which his title was founded.

The bill is hastily drawn. A confusion of ideas is introduced by the use of generalities, and sweeping expressions, than which nothing is more calculated to destroy certainty, so much to be desired in all judicial proceedings. It does not appear, however, that fourteen years intervened between the dissent and the marriage; that during the life of his wife, the title of the plaintiff was not called in question; that she died a little over a year after the marriage; and that, in a few days after her death, the defendants "claimed under the will an interest in all the estate and property of his wife at the time of the marriage, and, particularly, that they were entitled to the two negroes, Elias and Robert, and the rent of land from the time of the marriage."

It is certain the parties knew the contents of the will. By it the land and the two negroes Elias and Robert were "lent" to the widow for her life or widowhood. Elias is surrendered; Nancy is substituted for Robert, who had been sold; and rent is exacted from the marriage, not the death of the widow.

It is almost certain, that the contents of the report of the jury were not known to the plaintiff, and possibly not to the defendants. In the absence of any admission, that the plaintiff knew the contents of the report, his being ignorant of the extent of his title must be ascribed to his want of information as to this fact, rather than to suppose he was so stupid, as not to know the difference between an estate for the life or widowhood of his wife, and the absolute estate. But if it is to be ascribed to both causes, this ground of demurrer fails.

The next ground is, that by the plaintiff's own showing, the instrument signed by the defendants, purporting to pass their interest in the rest of the property to the plaintiff, is void for want of a seal, and that no consideration passed to make the transfer of the two slaves by the plaintiff to the defendants valid, as the instrument, signed by him, was not under seal, and, therefore, the plaintiff had a clear remedy at law.

This objection is based upon a misapprehension of the plaintiff's allegation. There is no allegation of a gift, which would not be valid without a deed. The allegation is, that the transaction was made to assume the form of a sale and delivery of the two slaves for a pretended consideration; whereas, in fact, there was no consideration, and the pretense of one was the means used to effect the fraud and induce the plaintiff to deliver up his property. This court has concurrent jurisdiction in matters of fraud: and it would be a disgrace to any court, having jurisdiction, to decline to exercise it, because the fraud is

so palpable and gross, that, possibly, redress might be had in some other court.

The third ground is, that the fifty-dollar note is under the jurisdiction of this court. That is true; but, as the plaintiff has alleged an important equity, he is at liberty to add a small item, as it is connected with, and tends to elucidate, the main subject.

The demurrer must be overruled with costs.

The opinion and decree will be sent, together with the other papers, to the courts of equity below, to which the cause is remanded. The cause was removed to this court under an act of the last legislature. There is no express provision as to what is to be done in a case like this. But it is a remedial statute, and by a liberal construction, in connection with the other statutes, we infer, that it was the intention of the legislature to have the cases sent back, to be further prosecuted in the court below.

Ordered accordingly.

IGNORANCE OF LAW AS GROUND OF RELIEF IN EQUITY: See notes to *Trigg v. Read*, 42 Am. Dec. 487; and *Garwood v. Eldridge*, 34 Id. 195, where prior cases in this series are referred to.

INGRAM v. KIRKPATRICK.

[6 IREDELL'S EQUITY, 463.]

TRUST DEED FOR BENEFIT OF CREDITORS NOT REVOCABLE.—When a trust deed has been executed, conveying property in trust for the payment of debts, and the trustee has accepted the same, the relation of trustee and *cestui que trust* is established in favor of creditors assenting (and the assent will be presumed unless the contrary is shown), and the trustee can not, with or without the direction of the grantor, apply the fund to any other purpose until the trusts of the deed are satisfied.

EQUITY. One Pittman, being insolvent, conveyed to the defendant by trust deed all his property. The deed recited certain debts for which defendant was surety, others for which plaintiff was surety, and others for which one Alexander was co-surety with defendant, and that the deed was made upon the following trust, viz.: that if Pittman failed to pay the above debts in a certain time, defendant should sell so much of the property as should be necessary for that purpose and pay them, the residue of the property to be returned to Pittman. Defendant accepted the deed, sold all the property, and applied all the proceeds

toward the debts for which he alone, and jointly with Alexander, was bound. Plaintiff having had to pay the debt for which he was surety, filed this bill, praying an account of the trust property, and that he be paid *pro rata*. The trust deed was prepared by defendant and executed at his request, the debt for which plaintiff was security being inserted at the request of Pittman, defendant objecting, until assured by Pittman that the property was sufficient to pay all those debts.

No counsel for the plaintiff.

Strange, for the defendant.

By Court, RUFFIN, C. J. It is not deemed material to notice any difference between the statements of the defendant and the witness. There is but little doubt that both of the parties to the deed have been disappointed in the result. But, as the deed expressly puts the plaintiff and the defendant on the same footing, it is clear that, if it be binding as a contract, it can not be varied upon evidence in the manner urged by the defendant. It is said, however, that conveyances of this kind are of a peculiar nature, and that the grantor can direct a different appropriation of the effects from that prescribed in the instrument; and, indeed, as the plaintiff did not execute the deed, nor was privy thereto, that he can not claim the benefit of it. In *Wallwyn v. Coultis*, 3 Meriv. 707, there is a very short note of a decision by Lord Eldon, on the authority of which other judges have proceeded to lay down a doctrine to the extent stated; which is a very remarkable instance of important legal principles being deduced from a very inadequate source. As the case is there reported, two noblemen conveyed land to trustees upon a trust for the payment of specified debts, without an agreement of any creditor, and without any consideration moving from any one of them. Upon a bill by a creditor for relief under the deed, Lord Eldon refused a motion for an injunction against a misapplication of the fund, saying only, as reported, "that the trust being voluntary, the court could not enforce it against the duke and marquis, who might vary it as they pleased." The report is very unsatisfactory, not stating the provisions of the deed particularly; and the reason assigned is so clearly erroneous, that there can be little doubt that it does not correctly state that which did influence Lord Eldon, whatever it might be. For, there being an executed conveyance which passed the legal estate to the trustees, it was altogether immaterial whether the trusts were voluntary or not. The trustees would be bound to

perform the trusts, though voluntary, because they took the estate on those express trusts, and therefore could neither keep the estate nor convey it to another exonerated of the trust. It was so held by Lord Thurlow in *Colman v. Sarrel*, 1 Ves. jun. 50, and expressly laid down by Lord Eldon himself, a few years before, in *Ellison v. Ellison*, 6 Ves. 656. In distinguishing between the rights of different volunteers to call for the execution of trusts he said, if one needs the assistance of the court of equity to constitute him a *cestui que trust*, he can not have it if the instrument be voluntary, as upon covenant to convey: but if there be a legal conveyance effectually made, though it be voluntary, the equitable interest will be enforced. For, he adds, where an actual transfer is made, that constitutes the relation of trustee and *cestui que trust*, though without a good or meritorious consideration, and voluntary.

The distinction seems to be perfectly sound. Indeed, it only applies a principle, which was before familiar at law, in respect to the creation of uses with and without a consideration: it being held, as explained by Mr. Hargrave, that in conveyances under the statute of uses, a consideration is necessary, because they are in truth bargains or covenants, which will not raise a use, if voluntary, to which the statute can transfer the legal estate; but that, in those at common law, as a fine or feoffment, a consideration is not necessary, because they operate by transmutation of possession to pass the land itself from the grantor without the interposition of equity, and the grantee, thus receiving it, coupled with a use, must hold it to that use whether voluntary or not; and then the statute would transfer the possession to the use. It would be against conscience for the feoffee to keep the estate for himself: and there could be no use resulting to the grantor, because the deed disposed of it to another. Therefore the use must belong to him, whoever he may be, for whom it was declared. The principle is, that uses and trusts annexed to a perfect conveyance of the legal estate will be sustained, but that a trust will not be raised against the owner of the legal estate upon an agreement with him, unless there will be a valuable or good consideration. Now in *Wallwyn v. Coutts*, 3 Meriv. 707, it is assumed, that the deed was effectual at law. Whether as a feoffment, or as a bargain and sale, expressing a consideration as passing from the trustees, or as a lease and release, is not material. The legal title was vested in the trustees, and it followed from the rule of the common law as to uses, and from the consequent doctrine of equity as to

trusts, that any trusts coupled with the estate in the conveyance, or declared by the trustees, ought to be executed, though gratuitous: and it is not seen, how trusts for creditors, supposing creditors, who are not parties to the deed, to be but volunteers, can be distinguished from trusts for children, or others not founded on a valuable consideration. It is most questionable, therefore, whether the report correctly attributes that as a reason of Lord Eldon's judgment.

That it is erroneous in that respect is the more probable, since subsequent judges, who approved of the decision, have undertaken to assign for it other and very different reasons. It has been said, that the true ground of the decision was not that a *cestui que trust*, under a voluntary conveyance, had not the right against the grantor, but that, in the view of the court, the relation of trustee and *cestui que trust* never existed between the trustee and creditors, but that the grantor was himself the only *cestui que trust*; and that what is said in the deed about paying debts is not for the benefit of the creditors, but the grantor's own convenience, and hence he had a right subsequently to direct the application of it, as his own trust fund: *Garrard v. Lauderdale*, 3 Sim. 1, and S. C. upon appeal, 2 Russ. & M. 451; *Bill v. Cureton*, 2 Myl. & K. 511. In the opinion given by Sir Lancelot Chadwell in the former case, he states the provisions of the deeds in *Wallwyn v. Coutts*, and, as the report of it in *Merivale* is so defective, Mr. Simons, vol. 3, p. 14, sets forth the bill and the several deeds particularly, and the order made by Lord Eldon. It appears thereby, that the estates conveyed belonged to the duke of Marlborough, and that, after reciting that the duke's son, the marquis of Bledford, had granted certain annuities, and that the duke was desirous of relieving him from the payment of them and also to make provision for his son, he, the duke, in consideration of natural love and affection for his son, etc., conveyed to the trustees in fee certain lands, upon trust to raise money sufficient to repurchase the annuities granted by the son, and then in trust, if the trustees should think proper, to raise any further sum, which they might decree expedient, to pay debts then due from the marquis. that the trustees should consider advisable to be paid: and, for the purpose of raising such sums, it was declared, that the trustees should, at such times as to them should seem proper, sell the lands; and that they should in the mean time mortgage any part of them, and stand possessed of the money raised thereby upon trust to pay off the annuities, and then upon trust, if the trus-

tees should think proper, but not otherwise, and at the request of the marquis, to pay such of his debts as they should consider advisable to be paid, and upon the further trust to pay to the duke any surplus of money raised in his life-time, and to pay any surplus raised after his death to the marquis; and, subject thereto, the trustees were to stand seised in trust for the duke for his life, and then for the marquis in fee.

By subsequent deeds between the same parties and reciting the first and certain acts done under it, other trusts were declared. One of the annuitants filed a bill, on behalf of himself and the others, praying that the fund should not be applied to the purposes of the substituted trusts, until the annuitants specified in the first deed were satisfied: and Lord Eldon refused an injunction. But the one case came before that great chancellor, which called for his opinion on this point, and therefore it can not be said positively whether he meant to confine what he did to the particular terms of that deed and circumstances of that case, or proceeded on the general principle which has been since laid down on the authority of the decision. But it would seem from the incongruity of such a principle with his judgment in *Ellison v. Ellison*, 6 Ves. 656, that he must have gone on the peculiar facts of that case. It is apparent that the position rests upon a supposed intention of the grantor to make a conveyance for his own convenience or pleasure, because not executed at the instance or with the concurrence of a creditor: and it was then considered, that, the thing being done in that way and to that intent, creditors can not claim benefit under it or interfere with the grantor's arrangements. Now, it may be said upon that deed, though with some scruples, that it owed its existence to an intention of that sort. The estate belonged to the father, while the debts were those of the son, and the father reserved to himself a life estate, subject only to the discretion of his trustees to raise a fund by sale or mortgage for the payment of the debts, when and if they thought it proper and advisable. It is manifest then, that there was no consideration to support the deed against purchasers from the father, or his creditors, because it was thought voluntary, in every sense of the term. There was then color for regarding the transaction, as an appointment by noblemen of persons to act, in the name of trustees, stewards in fact and attorneys in the management and sale of large estates, under their control, indeed, but without troubling the owners about them, until they should choose to recall the appointment or make other dispositions of the estates, and in

the course of such management to pay such debts as the grantors, or the trustees, might prefer.

It is to be observed, that there is nothing on the face of the deed or in the case to raise a suspicion, that the debts were not perfectly secure to the creditors, independent of the deed. The father does not say, he was desirous of securing the payment of his own debts, nor even those of his son, with any reference to the interest of the creditors: but, on the contrary, the motive for the deed was the father's desire to relieve his son from paying his debts, to promote the son's convenience and happiness merely, apart from the claims of his creditors. Viewed in that light and with an understanding, founded on experience and observation, of the probable purposes of persons of such fortune and rank as the parties to that deed, much more perfect than can be formed here, it is very possible, that Lord Eldon was correct in not considering the deed to have been intended to vest rights in the son's creditors, independent of the continuing pleasure of the father and son—if, indeed, such was the reason that actuated him. But it seems impossible to infer such an intention, when an insolvent person, or one greatly embarrassed, assigns his estate expressly as an immediate security for particular debts or for his debts generally, and this is the means, through sales by the trustees positively prescribed, of paying the debts as far as the effects will suffice: for the inference is greatly against the express declaration of the deed. Such a grantor plainly makes the deed, not to promote his own convenience, merely or chiefly, but to discharge a duty of conscience by making a positive provision for the payment of his debts in convenient time, as far as he is able: and it can not be presumed, that he did not, from the beginning, intend a benefit to the creditors. To what end shall a debtor retain a subsequent control over the property? To allow him to have it, by virtue of a doctrine of equity, is substantially to insert in the deed a general power of revocation and appointment: the effect of which would be to render it void against other creditors: *Tarback v. Marbury*, 2 Vern. 510; *Cannon v. Peebles*, 4 Ired. L. 207. As an insolvent can not honestly revoke a security, which he has once provided for his creditors, an intention to do so, or to reserve a power to do so, is not to be imputed to him, as a reason for construing his deed in opposition to its words and duty. There seems, indeed, to be no more reason, why his deed, when duly executed to pass the legal estate, should not be as obligatory on him and inure to the behalf of the creditors

as much, as a devise in trust for creditors is binding on his heir or devisee. It is true, the devise is a bounty.

But we have already seen, that when the deed is effectual to vest the estate in the trustee, a gratuitous trust is valid. But a devise for payment of debts is not received simply as a bounty: for if debts and legacies be both charged on the estate, undoubtedly the creditors are to be satisfied first, because in their nature they are of higher obligation, and it is considered that the testator, in providing for them, was but performing an act of honesty. Admit then, that the creditors, when entering into no covenant, and not privy to the execution of the deed, are volunteers: yet they may stand upon the words of the instrument, and upon the honesty of the trust in their favor, as against the debtor and trustee, and upon its honesty and priority as against creditors provided for in a subsequent deed. Accordingly, there are cases in England, in which such trusts were executed at the instance of the creditors. In *Langton v. Tracy*, 2 Ch. R. 30, the trust was for payment of debts generally, naming no creditor, and the deed made voluntarily. It was argued, that for these reasons it was revocable by the grantor: but Lord Keeper Bridgman, assisted by the judges, held clearly, that the debts were a just and honest consideration, and the creditors might, as *cestuis que trust*, compel the execution. In *Leech v. Leech*, Ch. Cas. 249, it was held again, first, that a trust created by deed is supported by that consideration, and, secondly, that a trust for payment of debts generally is good against the heir, though no creditor be a party to the deed. This last consideration, that is, the operation of such a deed after the death of the maker, is very material in determining its proper construction from the beginning: for it can hardly be supposed that the grantor intended, that his heir might frustrate his settlement, and yet, if the power of revocation be impliedly in the ancestor, it must extend to the heir. There is also the still later case of *Small v. Oudley*, 2 P. Wms. 427, when an assignment by an insolvent to a creditor to secure his debt was held good against assignees in bankruptcy, although the deed was made without the privity of the creditor. There are, moreover, many instances, in which assignments for payment of debts have been sustained against purchasers and other creditors, as founded on a valuable consideration, and therefore, not fraudulent, though the secured creditors were not privy to the deed: *Stephenson v. Hayward*, Prec. Ch. 310; *Marbury v. Brooks*, 7 Wheat. 556.

Now, that can not be, if the creditors can not enforce the

trust, but it is with the debtor to allow or forbid its execution: for it would be strange, indeed, if a creditor could not bring an estate to sale under his execution, which the defendant in the execution could control through his trustee: especially, since the statutes authorizing executions to be done on trusts. It may be a circumstance, on which a judgment creditor may the more readily impeach an assignment as fraudulent, when it is made of the debtor's own accord and without the knowledge of the creditors, whom it purports to secure. But that does not concern the question between those creditors and the grantor and trustee. As between them, the terms of the deed being plain, its purpose, as a security for a true debt, being perfectly just, and the efficacy of the deed, as a security for the debt, being indispensable to its honesty and validity to any purpose, the equity and necessity of holding the trust for the creditors obligatory, seem to be almost above question: and one is led almost irresistibly to think that Lord Eldon meant to confine himself, in *Wallwyn v. Coutts*, 3 Merv. 707, to the particular circumstances of that case, and not to lay down a general proposition, that, unless the creditors are privy to a conveyance upon trust to pay debts, they are but volunteers, and for that reason they can not as *cestuis que trust* enforce the trust. It must be admitted, however, that, whether he intended to be so understood or not, there have been so many other cases, professing to go on his authority, in which the judges have laid that down as a general principle, that probably it is to be considered now the settled rule in England.

But, whatever the courts in that country may think themselves bound to hold on this point, it is certain, as was said in *Walker v. Crowder*, 2 Ired. Eq. 478, that the doctrine deduced from the note of *Wallwyn v. Coutts* has not been adopted in this state, nor, is it believed, in this country. No instance has been found of even an intimation that a creditor, provided for, is not entitled to insist, as against all persons, on the full benefit of the trust as expressed in the deed. In the circumstances of this country, and regard being had to the pecuniary condition and general purposes of those who make assignments for creditors, it is plain that the principle is most applicable here on which the older English cases proceeded. It has been considered among us, when the grantor says in the deed that he makes it for the purpose of securing and paying his debts, that he in fact intends the debts to be thereby secured and paid. There have, accordingly, been many instances in which such trusts have been

executed at the instance of creditors, and the deeds upheld also, as valid conveyances, against third persons, upon the ground of the obligation created thereby on the trustee to satisfy the debts out of the trust property.

In *Nicoll v. Mumford*, 4 Johns. Ch. 522, Chancellor Kent laid it down that, if an assignment be to trustees for the payment of debts, and the legal estate vests in the trustees, chancery will compel the execution of the trusts for the benefit of the creditors, though they be not parties, nor at the time assenting to the conveyance. He had before held to the same purpose in *Shepherd v. McEvers*, 1 Id. 136 [8 Am. Dec. 561], and *Moses v. Murgatroyd*, 1 Id. 129 [7 Am. Dec. 478]. In the case of *Halsey v. Whitney*, 4 Mason, 206, Mr. Justice Story stated the doctrine thus: As to trusts created for the benefit of creditors, and to which they are not, technically speaking, parties, they are unquestionably valid, if the deed be made *bona fide* and pass the legal estate to the trustees; for it can be no question whether it is for a valuable consideration or not, because the debts due to the creditors constitute a valuable consideration in the highest sense, and the obligation of the trustee to perform the trust, according to the provisions of the deed, is a sufficient consideration as far as he is concerned. Similar views were taken of this matter, as supporting against an attachment an assignment, voluntarily made by a debtor to a trustee of his own selection, in trust for creditors without their privity, by Chief Justice Marshall in *Marbury v. Brooks*, 7 Wheat. 556, and yet more fully in the same case, when it came before the supreme court a second time: *Brooks v. Marbury*, 11 Id. 78. He said, that deeds of trust are often made for the benefit of persons who are absent, and even for those not in being. Whether they be for the payment of money, or for any other purpose, no expression of the assent of the persons for whose benefit they were made, has ever been required as a preliminary to the vesting of the legal estate; and such trusts have always been executed on the idea that the deed was complete when executed by the parties to it. He then proceeds to consider how the creditors, not being privy to the execution, may be evidence of fraud, and how that presumption may be repelled. But if *bona fide*, the deed is obligatory throughout. In each of the cases at law, it is evidently assumed that the creditor could, as *cestui que trust*, enforce the trust according to the terms of the deed; and neither of those distinguished judges conceived it competent to the debtor and trustee to defeat the trust to any extent. In truth

they plainly hold the contrary, since they put the validity of the deed, in point of *bona* or *mala fides* and of the sufficiency of the consideration, upon the ground that by its execution the deed became complete and secured a benefit to the creditors.

In the cases in New York the trusts were actually enforced in chancery at the suit of the creditors. There are other most respectable adjudications in equity to the same purpose. In *Ward v. Lewis*, 4 Pick. 518, an insolvent debtor made an assignment to trustees to pay debts in a certain order, which the trustees accepted. Afterwards the debtor and some of the creditors compounded upon other terms, and the trustees applied the effects according to the new agreement. Yet it was held that a creditor secured in the first deed, though not privy to its execution, had a right to affirm the trusts; and he had a decree for his debt against the trustee, who had received and misapplied the fund. Two years afterwards, under circumstances not at all favorable to the creditor, and although *Wallwyn v. Coutts* was cited, the court gave a second decision to the same effect in a suit upon the same instrument: *New England Bank v. Lewis*, 8 Id. 113. In this state no question has been made on the point before the present case, as far as recollected; and there have been but few occasions on which an observation has been made concerning it. In *Walker v. Crowder*, 2 Ired. Eq. 478, the remark was made, which has been already quoted; and in *Moore v. Collins*, 3 Dev. L. 126, where was a single creditor privy to the deed out of many secured in it, Judge Hall said, the creditors secured had a right to be paid their debts, and for that reason that the deed of trust, made to effect that end, was not fraudulent.

Upon the whole, therefore, the court holds, upon the intrinsic soundness of the principle, the prevalent impression in the profession, and the course of the adjudications in the United States, that the relation of trustee and *cestui que trust* is constituted by the execution of such a deed in favor of a creditor assenting at the time or in a reasonable time afterwards, and, indeed, that such assent is to be presumed, unless the contrary be shown. Consequently the trustee can not, with or without the direction of the grantor, apply the fund to any other purpose, until the trusts of the deed are satisfied; and therefore the plaintiff is entitled to the account, and to have his proportion of the fund, if there be not enough to pay him in full.

Decree accordingly.

REVOCATION OF ASSIGNMENTS MADE FOR BENEFIT OF CREDITORS: See note to *Oakley v. Hubbard*, 44 Am. Dec. 426-428, where the subject is discussed, and the principal case cited.

THE PRINCIPAL CASE IS CITED AND APPROVED in the following cases: *Smith v. Turrentine*, 8 Ired. Eq. 191; *Baggarly v. Gaither*, 2 Jones Eq. 82; *Stimpson v. Fries*, 1d. 160; *Potts v. Blackwell*, 4 Id. 67; *Wiswall v. Potts*, 5 Id. 189; *Dixon v. Pace*, 63 N. C. 605; *Hogan v. Strayhorn*, 65 Id. 285.

GRIFFIS v. YOUNGER.

[6 IREDELL'S EQUITY, 520.]

EQUITY WILL NOT COMPEL AN INFANT TO EXECUTE A CONTRACT for sale of his land, where the contract was procured from him by fraud; neither will it require him to make compensation if he was not guilty of any fraud.

EQUITY. The opinion states the case.

Graham, for the plaintiff.

No counsel for the defendant.

By Court, NASH, J. The case is before us upon an appeal from an interlocutory order of the court below, dissolving the injunction heretofore granted. The plaintiff requests the court not to suffer the defendant to avail himself of the protection which the law throws around him, because of a fraud, it is alleged, perpetrated by him and his father, Richard Younger, upon his intestate, John Griffis. It is impossible to read the plaintiff's bill and not be satisfied that there is no foundation for this charge. Richard Younger, the father, was indebted to John Griffis, the intestate, by note, and the defendant, a minor of eighteen years of age, lived with him and constituted a part of his family. In the month of July, 1850, a notice was published by the father in the public papers that "he had set his son at perfect liberty to transact his own business, make his own contracts, pay his own debts, manage his own farm, and claim the products from said farm, as if he had arrived at full age." In two months thereafter, to wit, in the succeeding September, John Griffis purchased from this liberated boy the tract of land in question. The bill nowhere charges that John Griffis believed, from the published notice, that thereby the defendant was invested with power to make a valid conveyance of his land. He must have known it could have no such effect. But again, the bill states that the consideration given for the land was four hundred dollars, which was paid "in a wagon and horse, and

cash to the amount of one hundred and fifty dollars, and the residue by the transfer of a note or bond held by John Griffis on the said Richard Younger." What was the estimated or real value of the wagon and horse, or the amount of the note or bond, we are not told; but we are assured "that the sale was highly beneficial to the defendant, as it enabled him to remove to the state of Missouri, and carry with him his father and family." The veil attempted to be thrown over the transaction is too slight to mislead any one. If a fraud was perpetrated, it does not lie at the door of the defendant, and it is a matter of surprise that the defendant should have been enjoined from asserting his legal right in disposing of his land. If any doubt could be entertained as to the true character of the transaction, it is removed by the answer. It states that, at the time the circumstances occurred, Richard W. Younger, the father of the defendant, was entirely insolvent, and indebted by note to John Griffis, who was his nephew, in the sum of two hundred and thirty dollars, and the defendant being the owner of the tract of land in controversy, the plan was formed between his father and John Griffis to make the land pay the note and furnish the means of transporting the family to the state of Missouri; that the defendant was under sixteen years of age at that time, and never received any part of the price of the land but his portion of his traveling expenses; and that the money advanced by Griffis was seventy-five dollars. Here, then, is the case of a boy, not quite sixteen, induced by a needy father to sell his land, his only patrimony, to pay a debt for which he was in no way bound, and the bill alleges it was highly beneficial to him. We can not perceive how. If the whole transaction was not a fraud upon the defendant, it was an unprincipled advantage taken of his youth and ignorance, and can receive no countenance or protection in a court of equity.

The bill prays that the defendant shall be enjoined from selling the land, and that it, the land, may be held by a decree of this court liable to pay to the plaintiff what his intestate paid for it. In addition to the reasons assigned in the bill, why the prayer should be granted, it has been urged upon us in the argument, that the injunction ought not to be dissolved, because the defendant has not offered to repay the money, nor to return the property given by John Griffis, nor to compensate the plaintiff for the improvements put upon the land. No one of these things was he bound to do. The bill does not allege that any portion of the price of the land was ever received by

the defendant—the allegation is general that it was paid, but to whom it does not state—and the defendant expressly denies he had ever received anything but his portion of the traveling expenses, and that doubtless from his father. As to the improvements, the bill alleges that John Griffis sold the land to Faucett and Rogers, with warranty, who made valuable improvements, after the premises were recovered from them by the defendant; Mr. Griffis had paid them their purchase money with interest on it. If, then, the improvements had been put upon the land, the question of compensation can not arise between these parties.

We have examined the authorities cited in the argument by the plaintiff's counsel, and while we do not question their soundness, we do not consider them as applicable to this case. Chancellor Kent, in treating of the contracts of infants, lays down the general proposition, that an infant is not to be protected in his fraudulent acts, and he refers to the case of *Badger v. Phinney*, 15 Mass. 643 [8 Am. Dec. 105], cited at the bar. The only question was whether the administrator of the infant could avoid his contract, he having died without so doing. The case of *Clarke v. Cobley*, 2 Cox, 173, is more in point, but is still no authority in this case, for the purpose for which it was used. The defendant's wife, while sole, had executed to the plaintiff two notes. Upon the marriage the defendant took them up, giving his own individual bond for the amount. Being sued, he pleaded his infancy, which was allowed him. Thereupon the bill was filed, and the prayer was that the defendant should be decreed to pay the amount of the bond or return the notes, and the court decreed the return of the notes upon the ground of fraud practiced upon the plaintiff. We have already said we do not consider the defendant as having been guilty of any fraud, and that he had not received from John Griffis any part of the price of the land. The horse and wagon and money were in the possession of the father, and the note, as far as disclosed by the bill, was so likewise, and the debtor died insolvent soon after he reached Missouri. We do not consider the difficulties, to which the plaintiff alleges he will be exposed in making a recovery against the defendant, if the injunction shall be dissolved, as any reason why it should be continued. They are difficulties into which John Griffis entered with his eyes open; he voluntarily encountered them. The plaintiff has no claim to the relief he seeks.

The interlocutory order of the court below, retaining the in-

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junction to the final hearing, is erroneous and must be reversed, and the injunction dissolved with costs. The plaintiff must pay the costs of this court.

This opinion will be certified to the court of equity of Alamance county.

Ordered accordingly.

CASES
IN THE
SUPREME COURT
OF
OHIO.

CUMPSTON *v.* LAMBERT.

[18 OHIO, 81.]

AGREEMENTS TO PERFORM, OR INDEMNIFY FOR THE PERFORMANCE of, unlawful acts, are void.

RIGHT TO CONTRIBUTION DOES NOT EXIST BETWEEN JOINT TRESPASSERS.

AGREEMENT BY A JUSTICE OF THE PEACE to indemnify one whom he summons to assist him in making an arrest can not be recovered on, if such arrest was unlawful.

ASSUMPSIT. The defendant was a justice of the peace, and as such, had called upon the plaintiff to assist him in arresting one William Razor, and promised to indemnify him for so doing. The arrest was afterwards held to be unlawful, and judgment was recovered against the plaintiff therefor, which he paid. This action was brought to recover on the contract of indemnity. The defendant demurred to the declaration, and his demurrer was sustained. The further facts appear in the opinion.

J. F. Wheeler, for the plaintiff in error.

Simeon Nash, for the defendant.

By Court, CALDWELL, J. The simple question, arising on this record, is whether a promise of indemnity of this kind is valid.

The general rule on the subject is, that agreements to perform, or indemnify for the performance of, unlawful acts are void. Another rule, of a kindred character, is, that there can be no contribution between wrong-doers.

There are, however, exceptions to these rules, where a contract of indemnity has been held good, notwithstanding the

act done, which formed the consideration, was illegal, and the person doing it liable to the party injured, on the ground that the party doing the act did not know of its illegality, and might reasonably have believed it to be legal.

It is contended by the plaintiff's counsel that this case comes within the exception, and we have been referred to a number of cases which are said to be analogous to the present; where the contract for indemnity was held to be valid. We think, however, that none of the cases referred to are similar to the present one.

The case of *Coventry v. Barton*, 17 Johns. 144 [8 Am. Dec. 376], is relied on. That was a case where the person indemnified was called on by the overseer to work on the highway, and ordered to remove a gate that stood across the road, and a promise of indemnity was given him by the overseer. On a recovery against him in trespass, he was permitted to recover on his contract for indemnity against the overseer. That case differs from the present one in this, that it was a trespass to property, whereas this was a direct assault on the person; that was a case where the person committing it, at the time was engaged in doing (what he was told to do, to wit), work on the roads, under the direction of the overseer, who was supposed to know what was to be done, and who, for the time being, had the right to control his labor. The same may be said of the most of the cases cited. They are cases of trespass to real property, where the person committing the trespass, and receiving the indemnity, was engaged in his usual occupation under the direction of the person who indemnified him. The case of *Fletcher v. Harcol*, Hut. 55; S. C., reported *sub nom. Battersey's Case*, Win. 48, however, is said by counsel to be strictly analogous to the present. That was the case of an innkeeper who kept in his inn during the night, a prisoner who was brought to his house by the sheriff, who had arrested him on a commission of rebellion, the sheriff promising to indemnify him. On a recovery had by the prisoner against the innkeeper for false imprisonment, it was held that he could recover against the sheriff on his promise of indemnity. Although a false imprisonment may be supposed to contain an assault on the person, it does not necessarily imply the use of actual force. In this case the innkeeper did not assist in the first instance in depriving the prisoner of his liberty—he had nothing to do with the arrest, but in the course of his business a prisoner is brought to his house. His business compels him to keep such persons as stop at his house; it is his duty to keep

prisoners as well as others, who must have some place to lodge, and who have to receive the necessities of life in their transit from one point to another. Humanity, if nothing else, would require the innkeeper to receive him.

We have seen no case where it has been held that a contract to deprive a person of his liberty, in the first instance, or to commit an actual assault on the person, where such arrest or assault was illegal, has been held to be binding. We do not suppose that such case comes within the rule, except in cases where the person committing the arrest is an officer whose duty it is, in a proper case, to arrest persons, and who acts by some supposed legal authority.

We do not think that the fact that the plaintiff in this case acted under the direction of a justice will at all avail him for doing an illegal act. Most of the tyranny and cruelty that has been practiced in the world over the persons and property of men, has been done under some kind of official sanction. I could much sooner sympathize with a person that had committed an illegal act on his own responsibility, than with one who did it because he had the backing or countenance of official power. If a person (as the plaintiff in this case did) commits an assault on another, either for the purpose of depriving him of his liberty, or to hold him in custody after he has been taken prisoner, he should be satisfied that such interference is legal, otherwise he should heed the consequences.

We think that this contract of indemnity comes under the general rule that a contract to do an illegal act is void; and therefore affirm the judgment of the supreme court.

SPALDING, J., delivered a dissenting opinion.

AGREEMENT FOR INDEMNITY, WHEN VOID BECAUSE ACT INDEMNIFIED AGAINST IS ILLEGAL: See this subject discussed at length in note to *Ives v. Jones*, 40 Am. Dec. 425, where the prior cases in this series are collected. Agreement to indemnify another for the commission of a trespass is not void, where the act is not, at the date of the agreement, known to be a trespasser *Marcy v. Crawford*, 41 Id. 158.

LAUGHLIN v. STATE.

[18 OHIO, 99.]

DECLARATIONS OF THE INJURED FEMALE IN A PROSECUTION FOR RAPE, made immediately after the offense was committed, are admissible in evidence for the purpose of corroboration, but not as substantive testimony, to prove the commission of the offense.

TESTIMONY OF A WITNESS WHO HAS REMAINED IN THE COURT-ROOM after an order directing all witnesses to withdraw from the room may be received at the discretion of the trial judge.

RAPE. The prisoner was convicted. The errors assigned by the bill of exceptions consisted in the admission in evidence of the declarations of the injured woman, made immediately after the commission of the offense, and the admission of the testimony of Robert Johnson, the father of the prosecuting witness, who had remained in the court-room, and heard the testimony of the other witnesses, after an order of the court directing all witnesses to withdraw from the room. The further facts appear in the opinion.

Umbstetter, Stanton, and Wallace, and William D. Ewing, for the plaintiff in error.

Henry Stanbery, attorney general, and John Clark, prosecuting attorney, for the defendant.

By Court, CALDWELL, J. The first question raised was decided by this court in the case of *Harrison Johnson v. The State of Ohio*, 17 Ohio, 593.

The court in that case decided that the declarations of the injured female, made immediately after the offense was committed, may be given in evidence, to sustain the testimony given in court, but not as substantive testimony, to prove the commission of the offense. And for this purpose of corroboration alone, we understand from the record, the evidence in the case now before us was received; and that it related only to such declarations as were made immediately after the commission of the alleged offense.

But the most important question arising in the case, and the only one that the counsel for the accused have relied on in argument, arises on the admission of Robert Johnson, the father of the girl, as a witness.

This is a question of no little delicacy. It relates, exclusively, to the fairness of proceeding on the trial. Much may be said on both sides of the case, and on the part of the accused in this case, many considerations meriting a careful examination have been presented. On the one side, where the order of the court has been made for the witnesses to retire, and be examined out of the hearing of each other, if a witness remains in violation of the order, it furnishes strong ground of suspicion that the witness is not fairly disposed in the cause, and that he wishes to avail himself of the testimony of the other

witnesses, in order to make his statements as potent as possible by making them correspond with theirs.

Where, too, a party in interest in the cause, after the order has been made, should procure his witnesses to be present, in violation of such order, it is equally suspicious that he intends a similar degree of wrong and unfairness. On the other hand, when we consider the little control that a party can have over his witnesses; the little attention he likely to be able to give to their movements; the crowds and the confusion that generally exist during exciting trials, rendering it impossible to note who are present; the questions that may arise on the trial, that could not be anticipated, and which may require by-standers to be called in as witnesses, who have been present and heard the other witnesses testify—these and other considerations which might be presented, render it difficult, and we think impossible, to establish any general rule of exclusion that would not in many cases deprive parties of important and necessary testimony, for the fair presentation of their cause. Nor do we find that any such rule has been established in the United States.

The authorities in this country, so far as they go, are against any such rule of absolute exclusion; although we have been able to find but little on the subject. In North Carolina, in the case of *State v. Sparrow*, 3 Murph. 487, it is decided that the witness may be sworn, although suffered to remain even by design of the party.

Henderson, J., in deciding this case, doubted the right to exclude for incompetency, in any case, as a consequence of the witness disobeying the order. But the court say, that "a refusal by either party to comply with an order of separation would make an unfavorable impression, would be fairly open to observation, and go to the credit of the witnesses."

In Cowen and Hill's notes to Phillips' Evidence, vol. 2, p. 722, note 501, the author, after reviewing the authorities, appears to arrive at the conclusion that it is a matter of discretion with the judge, to exercise the power of exclusion or not.

He says: "On the whole, it seems that although the right to exclude witnesses, for willful disobedience of the order, be well established, yet judges are quite cautious of exercising the power. The reason probably is, because a party may in that way, without any fault of his own, be put in very great hazard, by losing important testimony. He can not prevent the misbehavior of his witnesses."

In Greenleaf's Evidence, page 505, it is said: "If a witness

remains, in violation of the order, it is in the discretion of the judge whether or not he shall be examined."

In some of the English courts, the rule has been more stringently applied than it has ever been in this country. In the court of exchequer, the rule is said to be inflexible, that a witness who is present and hears the testimony of the other witnesses, in violation of the order, shall not be examined.

Starkie and Phillips both lay down the rule, generally, that under such circumstances the witness will be excluded. Still we would infer from the authorities, so far as we have been able to examine them, that, with the exception of the court of exchequer, it is within the discretion of the judge to admit the witness, although he may have been present in violation of the order. In the case of *Parker v. McWilliam*, 6 Bing. 683, the court hold that it is "always in the discretion of the judge to receive a witness who remains in court after an order to withdraw, except in the exchequer, where he is peremptorily excluded." It is certainly a good practice, where a party requests it, to have the witnesses examined separately. And we think (as in the case before us) where the witness is called to testify as to the previous statements of a witness, in order to corroborate the statement of such witness on the trial, it is especially necessary. And a right-minded judge will be very careful, particularly in a criminal case, where the defendant is generally in custody, unable to attend to his interests, in seeing that the order of the court is strictly complied with. Still we do not find that any rule has been established, in this country, that would justify this court, as a court of errors, in deciding that it was error in an inferior court to admit a witness who had violated the order, and heard the other witnesses testify. We think the law is the other way; and that the court of common pleas in this instance had the right, in their discretion, to admit the witness.

Judgment affirmed.

DECLARATIONS OF THE PROSECUTRIX IN A PROSECUTION FOR RAPE, made immediately after the commission of the offense, are admissible in evidence, for the purpose of corroboration: *McCombs v. State*, 8 Ohio St. 646, citing the principal case. See also *State v. De Wolf*, 20 Am. Dec. 90.

WITNESS UNINTENTIONALLY DISOBEYING ORDER EXCLUDING WITNESSES from court-room, when not incapacitated from testifying: *Kei'ha v. Wilson*, 35 Am. Dec. 443.

HARRIS v. COLUMBIANA COUNTY MUTUAL INSURANCE COMPANY.

[18 Ohio, 116.]

APPLICATION FOR A POLICY OF INSURANCE MAY BE REFORMED, so as to make it conform to the representation of facts made to the insurer's agent, if the insured was misled into signing an application containing a wrong statement by the action of such agent.

BILL in equity to reform an application for insurance, and to enforce the policy as reformed. The defendant demurred to the bill, and its demurrer was sustained. The further facts appear in the opinion.

Mason and Potter, for the complainant.

Umbstættler, Stanton, and Wallace, for the defendant.

By Court, CALDWELL, J. Do the facts contained in the bill entitle the complainant to the aid of a court of chancery to obtain the relief sought? It is contended on the part of defendants that the application being made a part of the policy, the representations there contained amount to a warranty; and that it matters not that the company, or their agent, might have known the true situation of the title; if the representations in the application are untrue, the policy is void. And that this is true, although the assured may have informed the insurer, verbally, of the true situation of the property. It is also said that such verbal representations can not be given in evidence for the purpose of explaining or contradicting the written application; and that it matters not whether such variation from the truth in the application be material to the risk or not. When there is no mistake on the part of the assured, and no misrepresentation is proved on the part of the insurer, these propositions are no doubt true. They are all decided in the case of *Jennings v. The Chenango County Mutual Insurance Company*, 2 Denio, 75, to which counsel have called our attention. But these principles, we think, will not apply to the present case. Now if Harris, in this instance, had chosen to put down his property as unincumbered, when it was not, of his own free-will, without any mistake on his part, or any inducement on the part of the company, or their agents, to do so, the policy would have been void, although the company were acquainted with the true situation of the property. But how is the case presented by the bill? Harris applies to the agent of the company to effect an insurance

on his mill; he tells him the true situation of his title; the agent (the company having previously instructed him to that effect) informs him that he considers such property unincumbered; he writes it down as such in the application, and hands it to Harris to sign, who signs it as it had been drawn up by the agent. The application is handed over to the company, who are informed of the situation of the title, and they afterwards treat the policy as valid, by making and collecting assessments on it.

The agent gave the terms to Harris, which (in accordance with the instructions of the company) he considered as properly describing the property to be insured, and because Harris adopted these terms, they claim that they are freed from all liability on the contract. To sustain this claim of the company, would be permitting them to commit a fraud on Harris.

Although verbal representations made at the time the policy is effected, can not be received to vary or contradict it, yet when a question of fraud or mistake arises, such representations become legitimate evidence to prove such fact; indeed they are generally the principal evidence in proving either of those facts.

The law is very strict in requiring of the insured the utmost good faith as well as the greatest accuracy, in his written application. The insurer should be held to an equally strict account on his part, and when he misleads the insured, and causes him to fall short of making a valid representation, he should bear the loss occasioned by his own conduct.

And although we would not infer, from the facts stated in *the bill*, that the company or their agent intended to mislead or defraud the complainant; yet they have led him into a mistake, which would operate as a fraud on his rights if he were thereby deprived of the benefit intended by the policy. And the complainant being by such mistake deprived of his remedy at law, we think he has a right to resort to a court of chancery for relief.

The demurrer will be overruled.

MISREPRESENTATIONS BY ASSURED, EFFECT OF, ON POLICY: See the prior cases in this series, where this subject is discussed, referred to and collected in note to *Burrill v. Saratoga Co. M. F. Ins. Co.*, 40 Am. Dec. 350.

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SUTCLIFFE v. DOHRMAN.

[18 OHIO, 181.]

PARTNER'S INTEREST IN PARTNERSHIP GOODS IS HIS SHARE OF THE SURPLUS after all demands against the firm are paid.

EXECUTION AGAINST A PARTNER FOR HIS INDIVIDUAL DEBT may be levied upon the partnership property, but a sale under such execution will pass only the interest of the debtor in the firm property.

EQUITY WILL RESTRAIN THE SALE OF THE ENTIRE PARTNERSHIP PROPERTY in satisfaction of the individual debt of one partner.

MEASURE OF DAMAGES IN AN ACTION OF REPLEVIN AGAINST A SHERIFF holding property under execution, when the defendant recovers judgment, is not the value of the property, except when that value is less than the amount, with interest, of the executions he may have in his hands.

REPLEVIN, brought by the plaintiff in error against the defendant as sheriff. The plaintiff claimed title to the property in dispute, claiming it as partnership assets. The defendant justified by virtue of a seizure under a writ of execution against one Pitner, a partner of the plaintiff, under a judgment rendered against him on an individual liability. The further facts are stated in the opinion.

R. S. Moody, for the plaintiff in error.

Stanton and McCook, for the defendant in error.

By Court, **EVERY, J.** It has been heretofore a cause of no little difficulty with this court, in proceedings against partnership property for the satisfaction of the individual debt of one of the partners, to determine, in accordance with any just rule, at what point the power of a court of law ends, and the jurisdiction of a court of chancery begins. In the case of *John W. Place v. Charles Sweetzer*, 16 Ohio, 142, the court interfered in equity, and restrained the rule by an injunction. In that case the execution, which was against one member of the firm, had been levied, and the goods of the partnership taken into possession by the sheriff. In the case now before the court, the judgment creditor proceeded after the levy, and until the property was sold under the execution at law and delivered to the purchaser. When the creditor levied with his execution upon this property, he claimed that Pitner, the debtor, had made a fraudulent conveyance of his share of it to the plaintiff, and that it was not therefore protected from his levy. The plaintiff claimed, it would seem, after the transfer to him of Pitner's interest, that he had become the sole owner of the property, and that there

was no partnership interest for a court of equity to adjust, and therefore he commenced his proceedings at law, to recover the possession. If Pitner's transfer of his share was valid, then the levy on the property was a trespass; but if the transfer was fraudulent and void, the levy was proper and sufficient to hold the title to the share. The plaintiff, before resting, introduced evidence designed to satisfy the jury that he was the owner of the property in controversy; that it was the same property which was found in the defendant's possession, seized by virtue of the act of replevin, and thereby restored to him. After the defendant had questioned the sole ownership of the plaintiff, and had given evidence from which the jury would be likely to infer that the transfer of Pitner was void, and the levy of the creditor therefore lawful, it became proper to inquire what, at that time, were the respective rights of the parties before the court.

The case above cited, from 16 Ohio, decides that a partner's interest in partnership goods, is his share of the surplus after all demands against the firm are paid, and that the sale may be restrained, as before stated, by a proceeding in chancery. It also recognizes the doctrine that an execution against one of the partners for his separate debt, may be levied upon the partnership goods. It was the prayer of the bill in that case that an account should be taken of the amount due by the firm, that the same should be first paid out of the property of the firm, and the interest of the complainant (he being another member of the firm) in the surplus should be paid, before execution creditors should be permitted to assert their claim on the property. The prayer of the bill was granted. We have looked at that case again and are not disposed to overrule or interfere with it; on the contrary, we recognize the doctrines established by the decision there made as correct.

The interest of Pitner, according to the determination in that case, in the property in controversy, when the constable was proceeding to levy upon it, was his share of the surplus, after all demands against the partnership were paid. If there could be no surplus, then the levy, though legal and binding the property, would be, at best, certainly unproductive. By no act of the plaintiff, after the levy, has his interest in the property been parted with. At any time before the sale, had he sought redress in chancery, an injunction would have been allowed him, to restrain the sale under execution at law; and on producing the proof (which the case concedes to be in his power) that there would be no surplus left for the judgment creditor,

He would have obtained a decree against the judgment creditor, securing his claim to the whole of the property. He did not, however, seek redress in chancery; neither did the creditor, who had an equal right to appeal to that court, file his bill to have his rights determined in relation to that property. He chose to make a sale under his execution. That sale did not pass to the purchaser, whether he was the judgment creditor or another person, the plaintiff's share in the partnership property; it only passed the judgment debtor's interest in the surplus, if there should be any, after the payment of all demands against the partnership. Giving the benefit of these principles to the parties, on the trial of the action of replevin, were the verdict and judgment in the case right?

It is contended in the argument for the defendant that he became, by the purchase, a partner or a joint owner with the plaintiff in the goods; and being in the possession of them, with an equal right to the possession, they could not be taken from him by a writ of replevin. Whether a sale of one partner's interest, by execution at law, can be recognized as valid, and if so recognized, how the rights and remedies of the several parties in interest, after the sale, are to be enforced, the court does not consider itself called upon, in the case under consideration, to decide.

The court of common pleas refused to admit evidence at the trial to show the true, actual interest of the defendant in the property replevied; and refused to charge that Dohrman, by his purchase at constable's sale, became but a joint owner of the bricks with the plaintiff, and that the measure of damages should be but the value of that interest; and the court did charge the jury, that if they found that the defendant had the right of property, the measure of damages should be the value of the property replevied, at the time of the service of the writ of replevin, with interest thereon. The language of the statute, Swan's Statutes, 786, is, "Where the jury shall find for the defendant, they shall also find whether the defendant had the right of property in the goods and chattels, or the right of possession only, at the commencement of the suit; and if they shall find either in his favor, they shall assess such damages as they may think right and proper for the defendant." Had the testimony offered been received, and had it established the fact (as must be supposed in the case) that there could be no surplus, then the value of the property, at the time of service of the replevin, and interest, would not be the damages right and

proper for the defendant. He stood in no such relation to that property as would make it necessary or proper to give him the full value of it against the plaintiff. The case of *Jennings v. Johnson et al.*, 17 Ohio, 154 [49 Am. Dec. 451], decides that when property is replevied from a sheriff holding it under execution, the rule of damages is not the value of the property, except where that value is less than the amount, with interest, of the executions he may have in his hands. The principle of that case, applied to the one before the court, would neither justify damages equal to the value of the property replevied, nor to the amount of the execution in the constable's hands, with interest thereon. The defendant, it would seem, could not be entitled to more than mere nominal damages. The common pleas, in the opinion of this court, erred in refusing the evidence, and in stating the measure of damages.

Their judgment is reversed.

PARTNERSHIP AND SEPARATE CREDITORS, RESPECTIVE RIGHTS OF: See the prior cases in this series on this subject collected in the note to *Ketchum v. Durkee*, 45 Am. Dec. 415.

MEASURE OF DAMAGES IN REPLEVIN AGAINST SHERIFF of property taken under execution, where the verdict is for the defendant: See *Jennings v. Johnson*, 49 Am. Dec. 451.

THE PRINCIPAL CASE IS CITED to the effect that a bill in equity lies by a partner against the separate creditors of a copartner, to restrain a sale upon execution of the partnership property, until an account can be taken of the partnership affairs, and the interest of the debtor partner ascertained: *Nixon v. Nash*, 12 Ohio St. 651.

TOWN COUNCIL OF AKRON v. McCOMB.

[18 Ohio, 229.]

OFFICERS OF MUNICIPAL CORPORATION ACTING IN GOOD FAITH, under an express authorization of the corporation, are not personally liable for injuries resulting from such acts, if the corporation, under its charter, had power to order them.

MUNICIPAL CORPORATION IS LIABLE FOR INJURY resulting to the property of a private individual, caused by lowering the grade of the street in front of his land, although such act was strictly within its corporate powers, and was done without negligence or malice.

PRIVATE INDIVIDUALS, BY DEEDS BETWEEN THEMSELVES, can not reserve the right to regulate the grade of streets adjoining the land conveyed, so as to deprive the municipality of such right.

AUTHORIZATION OF MUNICIPAL CORPORATION TO ITS AGENTS to do certain acts may be proved by parol.

ERROR to the common pleas. The opinion states the facts.

Lucius V. Bierce, for the plaintiff in error.

King and King, for the defendant in error.

By Court, AVERY, J. The action in the court of common pleas was case, brought by McComb against the town council of Akron. The plaintiff in the action was the owner of a lot in Akron, upon which he had erected a brick house, and had fitted it up for the purpose of merchandising. He had made his improvements with an express view to the level and grade of Howard street, adjoining which the building stood. After he had made his improvements, the town council caused the ground in front of his building to be excavated, and the street to be sunk several feet, in consequence of which, the value of his house and lot was greatly impaired.

The defendant put in the plea of not guilty, with notices of defense, of acting within their charter, etc.

When the action was first tried, a verdict was returned against McComb, the plaintiff, but the judgment on the verdict was reversed by a judgment of this court, reported in *McCombs v. Akron*, 15 Ohio, 474, and the case remanded to the common pleas for further proceedings. On the trial before the common pleas, after the reversal, the charge of the court was in accordance with the principle established in the case by this court, and the verdict of the jury, and the judgment, were in favor of the plaintiff. After which, the defendant, in its turn, applied to the court to review its judgment, pronounced as above, and found in *McCombs v. Akron*, *supra*; when the judges allowed, in behalf of the defendant, the present writ of error. The judgment, it was claimed, had introduced a new doctrine in reference to corporations, opposed to the current of authorities, and of doubtful propriety; and further, it was not the unanimous decision of the court, the late chief judge, Birchard, who was at that time one of the members of the court, having dissented from the opinion of the majority. The judges, upon the application of the defendant, allowed the present writ of error, that an opportunity might be given for a re-examination of the case.

Of the errors assigned, that which is deemed to be the principal and important one grows out of a part of the charge to the jury, which is substantially as follows, to wit: That the town council of Akron would be liable to the extent of the real and substantial injury done to the plaintiff's property, by its act in leveling the street, although acting within the scope of its authority, without malice and in good faith. If the doctrine estab-

lished in *McCombs v. Akron*, *supra*, is to stand, then there was no error in the part of the charge above referred to. That doctrine is, that a municipal corporation is liable for an injury resulting to the property of another, by an act strictly within its corporate powers, and without negligence or malice. The court had before determined, *Scovil v. Geddings*, 7 Ohio St. 214, that agents of a corporation could not be made liable for acts which were directed by it, if they were authorized by the charter. That was a special action on the case, for an alleged injury committed by the defendants, acting under an order of the trustees of the town of Cleveland, for grading the streets of the town. They were not shown to have done any unnecessary damage, nor to have violated good faith while acting under the order. The court by the determination in the case protected the defendants; holding that officers, acting in good faith under an authorized order of the town, are not personally liable for injuries done to individuals in such grading. No one can deny the correctness or propriety of that decision. If the town has power to cause the act to be done, and the agents perform it in strict accordance with a legal order, they can not, of course, be made personally liable. But that determination left the injured party without remedy, unless he could have his action directly against the corporation, and by its name.

The case of *Rhodes v. The City of Cleveland*, 10 Ohio, 159 [36 Am. Dec. 82], supplied the remedy. That was an action on the case for cutting ditches and watercourses in such a manner as to cause the water to overflow and wash away portions of the plaintiff's land. The court of common pleas charged the jury that the plaintiff could not sustain his action unless he showed that the city acted illegally, or, if within its authority, that it acted maliciously. The court in banc, however, declared that the corporation was liable to answer in damages for a consequential injury, though not acting beyond its lawful power, and reversed the judgment of the common pleas. The decision in *Rhodes v. The City of Cleveland* was the first in the state which maintained the principle that an action, sounding in tort, would lie against a municipal corporation by name, for an act done within the powers granted by its charter. And this was considered by the court as an authority for the decision in the case under review. It is, however, not the only authority to be found in support of the principle.

In *Thayer et al. v. The City of Boston*, 19 Pick. 511 [31 Am. Dec. 157], the plaintiffs declared that they had a right of way

over a public street or passage in front of their building, and that the defendants took up the pavement in front of their buildings, dug up the earth, etc., by which they were injured. In this case the principle is settled, "that an action sounding in tort may be maintained against a municipal corporation, and that it may be made liable in an action on the case for an act which would warrant a like action against an individual, if such act is done by the authority of the corporation, or after the act done has been ratified by it."

The same court, in *Stetson v. Faxon*, 19 Pick. 147 [31 Am. Dec. 123], makes use of this language: "Let the city take all that is necessary, convenient, and becoming this great and flourishing capital, but let compensation go hand in hand with the public benefit." Among the cases cited by the Massachusetts court, is one from Maryland, *Barron et al. v. The City of Baltimore*, 2 Am. Jur. 203, in which that court say: "The defendants are trustees of public interests for their own benefit, and ought to answer as an individual to the person at whose expense they are benefited." That a city or town should be clothed with sufficient power to accomplish all its useful and necessary objects, may be granted. It seems to be indispensable that a power should be given to it for the regulation of its streets; and in the exercise of such a power, injury to the property of individuals, amounting perhaps to a destruction of it, may become unavoidable. But when the public interest requires the sacrifice of private property, a very clear principle of justice requires also a compensation to be given for the injury.

The judgment which we are reviewing sanctions that principle, and gives the compensation. It is not without support from that section in the constitution of the state, which holds private property inviolate, but subservient to the public welfare, provided compensation be made to the owner. The above section has come under the consideration of the court upon various occasions in its bearings upon the public improvements of the state; upon private companies authorized to engage in the construction of works of public interest, and upon city and town corporations.

And in reference to them all, it is now maintained that powers may be conferred upon them that are necessary to carry out the objects for which they were created; but when, in the lawful exercise of such powers, individual property must be taken, sacrificed, or injured, they will be held liable to the party injured, to make good his loss. If the act conferring the authority pro-

vides itself the mode of rendering the satisfaction, that mode will be followed; if it points out no course of proceeding, or if the remedy so provided is denied to the injured party, he may still appeal to the court and find redress. It will be perceived, therefore, that the principle established by the case under review is just; that it is in accordance with the spirit of the constitution upon the point in controversy, and with other decisions of the court, as well as with the decisions of other courts upon the same subject. For the cause which has been under consideration, therefore, it will not be reversed. The writ of error in the case was allowed solely to give an opportunity to re-examine the error which has already been considered. For none of the other causes assigned, would it have been granted. One of these causes is, that the court below ruled out the contract under which McComb received his deed. The contract with the original proprietor of the lot required the original purchaser to grade in front of it whenever directed by the proprietor. If this contract was not canceled when the deed in fee simple was executed for the lot, still the power of the town council to grade the streets could not be questioned. The original proprietor could not reserve to himself the right to fix the grade in front of his lot; nor could he enforce an agreement made with a purchaser to grade the lot, in opposition to the orders of the town council.

Another cause of error, and the only remaining one which will be specially noticed, is, that the court admitted parol evidence, in the first instance, of the acts of the town council. When this evidence was offered by the plaintiff on the trial, and received by the court, no proof had been given that the acts existed of record upon the books of the town. To exclude the evidence in such a case, would be to presume that the defendant had kept a record of the acts, and to decide that it could be excused from liability by neglecting to put the proof of their acts on their book of proceedings. No such inference can be drawn in favor of the defendant. To give to it the protection sought, there must be evidence before the court that the acts to be proved exist in writing upon their record. Corporations are made liable in some cases, both upon their promises and for their acts, when there has been no record entry of either.

Judgment affirmed.

MUNICIPAL CORPORATIONS, WHEN LIABLE FOR INJURIES RESULTING FROM GRADING STREETS: See this subject discussed, and the prior cases in this series cited, in the notes to *Goodloe v. City of Cincinnati*, 22 Am. Dec. 786;

Hickox v. Cleveland, 32 Id. 730; *Green v. Borough of Reading*, 36 Id. 127; *Wilson v. Mayor of New York*, 43 Id. 723; *Commissioners of Kensington v. Wood*, 49 Id. 582. As to the power of a municipal corporation with respect to grading streets, see the notes to *Hickox v. Cleveland*, 32 Id. 730; *Humes v. Mayor of Knoxville*, 34 Id. 657; *Green v. Borough of Reading*, 36 Id. 127.

AUTHORITY OF AGENT OF CORPORATION, PROOF OF, BY PAROL EVIDENCE: See *Melledge v. Boston Iron Company*, ante, 59, and note, collecting previous cases in this series.

THE PRINCIPAL CASE IS CITED to the effect that a municipal corporation is liable for the injuries done by its officers, acting within the scope of their authority, and without malice or negligence, in *Dayton v. Pease*, 4 Ohio St. 94; *Crawford v. Delaware*, 7 Id. 464; *Youngstown v. Moore*, 30 Id. 143.

GREEN v. RAMAGE.

[18 OHIO, 428.]

MORTGAGEE WHOSE LIEN EXTENDS OVER TWO SEPARATE LOTS, each of which has been mortgaged at subsequent times to different individuals, can not be compelled to exhaust his security out of the lot last mortgaged. Equity will, however, compel him to satisfy his debt out of the proceeds of both lots, in proportion to the amount each lot may produce.

BILL in equity to compel the defendant Wilson, to whom the defendant Ramage had mortgaged two lots in the town of Zanesville, known as lots number 14 and 39, to exhaust his security out of lot number 39, before proceeding against the other. It appeared that, subsequent to the mortgage to Wilson, Ramage mortgaged lot number 14 to the plaintiff, and afterwards mortgaged the other to the defendant Hillier.

Searl and O'Neill, for the complainant.

Goddard, James, and Eastman, for the defendants.

By Court, CALDWELL, J. If there were but the two mortgages on the property, Wilson's and Green's, Green would without doubt be entitled to the relief which he claims. In Story's Equity, vol. 1, sec. 633, the rule on the subject of marshaling securities is stated thus: "The general principle is, that if one party has a lien on, or interest in two funds for a debt, and another party has a lien on, or interest in one only of the funds for another debt, the latter has a right in equity to compel the former to resort to the other fund, in the first instance, for satisfaction, if that course is necessary for the satisfaction of the claims of both the parties."

In this case, however, there are three parties interested. If Green should compel Wilson to exhaust lot 39 before he comes

on lot 14, then Green will have the benefit of the fund arising from lot 39; although he took no security on it. But Hillier by this arrangement will be deprived entirely of his security on lot 39, although he took a mortgage on it. We think the rule can not be applied in a case of this kind. The principle is one established for the purpose of securing to parties the rights to which, upon the principles of natural justice, they are entitled. To deprive Hillier of his security in this way, would be manifestly unjust. When Green took his mortgage he had notice of the mortgage of Wilson, on lot 14. When Hillier took his mortgage on lot 39, he had notice only of the lien of Wilson, which was all the incumbrance on it. There was nothing connected with Wilson's lien, that was even calculated to put him on inquiry in reference to Wilson's mortgage on lot 14, because Wilson's liens on these two lots were created by separate instruments. But if Wilson's lien on the two lots had been created by a single mortgage, Hillier was not bound to notice the situation of lot 14, having nothing to do with it. We think, then, that justice between Hillier and Green requires that each should have the full benefit of his mortgage, and this can only be done by requiring Wilson to take his debt out of the proceeds of both lots proportioned to the amount that each lot may produce. The decree will be so entered.

SUTCLIFFE v. STATE.

[18 OHIO, 469.]

MANSLAUGHTER AT COMMON LAW AND BY THE OHIO STATUTES CONSISTS in the unlawful killing of another, without malice, either express or implied. It may be either voluntarily committed, upon a sudden heat, or inadvertently, but in the commission of some unlawful act.

INDICTMENT UNDER THE OHIO STATUTE FOR MANSLAUGHTER NEED NOT ALLEGE that the killing was done without malice.

INDICTMENT FOR MANSLAUGHTER WHICH CHARGES THE PRISONER WITH AN ASSAULT upon the person killed, and unlawfully discharging and shooting off at him a loaded gun, sufficiently shows that the prisoner was engaged in the commission of an unlawful act.

VERDICT MAY BE RETURNED FOR MANSLAUGHTER, and a valid judgment rendered upon such verdict, under an indictment charging the prisoner with murder in the first degree.

PLEA OF ONCE IN JEOPARDY CAN NOT AVAIL PRISONER, upon proof of a former conviction before a lawful jury, upon a good indictment, when such conviction has been set aside by the appellate court, on the prisoner's motion, for errors occurring on the trial.

UPON TRIAL OF THE QUESTION OF FORMER CONVICTION, the original papers, and transcripts of the journals of the supreme court and of the common pleas, are admissible in evidence, instead of the record, when no formal record has been made.

REVERSAL OF JUDGMENT AND VERDICT WHICH FINDS PRISONER GUILTY of manslaughter does not reverse his plea of not guilty.

COURT HAS AUTHORITY TO IMPANEL A JURY to try whether a prisoner was standing mute obstinately, and if they should so find, to direct the plea of not guilty to be entered, and to proceed with the trial.

VERDICT OF JURY MAY BE RECEIVED IN PRESENCE of the prisoner, although in the absence of, and without notice to, his counsel.

MANSLAUGHTER. The opinion states the facts.

Stanton and McCook, for the plaintiff in error.

H. Stanbery, attorney general, for the defendant in error.

By Court, AVERY, J. Is the indictment good, upon which the prisoner has been convicted?

It contained at first three counts, but at the trial the prosecutor having entered a *nolle* upon two of them, he proceeded against the prisoner only upon the third. As a former jury in the case had returned a verdict against him for manslaughter only, which was, in effect, a verdict of not guilty upon the two first counts; upon these it is quite clear the prisoner could not afterwards be put to trial. He could be prosecuted, if at all, only upon the count for manslaughter. His counsel urge that this third count is defective, and if it be found upon examination to be so, the judgment must be reversed. The objection taken to the indictment is, that it does not charge the defendant with the crime of manslaughter, or with any offense defined by our law. There is no common-law crime in this state, and we, therefore, look always to the statute to ascertain what is the offense of the prisoner, and what is to be his punishment upon conviction. The count under examination describes the crime of manslaughter at the common law; it is drawn after the approved forms adopted in the prosecution of such crimes, and is without defect as a common-law indictment.

In deciding upon the objection raised, it will of course be proper to look at the crime of manslaughter as it existed under the common law. It is there defined in the following language: "The unlawful killing of another, without malice, either express or implied; which may be either voluntarily, upon a sudden heat, or inadvertently, but in the commission of some unlawful act." 4 Bl. Com. 191.

The word used as descriptive of the offense in the definition

here given, is introduced into our statute, where it is denominated manslaughter, and where the entire description of the offense is embraced in these words, to wit: That if any person shall unlawfully kill another without malice, either upon a sudden quarrel or unintentionally, while the slayer is in the commission of some unlawful act; every such person shall be deemed guilty of manslaughter: Swan's Stat. 229. It is evident that the legislature had in their view, while framing the enactment above quoted, the crime of manslaughter as well understood at the common law. They have adopted it in substance, and almost in form. If then the same rule were admitted applicable to an indictment upon a charge defined by statute, as upon a defense defined by the common law, there could be no objection to the present count. What is affirmed in this statute of manslaughter, of the character which this count was intended to reach, except that the slayer must be in the commission, at the time, of some unlawful act? The crime is declared to be complete "without malice," that is, where there exists no malice. Is it necessary to argue the negative form, that the act was done without malice? If there is in the indictment no averment touching the malice, will not the inference be necessarily drawn that the act was without malice? We think so. The same may be said of the other word, "unintentionally."

It is claimed for the plaintiff in error, that there is no allegation in the count of the unlawful act designated in the statute. It was necessary to allege in the indictment that the prisoner was engaged in the commission of some unlawful act. And this allegation, it appears to the court, is distinctly made in that part of the indictment which charges the prisoner with an assault upon the person killed, and unlawfully discharging and shooting off at him a loaded gun. This sufficiently describes an unlawful act. And we are of the opinion that the count objected to is good, and charges the crime of manslaughter, as described in our statute. It may be further observed, that the statute defines and prescribes three descriptions of homicide: murder in the first, and in the second degree, and manslaughter. In the first, the act of killing is of deliberate and premeditated malice, or in the perpetration or attempt to perpetrate some one of the higher crimes specified; in the second, the act is purposely and maliciously done, but without deliberation and premeditation; and in the third, the act constituting manslaughter is as above described. Now it is held, that upon a count for even the highest species of the crime, murder in the first degree, a verdict may

be returned for manslaughter, and a valid judgment against the prisoner may be rendered upon such verdict. In that case, there is not a description of the offense, as it is found in the statute; but to sustain the proceeding, a rule of the common law is applied, and the count which describes the greater offense, is supposed to include the less. The court therefore find that there is no error in the form of the indictment.

The plaintiff in error alleges that the second trial to which he has been subjected in this case, is in violation of that provision of the bill of rights in the constitution of the state, which declares that in criminal prosecutions, the accused shall not be twice put in jeopardy for the same offense. He sought to avail himself of the privilege before he was put upon his trial, upon the plea of not guilty, first by a motion to be discharged, and afterwards by the plea of former conviction. But the determination of the court was against him in both instances, and this is assigned as error. It is not claimed for the plaintiff in error that a conviction upon a defective indictment, when the judgment has been afterwards reversed, can be set up as bar to another prosecution. It is conceded by his counsel that in such a case the prisoner may be put again upon his trial. In such a case he says, according to the construction of all the courts, the prisoner never was in jeopardy. But he claims that by a trial before a lawful jury, upon a good indictment, and the finding of a verdict by that jury, the prisoner has been put in jeopardy, and can not, therefore, be again prosecuted for the same offense. It is not readily perceived how any real distinction can be drawn between the cases. In both it is but an error in the proceedings; in the first the error is found in the indictment; in the second the error is committed by the court, it may be in admitting or rejecting testimony, in charging or refusing to charge the jury, or in determining some other one of the various legal questions raised in the progress of the cause. If it be that when a party is convicted on a bad indictment for murder, he may be tried again because his life was not in jeopardy, it may with equal truth be said, under our system of laws, and since the allowance of bills of exceptions and writs of error in criminal prosecutions, he was not in jeopardy in case any other substantial error is found in the proceedings. For in this state any other error is as fatal as that which appears in the indictment, and as effectually secures him against the consequences of a conviction. The prisoner is held liable to be tried again upon the supposition that he never was in jeopardy. This upon principle, and

as a correct rule of law, may be allowed to govern courts in the trials of criminals. It will operate to subject them to a trial upon the merits, instead of allowing them to escape upon a mere technical defense. But though in a legal sense they may be said never to have been in jeopardy when the indictment was bad, yet this is not always true in point of fact; doubtless in some instance elsewhere as well as here, criminals have been tried and convicted under a defective indictment, and have afterwards suffered the punishment of the law without ever seeking or obtaining a reversal of the judgment.

Still the law of the state, though it holds a party, if the first judgment against him has been reversed, to abide the issue of a second trial, must nevertheless be allowed the credit of humane maxims and principles which are continually employed in behalf of prisoners upon trial. Their rights are regarded with scrupulous care; rules and presumptions are made to operate in their favor. If the plaintiff in error could succeed upon the point which has just been considered, he would himself escape and avoid a second trial, because he had once before been tried for the same offense upon a good indictment; but new trials, often the means of safety to the accused, would then be at an end, for it would be contrary to the bill of rights to allow a second trial under a good indictment. But the statute which first authorized the reversal of judgments in criminal cases, did not regard the second trial which might result from the reversal as a violation of the bill of rights; nor have the courts so regarded it, for they have always acted upon a different principle, and uniformly directed a second trial whenever the case seemed to require it.

Upon the trial of the question before the jury of a former conviction, complaint is made that improper evidence was received; instead of the record, all the original papers, transcripts of the journals of the supreme court and common pleas, etc., were admitted by the court. In this the court only followed a settled and long-established practice, and even at the present term there has been occasion in more than one instance to give a sanction to the principle. Such papers and entries are good evidence, both in civil and criminal cases, when no formal record has been made. The court ordered the prisoner to be arraigned and to plead to the third count of the indictment, and this is alleged as an error.

The reversal in the case necessarily put an end to the judgment, and the verdict on which the judgment had been founded;

but according to no principle could it be made to reach the prisoner's plea. It is true, the first verdict was in effect a return of not guilty upon the first two counts; but when the cause was remanded to the common pleas it stood, as to the third count, precisely as when first at issue, and before any error had occurred. The reversal did not extend to the plea. And if the entry of a *nolle prosequi* as to the first and second counts, the plea interposed by the defendant of a former conviction, together with the singular issue made up for the jury, could have the effect to set aside the first plea of not guilty, then, by a direct authority in the statute, Swan's Stat. 726, the court had power to impanel a jury, to try whether the prisoner was standing mute obstinately; and if they should so find, to direct the plea of not guilty to be entered, and to proceed with the trial. In all this no error is perceived.

After a verdict against the prisoner on the plea of not guilty, a motion was made by him for a new trial, for several reasons, and amongst the rest, because the verdict was received at 2 A. M., of the sixth of December, in the presence of the prisoner, without his counsel, and without notice to the counsel, and without an opportunity to poll the jury. There is no reason for supposing that the liberty of polling the jury was denied to the prisoner. Nor is there any law making it imperative that the counsel of the prisoner should be sent for, to be present upon the delivery of the verdict by the jury; though care ought to be taken to secure to the prisoner the benefit of his presence upon so important an occasion. There might, however, be cases in which it would be proper to dispense with the presence of the counsel; and a discretion must be left to the court of common pleas upon this subject.

The court are of the opinion, upon the whole case before them, that there is no error in the record and proceedings of the court of common pleas; and their judgment is affirmed.

MANSLAUGHTER, WHAT IS, AND DISTINCTIONS BETWEEN AND MURDER: See *State v. Field*, 31 Am. Dec. 52, and note citing prior cases in this series; *Anthony v. State*, 33 Id. 143; *State v. Hill*, 34 Id. 396; *Slaughter v. Commonwealth*, 37 Id. 638; *McWhirt's Case*, 45 Id. 196. In Ohio there is no common-law offense: *Davis v. State*, 32 Ohio St. 28; although the statutory definition of manslaughter is the same as at common law: *Williams v. State*, 35 Id. 175, citing the principal case.

ONCE IN JEOPARDY, WHAT IS, AND WHAT NOT: See this subject discussed at length in notes to *Crenshaw v. State*, 17 Am. Dec. 788; *State v. McKee*, 21 Id. 499; *State v. Solomons*, 27 Id. 469; also *State v. Ray*, 33 Id. 90; *Dunn v.*

State, 35 Id. 54; *Commonwealth v. Loud*, 37 Id. 139; *State v. Hornsby*, 41 Id. 314; *Mount v. State*, 45 Id. 542.

THE PRINCIPAL CASE IS CITED to the effect that an indictment charging a prisoner with manslaughter need not follow the exact language of the statute, in *Poage v. State*, 3 Ohio St. 234.

COLLINS v. HATCH.

[18 OHIO, 523.]

MUNICIPAL CORPORATION CAN ONLY EXERCISE POWERS EXPRESSLY GRANTED, and such others as may be necessary to carry the powers expressly granted into execution.

POWER CONFERRED ON MUNICIPAL CORPORATION TO ENACT such ordinances as it shall deem necessary for "the well regulation, interest, health, cleanliness, convenience, and advantage" of the corporation, and "to require and compel the abatement of nuisances," does not authorize the municipality to pass an ordinance prohibiting swine, cattle, horses, and so forth, from running at large, in contravention of the general law of the state, which allows such animals to run at large.

TRESPASS for taking and carrying away three hogs. The defendant justified under an ordinance of the corporation of Conneaut, which prohibited such animals from running at large, and alleged the taking to have been committed by authority of such ordinance. The plaintiff demurred to this plea, and upon the overruling of the demurrer, judgment was entered for the defendant. The further facts appear in the opinion.

R. P. Ranney and Brewster Randall, for the plaintiff in error.

H. Wilder, for the defendant in error.

By Court, HITCHCOCK, C. J. As the defendant in this case attempted to justify under an ordinance of the borough of Conneaut, in the county of Ashtabula, as set forth in the plea, it becomes necessary to inquire whether the corporate authorities of that borough had power, under their act of incorporation, to adopt the ordinance in question. In determining the powers of municipal corporations it is right and proper to allow them the exercise of all powers expressly granted, and such others as may be necessary to carry the powers expressly granted into execution. Beyond this the court ought not to go, and should there be error in construing those powers, it is better to err, in restricting than in extending them.

The ordinance in question, is one by which swine, cattle, horses, sheep, and geese are prohibited from running at large in said borough. The general law of the state contains no pro-

hibition of the kind, but on the contrary, by the first section of the "act defining the duties of persons taking up estray animals," etc., Swan's Stat. 870, it is enacted "that no person shall be allowed to take up any neat cattle, sheep, or hogs, after the first day of April, and before the first day of November, annually."

The power to adopt the ordinance in question is supposed to be derived from the seventh section of the act of incorporation: Local Laws, vol. 36, p. 24. This section provides, "that the mayor, recorder, and trustees, or a majority of them, of whom the mayor or recorder shall always be one, shall have authority to make, ordain, and publish all such by-laws and ordinances, consistent with the constitution and laws of this state and of the United States, as they shall deem necessary for the well regulation, interest, health, cleanliness, convenience, and advantage of said borough and its inhabitants; to impose fines, forfeitures, and penalties (not exceeding fifty dollars), upon each and every person offending against the laws and ordinances, which may be made as aforesaid," etc.

This ordinance could not be adopted under this part of the section, as it is in contravention of the general law of the state which allows such animals to run at large.

Power is also conferred upon the corporation "to require and compel the abatement of nuisances." It has been supposed that this ordinance is authorized by this clause of the act of incorporation. But such is not the opinion of the court. Although it may be considered as a nuisance that swine should be allowed to run at large in a town corporate, still it is manifest that such is not the nuisance here spoken of.

Besides, it is common in our legislature to grant expressly to towns corporate the power to do what in this case has been attempted to be done. That is, the power to prohibit horses, cattle, and swine from running at large. Such being the practice, it is right to presume, where this power is not expressly granted, it was intended it should not be exercised.

In the opinion of the court the corporation of Conneaut had no power to adopt the ordinance in question, and the same is void. Such being the opinion of the court, it is unnecessary to consider the other points raised in argument.

Judgment of the common pleas reversed, and the case remanded for further proceedings.

POWER OF MUNICIPAL CORPORATION TO ENACT ORDINANCES: See this subject discussed at length in note to *Robinson v. Mayor of Franklin*, 34 Am. Dec. 627.

VANCE ET AL. v. BLAIR.

[18 OHIO, 532.]

ONE PARTNER CAN MAINTAIN AN ACTION AT LAW against another partner for a breach of the partnership agreements, and need not join other partners as defendants if they have sold out before the cause of action arose.

ALLEGATION OF OFFER OF PERFORMANCE MUST STATE THE DATE on which such offer was made.

ASSUMPSIT. The plaintiffs and defendant, and David Cary and Ely Hyatt, entered into a partnership agreement for the purpose of obtaining a contract to build a part of the Miami canal. The agreement provided that such contract should be taken by and in the name of the firm. The defendant took such contract in his own name and performed the work. This action was brought to recover for the breach of the partnership agreement. The defendant demurred to the declaration, and his demurrer was sustained. The further facts appear in the opinion.

Crane, Davis, Grosvener, and Aylesworth, for the plaintiffs in error.

Conklin and Morris, for the defendant in error.

By Court, CALDWELL, J. It is contended, on the part of the defendant, that the demurrer was properly sustained, because the declaration shows a case of partnership; and, therefore, the plaintiffs must seek their remedy in a court of chancery. We do not think the case made in the declaration, comes within the general rule that requires partners to seek redress, against each other, in chancery. No part of the object which induced the parties to enter into the contract, had been accomplished by them—no accounts made that required settlement. It is a suit brought solely to recover damages for a breach of the partnership articles. In Story on Partnership, p. 319, sec. 218, it is said: "Wherever there is an express stipulation in the partnership articles, which is violated by any partner, an action at law, either *assumpsit* or covenant, as the case may require, will ordinarily lie to recover damages for the breach thereof." We think it a proper case for a court of law. It is contended that the declaration is demurrable because the suit is brought by the plaintiffs jointly, upon a several contract. Now, we know nothing of the terms of the contract, except what is stated in the declaration. It is alleged to be in the hands of defendant Blair. The declaration speaks of the parties agreeing, in writing, that they should be a company in obtaining and performing this job; and that each was to bear his share of the expense,

and to receive an equal share of the profits, etc. We think the declaration sets forth a contract both joint and several.

Another objection is, that Cary and Hyatt are parties to the action. Cary and Hyatt, although parties to the contract, we think could not be parties to this suit. Before the work commenced, as can be fairly inferred from the declaration, they sold out, each his one sixth of the right to the contract, to Blair. They have no cause of complaint against either party; nor can either party complain of them. They have not broken the contract, nor has either of the parties broken it with them. They can not maintain a suit against Blair, because Blair admitted to them their rights under the contract, and paid them what they were willing to take for those rights. The plaintiffs can not maintain a suit against them, because they only claimed and received what they had a right to, under the contract—the same that the plaintiffs are claiming in this suit. We think, then, as they sold out before the work was commenced, and as all parties have acquiesced in that arrangement, they are properly left out of the case.

Another objection set forth by the special demurrer is, that it is not stated at what time the offer of the plaintiffs to perform their part of the contract was made.

It is a rule in pleading, that every material fact which is issuable and triable must be averred to have happened at a certain time and place, although it is not generally necessary to prove the time as laid. In this instance it was necessary that the plaintiffs should allege an offer to perform the contract on their part, and it was also necessary that that offer should be made in a reasonable time. The averment in the declaration is, that immediately after the job was awarded, etc., they offered, etc. Now it is true that if the plaintiffs, immediately after the award, made this offer and demand, it would, so far as time is concerned, be a good offer of performance. Still we believe it to be an inveterate rule of pleading that when an important issuable point, standing out by itself, has to be alleged, that a day on which it happened should be stated. This is the only defect that we have discovered in the declaration.

We think the common pleas decided right in sustaining the demurrer.

The judgment will be affirmed.

PARTNER MAY MAINTAIN ACTION AGAINST HIS COPARTNER, WHEN: See the prior cases in this series cited in note to *Bonnaffe v. Fenner*, 45 Am. Dec. 278.

TAYLOR v. FOWLER.

[18 OHIO, 567.]

SALE OF LAND UNDER JUDGMENT AGAINST HUSBAND does not bar the widow of her right of dower, although the court directs the proceeds of the sale to be first applied in satisfaction of a prior mortgage, in which the wife joined and released her dower.

PETITION for dower. The opinion states the facts.

Burgess, Smith, and Vallandigham, for the petitioner.

Charles Morris, jun., for the defendant

By Court, HITCHCOCK, C. J. There is no controversy about the facts in this case, and they are all contained in the bill and answer. In May, 1837, Jonah Taylor, the husband of complainant, mortgaged the premises in which dower is now demanded, to the state of Ohio, for the use of the fund commissioners of Miami county, to secure the payment of a loan from said commissioners. To the deed of mortgage the complainant was a party, therein relinquishing her right of dower. The loan being unpaid, such proceedings were had that a decree for the sale of the mortgaged premises was entered against Taylor and wife, at the May term of the Miami common pleas, 1842. Orders of sale were issued, but the land remained unsold for want of bidders until 1847.

In the mean time, and after the rendition of the decree, John Sloan renewed a judgment against Taylor, upon which an execution was issued, and the land mortgaged, levied upon, and sold in 1847. The sale, being reported to the court, was approved, but the court directed the mortgage to be first satisfied from the money made on the execution.

In this state of the case, the question made is, whether the petitioner is barred of her right of dower.

Had the land been sold under the decree of foreclosure, she must have been barred. Of this there can be no doubt. In such case the purchaser must have held all the rights of the mortgagors and mortgagees. His title would have been perfect as against them, and all in privity with them. If the purchase money exceeded the amount of the mortgage debt, the petitioner would have been entitled to her dower in this surplus, provided the sale had been made after the death of her husband. The land, however, was not sold under the decree. Why it was not we do not know. The fact is apparent that it remained unsold for more than five years after the decree was rendered, and

when sold, was sold on a judgment which was subsequent in point of time to the lien of the mortgage.

Suppose the fund commissioners, instead of proceeding upon the mortgage, had prosecuted a common-law suit upon their bond, had recovered judgment, and upon this judgment the land had been sold, would the purchaser have taken the land discharged of the dower interest of the widow? It seems to me he would not. In such case the only interest which he would acquire would be the interest of the judgment debtor, not any interest, present or contingent, of the wife of the judgment debtor. A judicial sale of the real estate of the husband does not divest the wife of her right of dower, unless that sale is in a case where she has herself, by her own act, divested herself of any interest which she may have had in the property. The hypothetical question here stated does not, however, arise in this case, and it is not necessary to settle it.

In the case under consideration, Sloan recovered a judgment against Taylor, took out execution, had the same levied on the land in controversy, and the land was sold to the present defendant. Now there can be no pretense that under this sale the defendant acquired any right incompatible with the petitioner's right of dower. This judgment had no relation to the mortgage. Nor was the sale, so far as appears, made with reference to that mortgage. It was an ordinary sale on execution. After this sale, had Taylor, or had a stranger, satisfied the mortgage lien, there can be no doubt but that the petitioner would have been remitted to her right of dower. By her contract she could only be barred of that right in case the property pledged was appropriated to the payment of the debt for which it was pledged, and there was but one way by which it could be regularly thus appropriated, and this was by a judicial proceeding upon the mortgage itself.

As before remarked, Taylor himself, or a stranger, might after the sale of this land have satisfied this mortgage, in which event the petitioner would have been entitled to dower. Even had the defendant himself, of his own mere motion, discharged the mortgage debt, the result would have been the same. Can the fact that the court of common pleas directed the mortgage to be satisfied from the purchase price of the land make any difference in the case? It seems to a majority of the court that it can not. That order was made for the benefit of the defendant. Without it he might have been compelled to pay the price bid, while he would have acquired only a title incumbered by a mortgage.

With it, he acquires a title disincumbered of the mortgage, but incumbered with the widow's right of dower.

No question like the present has ever, within my recollection, been submitted to this court; nor do we find many, if any, analogous cases in the books of reports of other states. In the case of *St. Clair v. Morris*, 9 Ohio St. 15 [34 Am. Dec. 415], this court held that where the wife joins her husband in a mortgage containing a relinquishment of dower, a sale of the land by the administrator of the husband for the payment of his debts extinguishes the right of dower, and transfers an unincumbered title to the purchaser. The case shows that the land sold for less than one half the debt secured by the mortgage. Under our law the administrator may sell land incumbered by a mortgage, but the money received must first be appropriated to discharge the mortgage debt. The right of the administrator to sell does not interfere with, or in any way affect, the lien of the mortgagee. This specific lien is secured to him; and the sale by the administrator would be as effectual to defeat the widow's right of dower as would a sale upon a judicial proceeding upon the mortgage itself.

The case of *Popkin v. Bumstead*, 8 Mass. 491 [5 Am. Dec. 113], is one which is supposed to militate against the decision now made, but I do not see that it does. In that case, the equity of redemption to mortgaged premises had been sold at administrator's sale, under the law of Massachusetts, and the court held, that the purchaser might redeem the land and hold it discharged of the widow's dower, she having joined with her husband in the execution of the mortgage deed.

The cases of *Harrison v. Eldridge*, 2 Halst. 392, and *Barker v. Parker*, 17 Mass. 564, are cases which, if not directly in point, go strongly to sustain the decision now made. We put the case upon this ground: If the defendant had been a purchaser under the decree of foreclosure, he would so far have connected himself with the mortgage as to have been protected against the dower claim; but, inasmuch as he is a purchaser under an ordinary judgment, he is in no way connected with the mortgage, and can derive no protection from it.

The complainant is entitled to a decree.

ABEY, J., delivered a dissenting opinion.

RIGHT TO DOWER, WHEN BARRED BY JOINING IN MORTGAGE: See the prior cases in this series cited in note to *Hawley v. Bradford*, 37 Am. Dec. 392. The doctrine of the principal case on this subject was affirmed, and applied to various states of circumstances, in *Carter v. Goodin*, 3 Ohio St. 75; *Woodworth v. Paige*, 5 Id. 73; *State Bank v. Hinton*, 21 Id. 515; *Ridgway v. Masting*, 23 Id. 295.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

KNABB'S APPEAL.

[10 PENNSYLVANIA STATE, 186.]

CLAIM OF MECHANIC UNDER THE STATUTE OF 1836 is not insufficient for failing to contain the initial letter of the owner's name, and where the claim is a joint one, for omitting to state whether the claimants are partners or individual joint creditors.

NAME OF CONTRACTOR NEED BE STATED IN MECHANIC'S CLAIM only where the contract was made with a builder, distinct from the owner of the building.

MECHANIC'S CLAIM WHICH DESIGNATES LOCALITY OF BUILDING as in "Upper Providence township, Montgomery county, Pa., bounded by lands of Jacob Landis and others," is sufficient.

ITEMIZED ACCOUNT ANNEXED TO MECHANIC'S CLAIM is a part thereof, and if such account contains but one date, it will be presumed that all the materials were furnished on such date, unless the contrary appears.

SUBSEQUENT INCUMBRANCERS MAY OBJECT TO THE DEFICIENCIES appearing in mechanics' claims filed against their debtor.

APPEAL from an order distributing a fund arising from the sale of a decedent's estate, among certain mechanic lienors. The opinion states the facts.

G. R. Fox and Sterigere, for the appellant.

H. Freedley, for the appellees.

By Court, **BELL, J.** The formal objections to the statements of the claims in question are made under the twelfth section of the act of 1836. The great object of its several provisions is notice, and it has been truly said, an observance of them is essential to the safety of owners, purchasers, and other lien creditors, as furnishing some *data* by which, in case of dispute,

they may be enabled to ascertain the truth: *Noll v. Swineford*, 6 Pa. St. 187. But all the cases agree that a substantial compliance is sufficient, and this is shown to exist wherever enough appears, on the face of the statement, to point the way to successful inquiry. Adherence to the terms of the statute is indispensable, but the rule must not be pushed into such niceties as serve but to perplex and embarrass a remedy intended to be simple and summary, without, in fact, adding anything to the security of the parties having an interest in the building sought to be incumbered. Certainty to a common intent has, therefore, always been held to suffice. If we apply this reasonable rule to the claims here disputed, I think it will be found the plaintiffs have done all incumbent on them to do. The exceptions taken ask more than this. Indeed, many of them were tacitly conceded to be hypercritical, by the lack of energy with which they were urged on the part of the contesting creditors.

The first of them relate to the supposed insufficiency of the statement filed by Bean & Ullman, in setting out the name of the owner and the character in which material-men claim. The omission of the initial letter M., in writing the name of the reputed owner in the body of the claim, is put forward as a fatal defect. But, even under the critical accuracy sometimes required by the common-law system of pleading, such an omission could not be pleaded in abatement; and it would be strange, indeed, if, at this day, it should be entertained as destructive of a procedure wherein convenient certainty, only, is required, and which, in this instance, is obtained by reference to the title of the statement and the bill appended to it. The accidental dropping of the middle letter is, at most, but a *lapsus pennæ*, which can mislead no one.

The objection, that it does not appear whether the creditors claimed as individuals, or as a firm, is equally unsubstantial. Even admitting they claim in the latter capacity, it is not necessary it should so appear, in order to individuate them. In point of form, even a common-law *narr.* by partners is good without so specifically designating them. But how are we to know they so claimed as partners, in the mercantile sense of the term? And if not, all shadow of exception vanishes.

Harper is named as owner or reputed owner, and no one is designated as contractor, architect, or builder. This is the third exception. But the act requires, in express terms, a contractor to be named, only where the contract was made with a builder, distinct from the owner of the building, and the decisions have

not extended these terms beyond their obvious meaning: *Jones v. Shawhan*, 4 Watts & S. 262; *Sullivan v. Johns*, 5 Whart. 366. To be sure, in the latter case, it is observed, there is no objection to naming an owner, who built the house for himself, as owner or contractor, or both. It is so done in this instance, in the claim filed by Davis & Whitaker. But there is no imperative necessity for this. It has even been said that as the name is only a circumstance of description, to specify the property, entire accuracy as to the ownership may not be indispensable. Certain it is, the proceeding being *in rem*, the object in stating the names of the parties connected with the structure, is a designation of the thing and not of the person. This object is generally affected by naming the owner alone. Still, where there is also a contractor, builder, or architect, conformity with the statute requires him to be named. What would be the effect of a neglect to notice him, in a proper case, we are not called on to declare, since it nowhere appears there was, in this case, a distinct contractor.

The succeeding class of exceptions is based upon a supposed absence of accuracy and certainty in certain particulars, which are now to be considered. A very brief notice of each of them will suffice.

And first: it is admitted the building, subject to these liens, is described with sufficient definiteness in the statement filed by Davis & Whitaker; but the quality of certainty in this particular is denied to exist in that put on record by Bean & Ullman. And yet, descriptions of no greater certainty—nay, some of much less—have passed muster. A building in this city was described as a three-storied brick house (naming the owner), situate on the south side of Walnut street, between Eleventh and Twelfth streets. This was held sufficient, although another street called Quince intervened between the last-named streets: *Harker v. Conrad*, 12 Serg. & R. 301 [14 Am. Dec. 691].

To the same effect is *Springer v. Keyser*, 6 Whart. 187. *Shaw v. Barnes*, 5 Pa. St. 18 [47 Am. Dec. 399], was still less precise; for there the structure was said to stand "on the north side of Lombard street, west of Ninth street, adjoining Smith's lot on the east," without giving another parallel street. This was decided to be well enough to designate locality. An effort was made in *Washburn v. Russel*, 1 Id. 499, to embrace within the rule of these decisions a claim filed against "a tract of land in Clarion county, on the waters of the Clarion river, with one double saw-mill thereon, situate on the east side of said river."

stating the dimensions of the mill. But this was thought to lack necessary precision, for, in effect, it was no more that stating the building to be in a particular county; a generality not aided by a description of the building, which resembled many others.

In the instance here in question, the name of the owner, the locality of his building, "Upper Providence township, Montgomery county, Pa., bounded by lands of Jacob Landis and others," the material of which it is constructed, its dimensions, and the number of its stories are given. This would seem to be a literal compliance with the terms of the statute. It certainly furnishes means for easy identification, and this is all, as already observed, that is required. You shall, says the law, give "the locality of the building, and the size and number of stories of the same, or such other matter of description as shall be sufficient to identify the same." It is not pretended Harper was the owner of another building in Providence township at all like this, or, indeed, of any other house; a fact which was considered of weight in *Springer v. Keyser*, 6 Whart. 187, and which in our case, it seems to me, ought to be of decisive effect. Upon this head it was principally urged for the contesting creditors, that the claim filed by Davis & Whitaker, shows the house to be situate in a village called Quincy. Admitting this to be so, mention of the fact would be but a superadded circumstance of description, increasing, perhaps, the facilities of discovery, but not absolutely essential to it. It is not averred the village is of such size, or so important in its relations of business and trade, that a neglect to name it would naturally lead an inquirer to the conclusion the building described stood not in the town, and we do not, therefore, intimate any opinion how far, under such circumstances, silence as to the urban character of a dwelling or other structure, would detract from the necessary certainty of description.

Of the remaining exceptions of this class it is to be premised that the statement and bill annexed to it are to be taken as constituting what, by the act of assembly, is called the "claim" of the plaintiff. Of this there can not be a moment's question where the appended bill is specially referred to by his statement. Nor is this more doubtful, though notice of the account be omitted in the statement, if otherwise, it sufficiently appears to have been the intent of the plaintiff to make it a constituent portion of his claim. The question must always be, Does the appearance of the document, taken as a whole, indicate such an

intent, or is its aspect, or circumstances connected with it, calculated to mislead one candidly searching after truth? No particular form is prescribed for these instruments, nor has a general practice, under the statute, assigned to them a technical garb. The shapes they are made to assume in different counties, and even in the same county, are almost as various as the intelligence and business tact of those who prepare them for the office files.

Under such circumstances it would be absurd to measure them by any other standard than one suggested by the ordinary business habits of the country, or to exact for them a nicer and more critical construction than usually enters into the composition of such papers among non-professional men. Here the bill or account annexed by Davis & Whitaker to their statement obviously forms part of it. It is in their handwriting, following immediately after the statement itself, and treats of the same subjects of charge, viz., lumber furnished and hauling it to the building. Its adjusted amount, too, exactly corresponds with the sum claimed by the statement as due; and it is not to be doubted—though not so expressly stated on the paper-book—the whole was spread, by the prothonotary, on the dockets of the court, as forming one document. It must, on the grounds stated, be so accepted by us. Thus esteemed and treated, these claims satisfy every rule. They give the amount of the debts claimed by the material-men; the nature and amount of the materials furnished and labor performed; the building for which, and the time when, they were furnished and done. In this last particular the account of Davis & Whitaker is very minute and precise. That furnished by Bean & Ullman has but one date. But, in the absence of contrary proof, they must be taken as designating the time when the bricks were furnished. It is totally unlike the appended bill in *Witman v. Walker*, 9 Watts & S. 183. There the account consisted of various items of marble furnished for the building: such as mantels, steps, ashler, etc., and of marble-work, which must have been furnished and performed at different times; and yet there was but a single date. "It is obvious," said Judge Sergeant, "the date is the date in the bill, and nothing else." But this can not certainly be asserted of the present account. It consists of but one item, and though not very probable, it is possible the bricks may all have been furnished on the same day. Of this the only evidence we have is the bill itself, and it would be hazardous to assume a fact in contradiction of it, for the mere purpose of in-

validating the lien. Besides, it is said to be the habit of the trade to ascertain the number of bricks furnished for a building after it is completed, and then to make the final charge. If so, I should think the act satisfied by the insertion of that date.

Another objection, not much pressed, is that the claim of Davis & Whitaker contains no distinct specification of the amounts due for materials and work, respectively. This objection is founded upon the rejection of the appended account, as part of the claim. That shows distinctly how much is claimed for hauling.

The fifth exception to the claim was not argued. There is nothing in it.

These views, in affirmance of the validity of the liens, make it unimportant to decide the other question made on the argument, namely, whether subsequent incumbrancers can be admitted to object deficiencies in the statement in avoidance of the lien. But upon this point we entertain no doubt. Until now, their right to do so has never been questioned. It was permitted, without objection, in the much-contested case of *Thomas v. James*, 7 Watts & S. 381; no one dreaming of a doubt. A claim filed is not in the nature of a judgment pronounced by a court. It is, as was decided at the present term, but a means, partaking of the character of process, of enforcing a statutory lien. It comes not, therefore, within the principle upon which the doctrine of *Hauer's Appeal*, 5 Id. 473, and other similar cases, is based. This is proved by the whole scope of the act of 1836, and particularly by the provisions of sections 5, 9, 13, 23, and 25, which evidently contemplate and provide modes for the interference of mortgagees, judgment creditors, and other incumbrancers, having no estate in the premises bound.

Decree affirmed.

MECHANIC'S LIEN CERTIFICATE, WHAT SHOULD CONTAIN UNDER PENNSYLVANIA STATUTE: See *Shaw v. Barnes*, 47 Am. Dec. 399, and cases cited in notes. As to the requirements of such certificate under Connecticut statute, see *Bank of Charleston v. Curtiss*, 46 Id. 325.

ESTATES AND INTERESTS AFFECTED BY MECHANIC'S LIEN: See note to *Lyon v. McGuffey*, 45 Am. Dec. 678-680, where this subject is discussed.

BLIGHT v. SCHENCK.

[10 PENNSYLVANIA STATE, 285.]

GRANTOR CAN NOT, BY SUBSEQUENT CONDUCT, AFFECT OR DIVEST TITLE, if, at the time of the acknowledgment and execution of his deed, he has performed acts amounting to a delivery.

RECORDING OF DEED, ALTHOUGH NOT CONCLUSIVE AS TO ITS DELIVERY, is strong evidence thereof in the hands of an innocent purchaser.

LEAVING DEED, PROPERLY ACKNOWLEDGED, SIGNED, AND SEALED, in the possession of the officer who takes the acknowledgment, without the grantor's doing or saying anything to qualify the delivery, is sufficient to vest the title in the grantee, although he be not present; and the grantor can not, by subsequent instructions, limit the effect of such acts to a mere delivery in escrow.

ACCEPTANCE OF A DEED, IF FOR THE BENEFIT OF THE GRANTEE, will be pre-sumed, unless the contrary appears.

BURDEN OF PROOF TO SHOW THAT DEED DULY RECORDED was never delivered is on the grantor, in an action of ejectment against an innocent purchaser.

DEED DELIVERED BY ONE WITH WHOM IT HAS BEEN LEFT IN ESCROW, before the performance of the condition on which the delivery was authorized, is not void in the hands of an innocent purchaser.

ATTORNEY IN FACT OF ASSIGNEE FOR THE BENEFIT OF CREDITORS may make a deed, although the assignment conveys no authority on the assignee to appoint an attorney.

EJECTMENT. In 1834, James and Thomas Darrach were the owners of the premises in dispute. During such year, Thomas assigned his property to the plaintiff. The defendant claimed title under a deed from the assignees to James, purporting to have been made by Thomas Bradford, their attorney in fact, and a subsequent deed from James to him. The assignment contained no delegation of power to the assignees to appoint an attorney. The further facts appear in the opinion.

Cuyler, for the plaintiff in error.

V. L. Bradford and Scott, for the defendants in error.

By Court, ROGERS, J. In *Souverbye v. Arden*, 1 Johns. Ch. 240, it is ruled that the declarations of the intention or understanding of a grantor, different from the intent apparent on the face of the deed or of conditions annexed to it, to be effectual, must be made at the time of executing it. That if, at the time of executing a deed, there was no delivery or intention to deliver—these are facts which should be explicitly proved by the grantor. If, therefore, the acts and declarations of Mr. Bradford, at the time of the execution and acknowledgment of the deed, amounted to a delivery, his subsequent conduct the next

day can not affect or divest the title. The question must be examined in reference to that point of time, throwing entirely out of view what the witness proved afterwards took place.

The fifth section of the act of 1715 enacts that all recorded deeds, etc., shall have the same force and effect for giving possession and seisin, and making good the title and assurance of lands, tenements, and hereditaments, as deeds of feoffment with livery of seisin, or deeds enrolled in any of the king's courts of record at Westminster have, in the kingdom of Great Britain.

Now, although recording the deed is not an absolute delivery, but only evidence of it, as is ruled in *Chess v. Chess*, 1 Pen. & W. 34 [21 Am. Dec. 350], yet, as the fact of delivery is the assurance of the title in the hands of an innocent purchaser, it is entitled to great weight and consideration. A purchaser for value has a right to act on the faith that it has been signed, sealed, delivered, and acknowledged, as it purports to be, in proper form and by proper parties. He can not suppose it was surreptitiously taken from the grantor, and put on record by circumvention and fraud; and hence, as is decided in *Souverbye v. Arden*, already cited, before he can be deprived of his property, the facts which avoid his title must be proved by the grantor by the most unexceptionable testimony. Has the plaintiff made out such a case as avoids the deed, depends mainly on the testimony of Mr. Bradford, who proves that he went to the office of the alderman, found the deed there already executed by the co-assignee; that he signed and acknowledged it himself, without any qualification, and went away, leaving the deed where he had found it. It is true, he went the next day to the office of Curtis, the agent of both parties, and told him not to deliver any of the deeds, where the purchasers were to pay money, until he received the money. If the act of Mr. Bradford, at the office of the alderman, was in law a delivery, his subsequent acts can have no effect in divesting a title already vested in the grantee: *Souverbye v. Arden*, 1 Johns. Ch. 240. That the delivery was complete when the grantors declared before the proper officer, that they signed, sealed, and delivered the deed, without saying or doing anything to qualify the delivery, is well settled on authority. If the grantee had been present at the time, either personally or by agent, no person would doubt that the title vested; but it is ruled that this will not prevent its taking effect as a good deed. Thus, in *Garnons v. Knight*, 5 Barn. & Cress. 671, and *Lloyd v. Bennett*, 8 Car. & P. 124, the principle deduced by Mr. Justice Bayley, in a most

elaborate review of all the authorities, is, that when an instrument is formally sealed and delivered, and there is nothing to qualify the delivery but the keeping of the deed in the hands of the executing party—nothing to show that he did not intend it to operate immediately—that is a valid and effectual deed, and that delivery to the party who is to take by it, or any other person for his use, is not essential.

But this case, be it remarked, is stronger than the case cited; for there was not only a complete and unconditional acknowledgment of the signing and delivery, but the grantor did not even retain the deed, but left it with the magistrate. Shepherd, in his *Touchstone*, p. 57, lays it down that delivery to a stranger will be a sufficient delivery if he has authority to receive it, or if made for the use and on behalf of the grantee. Delivery to a third person for the use of the party in whose favor the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual from the instant of such delivery, although the person to whom the deed is so delivered be not the agent of him to whose benefit the deed is made. Can there be any question, says Balguy, J., in *Garmons v. Knight*, that delivery to a third person for the use of the party in whose favor the deed is made, when the grantor parts with the whole control over the deed, makes the deed effectual from the instant of such delivery? The law will presume, if nothing appears to the contrary, that a man will accept what is for his benefit. The cases cited show conclusively that the presence of the grantee is not essential, nor does it alter the case that the magistrate was not the agent of the grantee. The delivery is good, notwithstanding, if he parts with all control over the deed; if he parts with it without any qualification, the title vests from the instant it is so delivered. It is not pretended that at the time the deed was signed, sealed, delivered, and acknowledged there was any condition, qualification, or explanation whatever.

The condition or qualification, if any, was made to Mr. Curtis on the following day; but that was too late, as it was not until the title was vested in the grantee. To the same effect is *Lloyd v. Bennett*, 8 Car. & P. 124. There a person made a deed of gift of all his real estate to his daughter; he signed and sealed it, and no one being present but the attesting witnesses he said: "I deliver this as my act and deed." After this he desired a third person to keep it, and not deliver it to his granddaughter till he was dead, it being suggested to him that she might otherwise take his property from him in his life-time; it was held that

the delivery of the deed was complete. It is contended with great force that the deed being perfect in form and complete, it being duly recorded and the grantee in possession, a third party having innocently invested his money on the faith of such circumstances, it rested on the plaintiffs to show strictly that the condition, if any, was not complied with. The plaintiff in error insists that the grantee ought to show that Blight did not deliver the deed, that he had not received the purchase money, or that Curtis had not received it. We deem these facts important, and are of opinion that the burden of proving this was thrown on the grantor. There was no evidence that the deed had not been delivered by Blight, one of the grantors; that he had not received the purchase money, except what amounts to little, if anything, that he does not charge himself with it in a subsequent and separate account; nor was there any evidence that Curtis had not received the purchase money, except the testimony of Mr. Bradford, that he never accounted for it to him, nor, so far as he knew, to any other person. As the burden of proof is on the grantor, he must establish these facts, even if it be necessary to examine Mr. Darrach for that purpose. If the attesting witnesses had been present at the time of the execution of the deed before the alderman, they must have been called by the grantor: *Markley v. Swartzlander*, 8 Watts & S. 172; but as they were not present, a condition attached to the delivery at that time, may, I agree, be proved by others, as the alderman for example.

But it is unquestionable law, that a deed can not be made an escrow by any other declarations than are made at the time of signing and executing the instrument. This is so held, in effect, in *Souverbye v. Arden*, 1 Johns. Ch. 240, where it is ruled, as has been already said, that the declarations of the intention or understanding of a grantor, different from the intent apparent on the face of the deed, or of a condition annexed to it, to be effectual, must be made at the time of executing it. It is the duty of the grantor, as the chancellor truly says, to speak then, and declare his intentions, if any he has, inconsistent with the natural and necessary result of the solemnity.

The general principle of law is, that the formal act of signing, sealing, and delivery, is the perfection and consummation of the deed; and it lies with the grantor to prove clearly that the appearances were not consistent with the truth. The presumption is against him, and the task is on him to destroy that pre-

sumption by clear and positive proof that there was no delivery, and that it was so understood at the time.

But, granting the deed was deposited with Curtis, as an escrow, to be delivered only on the performance of a special condition, and in violation of his instructions, he delivered the deed without exacting payment, does that avoid the title of the defendant, who is a *bona fide* purchaser without notice? This is the next question. The first reflection which strikes us is that, if a title may be avoided under such circumstances, no purchaser is safe. This is a strong case, for here the defendant is an innocent purchaser for value. He invests his money on the faith of the solemn acts and declarations of the plaintiff. These acts and declarations were made before a magistrate, duly empowered for that purpose, certified to by him in proper form, duly recorded on the records of the county, which, by the act of 1715, is to have the same force and effect for giving possession and seisin, and making good the title and assurance of the law, as a deed of feoffment, with livery of seisin, etc. Moreover, it appears that, at the time of the purchase, the vendee was in the actual possession of the premises. There was, therefore, nothing to put him on his guard. It must require a very strong case, as the plaintiff in error justly contends, to permit a grantor to aver against the confidence thus reposed in his acts and declarations, exactly the opposite of those acts and declarations; to say, after acknowledging before the proper officer of the law that he delivered the deed, that he never delivered it, and having acknowledged that he received the purchase money, that he never received it.

The case of *Pratt v. Holman*, 16 Vt. 530, is in point. That case rules that, where the grantor in a deed of land delivered the deed to the agent of the grantee, with directions not to deliver the deed without payment by the grantee of a sum of money, and the agent delivered the deed to a third party, for the grantee, such third person promising to pay the grantor the sum claimed, that the deed became operative, and there was a sufficient delivery, notwithstanding the agent did not comply with his instructions. Chief Justice Williams considered it a very plain case. It is not necessary for us to go as far as this case extends, for the delivery was held complete as between the grantor and grantee, the court saying, the remedy is against the grantee to recover the sum unpaid, in a proper action. But, if the title is good, as between the immediate parties to it, and that it is so, unless the transaction is tainted with fraud, I have no

doubt, how much more so in the case of an innocent purchaser! The defendant is in possession, and has, moreover, a legal title; the plaintiff can not succeed, except by showing not merely an equal, but a superior equity. But his only equity is, that he has not received his purchase money; and, as the plaintiff justly contends, his equity is equal, for he has paid his purchase money. But, where the equities are equal, as has been often decided, the legal title must prevail. It is a wholesome maxim of the law, that, where one of two innocent persons must suffer a loss, and *a fortiori* in cases where one has misled the other, he who is the cause or occasion of that confidence by which the loss has been caused or occasioned, ought to bear it. A party who enables another to commit a fraud is answerable for the consequences; so, if a party says nothing, but, by his expressive silence, misleads another party to his injury, he is compellable to make good the loss, and his own title is made subservient to the confiding purchaser. This is text law: Story's Eq., secs. 388, 439; 1 Fonbl. Eq., b. 1, c. 8, sec. 4, n.

Here Curtis, who, it is alleged, delivered the deed contrary to his instructions, was the agent of the grantor. If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority, or may commit a wrong by acting knowingly contrary to them.

But this principle must not be extended to a person who has no possible means of protecting himself, who acts on the presumption that the records of the county are not intended to mislead, but speak the truth, that the acts and declarations of the grantor are such as they purport to be. If the grantor is injured by the conduct of his agents, the remedy is against them; surely there is no reason that it should affect an innocent purchaser, who pays his money on the faith that his title is good. Nor is it any answer that he may protect himself by proper covenants. This, in many cases, may be impracticable, and would amount to this, to discourage all sales or transfers of property whatever. This case was ruled on the idea that the title of the original purchaser was void. The court instructs the jury that the hinge on which the case turns is, whether Darrach got the deed from Curtis without paying the purchase money. "If you find he did, it is my business to tell you the deed is worth no more in his hands than a blank sheet of paper.

and the defendant can not make title to it, whether he knew of the original defect or not. Without delivery by the grantors, or some one authorized by them, the deed is imperfect, or rather no deed at all, and it can not be delivered on the authority of the grantors, except on the condition prescribed by them." Again, the court say that "if he (Curtis) delivered the deed without having received the purchase money, it was an incomplete deed, or rather no deed at all, and it would remain so, even in the hands of an innocent purchaser, to this day; and I say to you, by way of direction, as matter of law, of which it is the business of the court to judge, that it would confer no title on defendant or to anybody else." But this is an erroneous view of the law, for, as is ruled in *Pratt v. Holman*, 16 Vt. 530, the deed is operative, there being a sufficient delivery, notwithstanding the agent did not comply with his instructions. It is not the case of condition, but the ordinary case of a breach of instructions, which at most makes the deed voidable, but not void.

The agent has the power to deliver the deed, and when he does not comply with his instructions, he becomes answerable to his principal. If this principle be sound, the deed would be void by the omission to receive one cent of the purchase money, a proposition which would shock the common sense of every man.

It would be incapable of conformation, as, in the language of the chief justice, it would be no deed at all—a mere sheet of blank paper, conferring no title on the original purchaser, or on an innocent purchaser from him. On this branch of the case, the defendant in error relies on *Van Amringe v. Morton*, 4 Whart. 382 [34 Am. Dec. 517], and *Arrison v. Harmstead*, 2 Pa. St. 195, the former of which he contends to be on all fours in principle with the ruling of the chief justice in the present case. With all due respect, I must say, I see but little resemblance between the cases. That case was ruled on the principle that the deed was void, there being no delivery at all, either by the grantor himself or by any person having the semblance of authority. The point decided in that case is, that if a deed, which has been executed and acknowledged by the grantor, with a blank for the grantee's name, be surreptitiously and fraudulently taken from the grantor's house, and the blank filled up, no title passes, and a *bona fide* purchaser, for a valuable consideration, from the person holding the deed, stands in no better situation than such fraudulent holder, especially if

the original grantor remains in possession of the property. In the first place, be it remarked, the deed was incomplete, being executed by the grantor with a blank, negating all idea of a formal delivery. The deed was fraudulently taken from his possession, by a person not having the slightest authority to do so; the blank filled up by him, and delivered to the grantee. It is true the deed was kept by the grantor locked in his drawer, and that he trusted the key to his brother, who was induced by the grantee to fill up the deed and deliver it to him, without the grantor's knowledge or consent, and contrary to his instructions at the time he trusted the key to him. There was, therefore, no power in him, general or limited, and there was no such negligence or default in the grantor as could postpone his rights; for the mere custody or superintendence of property, as in the case of a servant or friend, gives no authority to dispose of it, either express or implied.

The deed was simply void. Besides, the case shows that the original grantor remained in the possession, which, of itself, served to put the purchaser on inquiry. In *Van Amringe v. Morton*, the deed, as between the grantor and grantee, was a mere nullity—a blank sheet of paper—no deed at all. As, then, the grantee, who was himself a party in the fraud, had not even a semblance of title, he could pass none to another, although that person was an innocent purchaser for value. In *Van Amringe v. Morton*, the distinction is taken between a void and voidable deed, in reference to its effect on an innocent purchaser. On that distinction it was that the case of *Price v. Junkin*, 4 Watts, 85 [28 Am. Dec. 685], was ruled. It is also applicable to all cases of fraudulent sales; for, although the title is a voidable one as between the original parties, yet, as respects a subsequent and innocent purchaser, the title is good.

We perceive no error in charging that, as an act of confirmation, the covenant not to issue execution has no effect. The covenant extends only to the real estate situate in the county of Philadelphia, of which the said James Darrach was seised or possessed at the time the judgment was obtained. The property in question did not pass to James Darrach until after the rendition of the judgment. It was after-acquired property, according to the defendant's own showing. Besides, Mr. Bradford testifies that, at the time he executed that instrument, he was ignorant of the fact that Darrach had obtained possession of the deed, etc., without payment of the purchase money.

Judgment reversed, and a *venire de novo* awarded.

DELIVERY OF DEED, WHAT AMOUNTS TO, and when need not be made to grantee personally: See *Farrar v. Bridges*, 42 Am. Dec. 439, and note citing prior cases in this series; also, *Merrills v. Swift*, 46 Id. 315.

GRANTEE'S ASSENT TO DEED IS PRESUMED WHEN BENEFICIAL TO HIM: *Merrills v. Swift*, 46 Am. Dec. 315; *Peavey v. Tilton*, 45 Id. 365, and note citing prior cases in this series.

DELIVERY OF DEED IN ESCROW: See *Perry v. Patterson*, 42 Am. Dec. 424, and note; *Foster v. Mansfield*, 37 Id. 154, and note; *Hicks v. Goode*, Id. 677, and note citing prior cases in this series: *Shirley v. Ayres*, 45 Id. 546.

THE PRINCIPAL CASE IS CITED to the effect that where a deed has been executed and left with the executant in the custody of another, the law regards the transaction as a delivery to the grantee, and will consider the custodian as agent for him for such purpose: *Piper's Estate*, 11 Phil. 142; *Booth v. Williams*, Id. 270.

FRALEY v. BISPHAM.

[10 PENNSYLVANIA STATE, 320.]

SALE OF GOODS BY SAMPLE IMPLIES A WARRANTY BY THE VENDOR that the goods sold will correspond in kind with the samples, but not in quality, in the absence of fraud or any express warranty.

ACCOUNT STATED DOES NOT LIE FOR DAMAGES FOR BREACH of a contract, where there has been no actual settlement or adjustment between the parties.

THE declaration contained several counts, one founded upon a breach of warranty on the sale of tobacco, and another on an account stated. Upon the trial the plaintiffs offered in evidence certain letters written by them to the defendants, in which they claimed to be reimbursed for the loss sustained by them, and then offered to prove that the defendants had paid no attention to such letters. The evidence was excluded, and the plaintiffs nonsuited. The further facts appear in the opinion.

G. W. Biddle, for the plaintiffs in error.

L. A. Scott and Scott, for the defendants in error.

By Court, COULTER, J. This cause was closely argued, and with much ability. But, after all, the court are of opinion that no warranty was established which was competent to go to the jury, under either of the courts in the *narr*. The cause seems to be conclusively governed by the case of *Borrekins v. Bevan*, 3 Rawle, 23 [23 Am. Dec. 85], in which the doctrine of *Chandelor v. Lopus*, Cro. Jac. 4, is dismissed with disapprobation, and the rule established that, in all sales of goods by bills of parcels, samples, etc., there is an implied warranty, that the article delivered shall correspond in specie with the commodity sold,

unless there are facts and circumstances to show that the purchaser took upon himself the risk of the kind as well as the quality of the commodity purchased. If that case means anything, it means this, that when the thing is sold by sample, and without express warranty, the purchaser takes it at his own risk, unless it should prove to be an article different in kind; all gradations in quality are at the hazard of the buyer. But if an article was sold as a diamond, and turned out to be glass, or when the thing was sold as tea, and was, in fact, chaff, the vendor would be responsible; thus rendering the seller liable for a difference in kind, but not for a difference in quality. Whether the rule in *Chandelor v. Lopus*, to wit, express warranty or fraud, in all cases, both as to kind and quality, was better than the one established in *Borrekins v. Bevan*, is a matter of little import now. It is useless to wander darkling among the dust and mist of old cases, to determine which was best, or most authoritatively recognized. *Borrekins v. Bevan* has been repeatedly acknowledged by this court, and is now the law; that is sufficient. Let us test this case by it. The sale by the bill of parcels, with which perhaps the sample corresponded, was of sweet-scented Kentucky leaf tobacco. It is not pretended that the article delivered was not tobacco, nor that it was anything else than Kentucky leaf tobacco. But, it is alleged and proved, that it was of inferior quality, and perhaps not very sweet-scented. The witnesses examined at Liverpool say that it was of a low, mean quality. The gist of the whole case, on the part of the plaintiffs, is, that the tobacco delivered was not of a quality equal to the sample, but of inferior flavor, taste, and quality. It was in specie Kentucky leaf tobacco, in kind the same as the article sold.

Indeed, the *gravamen* of the plaintiffs' *narr.*, and the allegation in their own letter, is, that the article delivered was inferior in quality to that sold by sample and bill of parcels. And in such cases, by the law of this state, as well established, there being neither express warranty nor imputed fraud, the risk falls on the buyer.

The court were right in rejecting the paper containing the claim of the plaintiffs, although it had been sent to defendant before suit brought. It was not competent evidence on the count of *insimul computassent*, or account stated, and it was not offered on any of the other counts.

I regard the paper as nothing more than a specification of damages, sustained upon an alleged breach of contract on the

part of defendant, of which the defendant was bound to take no notice by the usages of trade or mercantile law. He resisted the whole claim. *Insimul computassent* is a writ that lies between two merchants or other persons, upon an account stated between them. In such case the law implies that the one against whom the balance appears has engaged to pay it to the other, although there be no actual promise. But here is no account between the parties—no *insimul computassent*; nothing but a contract between the parties in regard to a particular thing or transaction; and which contract the plaintiffs say the defendant has broken, and send him a written specification of losses or damages. The defendant denies that he has broken his contract. It is not a case of account; no case was produced, and I apprehend none can be, that the *insimul computassent* extended to damages for breach of contract alleged where there had been no actual settlement or adjustment between the parties. We perceive no error in the record.

Judgment affirmed.

WARRANTIES IMPLIED ON SALE OF GOODS BY SAMPLE: See notes, and prior cases in this series cited therein, to *Salisbury v. Stainer*, 32 Am. Dec. 437; *Moses v. Mead*, 43 Id. 676-680.

ADMISSION OF CORRECTNESS, OR SILENCE BEYOND REASONABLE TIME, when renders an account an account stated: *Langdon v. Roane*, 41 Am. Dec. 60; *Tassey v. Church*, 39 Id. 65.

THE PRINCIPAL CASE IS CITED to the effect that a warranty will not be implied except in cases where goods are sold at sea, where the party has no opportunity to examine them, or in case of a sale by sample, or of provisions for domestic use, in *Moore v. McKinlay*, 5 Cal. 472.

FISHER v. STRICKLER.

[10 PENNSYLVANIA STATE, 348.]

AGREEMENT BETWEEN TWO BROTHERS TO THE EFFECT THAT UPON THE DEATH OF EITHER the one who survived should be his heir, is a covenant to stand seised to uses, and is not in conflict with the law of Pennsylvania, either as affecting the collateral inheritance tax or the dower of any future wife.

EJECTMENT by one of the heirs of Christian Strickler, deceased, for a portion of the estate of such deceased. The defendant was a brother of the deceased, and claimed the whole estate, by virtue of an agreement between him and his brother, which was recorded after the latter's death, by which they agreed, in effect, that if either should die, without issue, the survivor should be

the sole heir of the one deceased, and entitled to the sole possession and ownership of his estate. Judgment was given for the defendant, Hayes, P. J., delivering the following opinion: "The instrument of writing set forth in this case, is what is technically called a covenant to stand seised to uses. The words are sufficient to create the covenant, the intention being apparent on the face of this deed, that each party should stand seised to the use of the other surviving him, under the circumstances stated. And the consideration of natural love, though not expressed, is manifest from the relation of the parties; and as this, being consistent with the deed, might be averred in pleading, and admitted in evidence, it is not essentially necessary that it should be mentioned in the instrument: *Milburn v. Salkeld*, Willes, 673; *Bedell's Case*, 7 Rep. 40; *Crossing v. Scudamore*, 1 Vent. 137; 3 Cruise's Dig., part 4, p. 186, 190. Being of this opinion, I think judgment, on the case stated, should be for the defendant."

Mathiot, for the plaintiff in error.

Franklin, for the defendant in error.

By Court, ROGERS, J. After a careful examination of the authorities cited, we concur in the opinion that this is a covenant to stand seised to uses. The judgment is therefore affirmed, for the reasons given by Judge Hayes. We perceive nothing in the contract, as contended, in conflict with the law or policy of this state, either as it affects the collateral inheritance tax or the dower of any future wife.

Judgment affirmed.

DEED, WHEN CONSTRUED AS COVENANT TO STAND SEISED TO USES: See *Bell v. Scammon*, 41 Am. Dec. 706, and notes citing prior cases in this series; *Chancellor v. Windham*, 42 Id. 411; *Davenport v. Wynne*, 44 Id. 70, and note; *Russell v. Switzer*, 63 Ga. 723, citing the principal case.

COMMONWEALTH v. STAUFFER.

[10 PENNSYLVANIA STATE, 350.]

SUBSEQUENT CONDITION, IN GENERAL RESTRAINT OF MARRIAGE, when annexed to a devise of land, is not void, for reasons of public policy, although when annexed to a legacy the rule is otherwise.

CASE stated. The opinion states the facts.

Heister and Parke, for the plaintiff in error.

McElroy, for the defendant in error.

By Court, GIBSON, C. J. This action is brought for surplus proceeds of land devised to the testator's widow, for life, on condition not to marry; but sold by order of the orphans' court, for payment of his debts. She did marry shortly after the sale; and the question is, whether a subsequent condition, in general restraint of marriage, when annexed to a devise of land, is void, for reasons of public policy. When annexed to a legacy, the decisions of the ecclesiastical courts, followed in chancery, have certainly established that it is; and so the rule is held in Pennsylvania, both at law and in equity, as is shown by *McIlvaine v. Gethen*, 3 Whart. 575, and *Hoopes v. Dundas*, 10 Pa. St. 75. But, it is said, in 2 Powell on Dev. 282, that the rule of the ecclesiastical courts in legatory cases are inapplicable to devises of land, or money charged upon it; and that it owes its existence, in any case, to the ecclesiastical judges, who borrowed most of their rules from the civil law. The same thing is repeated in 1 Jarm. on Wills, 836, and fortified by references to *Reves v. Herne*, 5 Vin. 393, pl. 46; *Harvey v. Aston*, 1 Atk. 361; *Reynish v. Martin*, 3 Id. 330; *Stackpole v. Beaumont*, 3 Ves. 96; and the cases collected in Mr. Sanders' note to *Harvey v. Aston*; to which may be added the great case of *Fry v. Porter*, 1 Mod. 308. The ground on which these precedents stand is the indisputable fact that devises of land are governed, not by the Roman, but by the common law. Yet, a mistaken notion has been entertained that restraint of marriage, to be valid in a devise of land, must not be general; but that would bring such a devise to the level of a bequest of chattels, and abolish the distinction between legacies and devises altogether. Yet the notion has received color from the very same text-writers, who, in 2 Powell on Dev. 291, and 1 Jarm. on Wills, 843, have asserted that, even in regard to devises of land, it seems to be generally admitted (by whom?) that unqualified restrictions on marriage are void, on grounds of public policy; though the point rests, they say, rather on principle than decision. I know of no policy on which such a point could be rested, except the policy which, for the sake of a division of labor, would make one man maintain the children begotten by another. It would be extremely difficult to say why a husband should not be at liberty to leave a homestead to his wife, without being compelled to let her share it with a successor to his bed, and to use it as a nest to hatch a brood of strangers to his blood. Such is not the policy of the statute of wills, which allows a man to devise his land "at his

own free-will and pleasure;" nor is it the policy of the common law, which allows him to give his property on his own terms or not at all; and if he might not do the one, he would assuredly do the other: so that it is not easy to see how the cause of population would be promoted by binding his hands. To throw the widow of a landless merchant on her dower at the common law, would not do it. It may be the present policy of the country to encourage reproduction—though the time will certainly come when excess of population will be a terrific evil here, as it is elsewhere—but no political regulation, which looks no further than inducements to second marriage, will either advance or retard it.

It is therefore hard to discern the policy that has been glanced at by the text-writers. It may seem to them, as it did to the judge who ruled the cause below, that a condition in general restraint of marriage is contrary to an instinct of our nature, which it would consequently be sinful to oppose. But the intercourse between the sexes is a legitimate subject of civil regulation; for the land would be filled with violence and blood if it were not. It would be impious, if it were possible, to suppress it; but a gift on condition not to marry leaves the donee free as air to do anything, at pleasure, but divert it to uses for which it was not intended. The truth is, the notion is the product of the Roman law, adopted, as it was, with modifications, by the ecclesiastical judges; and how far the Romans were driven, by waste of life in their ceaseless wars, civil, servile, and foreign, to force the growth of population by concubinage as well as marriage, and by the imposition of a mulct upon celibacy, is matter of school-boy history. But that the rules thus borrowed have not been eventually applied by the common-law courts to land, is shown by *Goodright v. Glazier*, 4 Burr. 2512, in which it was ruled that a prior uncanceled will is not revoked by a subsequent canceled one; a precedent followed by this court in *Flintham v. Bradford*, 10 Pa. St. 82. In *Harvey v. Aston*, Com. 729, it was indeed intimated that the rule of the ecclesiastical courts, in regard to conditions, ought to be followed by the other courts, for the sake of uniformity; the absurdity of which was forcibly exposed by Lord Rosslyn, in *Stackpole v. Beaumont*, 3 Ves. 89: "In deciding questions that arise on legacies out of land," said he, "the court very properly followed the rule which the common law prescribes, and common sense supports, to hold the condition binding where it is not illegal. Where it is illegal, the condition would be rejected, and the gift pure.

When the rule came to be applied to personal estate, the court felt the difficulty, upon the supposition that the ecclesiastical court had adopted a positive rule from the civil law, upon legatory questions, and the inconvenience of proceeding by a different rule in the concurrent jurisdiction (it ought not to be called so), in the resort to this court, instead of the ecclesiastical court, upon legatory questions; which, after the restoration, was very frequent, and in the beginning, embarrassed the court. Distinction upon distinction was taken to get out of the supposed difficulty. How it should ever have come to be a rule of decision in the ecclesiastical court, is impossible to be accounted for but on this circumstance, that in the unenlightened ages, soon after the revival of letters, there was a blind superstitious adherence to the text of the civil law. They never reasoned, but only looked into the books, and transferred the rules, without weighing the circumstances, as positive rules to guide them. It is beyond imagination, except from that circumstance, how, in a Christian country, they should have adopted the rule of the civil law, with regard to conditions as to marriage."

So much for the support which the notion receives from principle; and now for the support which it receives from precedent. For the latter, we are referred to the supposed inclination of Lord Ellenborough's mind, in *Perrin v. Lyon*, 9 East, 183, thought to be intimated by his remark on a condition not to marry a man of Scottish birth, that he "saw no ground to hold the condition to be void, as being in general restraint of marriage;" whence an inference that he would have done otherwise, though the gift was of realty, had the restraint not been special. He said no more, however, than that the limited terms of the condition relieved him from the necessity of deciding the broad question; from which no more can be inferred than that he may have thought it a debatable one. The *nisi prius* opinion of our late brother Kennedy, in *Middleton v. Rice*, 6 Pa. L. Jour. 234, is more formidable, not only because of his great learning and experience, but because it furnishes the only direct authority for the notion that is to be found in the English or American books. But it is directly opposed by a solemn decision of this court in *Bennett v. Robinson*, 10 Watts, 348. True; that was the case of a conditional limitation, but, if it were contrary to the law of nature, it would be equally inoperative as a condition, either in respect to land or in respect to a legacy: it could not be good as to the one and bad as to the other. But, whether the restraint be by limitation or condition, is, in a vast majority

of cases, the effect of accident, depending on the term of expression habitual to the scrivener, who seldom knows anything of the technical difference between them. If the rule of the ecclesiastical courts were applicable to land, it would be easily evaded by using words of limitation instead of words of condition; and thus it would have no greater effect on devises in restraint of marriage, than the statute of uses had on trusts, which worked a change only in the words necessary to create them.

The difficulty in the application of the common-law rule to the case before us, is the want of an entry to determine the widow's estate for the condition broken, which is generally necessary to divest a freehold, though not to divest a term for years. Here, however, an entry was impossible, for the land was sold before the widow's marriage. Had the condition been broken before the decree, there might have been an actual entry, though perhaps even then it would not have been indispensable; but, since it has been converted, her right to the money substituted for the land, is extinguished by the simple adverse claim of it. Her administrator, therefore, is not entitled to recover.

Judgment reversed, and judgment rendered for the plaintiff for three hundred and thirty-four dollars and costs of suit.

CONDITIONS IN RESTRAINT OF MARRIAGE, ANNEXED TO LEGACIES OR DEVISES, WHEN VOID: See the subject discussed at length in note to *Coppage v. Alexander's Heirs*, 38 Am. Dec. 156.

MUSSELMAN v. ESHLEMAN.

[10 PENNSYLVANIA STATE, 304.]

PURCHASE BY ADMINISTRATOR AT HIS OWN SALE is voidable only by the beneficiaries or their heirs, who may elect, within a reasonable time after arriving at majority, whether to affirm or disaffirm such sale. Such purchase can not be disaffirmed by the beneficiaries twenty-one years after the sale, and ten years after the youngest child of the intestate has attained majority:

EJECTMENT. The land in question belonged to D. Eshleman in 1819. He died in that year. The defendant was appointed administrator, and upon a sale by order of the orphans' court purchased the land in 1824, and since then has been in possession. The plaintiff, the youngest child of the intestate, attained his majority in 1837. This action was brought in 1848. The further facts appear in the opinion.

Frazer and Parke, for the plaintiff in error.

Franklin and Stevens, for the defendant in error.

By Court, BURNSIDE, J. In the case of *Painter v. Henderson*, 7 Pa. St. 50, it is declared that the law has wisely forbidden a trustee, executor, or administrator to act in the double capacity of seller and buyer. Such a transaction is a legal fraud. But a deed in such a case is not absolutely void; and, therefore, no party to the deed, or others claiming under him, are allowed to repudiate it. Neither can strangers avail themselves of such an objection. It is voidable only by the *cestui que trust* and his heirs. Nor can the administrator purchase by a third person, with a view of having the conveyance afterwards made to himself. Where there is actual fraud, the deed is absolutely void. No actual fraud is alleged or pretended, or could be demonstrated in this case. It is true, that the land was sold at a time when lands in Lancaster county were depressed. Eshleman directed McCurdy to bid it up to sixty dollars per acre, and this was deemed by the neighborhood a full price at that time.

The guardian of the heir of Musselman, or the heirs themselves, as they came of age, had a right to elect whether they would have the land: whether they would affirm or disaffirm the sale. In what time, or on what terms, is not distinctly settled; but the election ought to be made in a reasonable time. This is not a fit case for settling that matter; it presents no question of doubt or difficulty. Here the defendant was more than twenty-one years in the actual adverse possession, and the suit was not brought until more than ten years after the youngest child reached the age of maturity. Courts of equity act in obedience to the statute of limitations: *Campbell v. Walker*, 5 Ves. 678. The cases that require twenty-one years after the heirs come of age, are cases of actual fraud, where the deed is absolutely void, or cases of after-discovered fraud, where the statute will begin to run from the discovery. This sale was voidable by the policy of the law, but the action to recover the land was too late.

Judgment affirmed.

RIGHT OF EXECUTOR OR ADMINISTRATOR TO PURCHASE AT HIS OWN SALE. Such sale is voidable at the instance of the heirs: *Pearson v. Moreland*, 45 Am. Dec. 319, and note; *Bailey v. Robinsons*, 42 Id. 540, and note citing prior cases in this series; *Buckles v. Lafferty's Legatees*, 40 Id. 752. The executor or administrator can not avoid such sale if it is ratified by the beneficiaries: *Scott's Ex'r v. Gorton's Ex'r*, 33 Id. 578, and note.

FITCH'S APPEAL.

[10 PENNSYLVANIA STATE, 461.]

SHERIFF CAN NOT APPROPRIATE MONEY REMAINING IN HIS HANDS, after payment to the execution creditor, in order to satisfy an individual debt due him by the execution debtor, as against the assignee of the latter.

APPEAL from the common pleas. The opinion states the facts.

McCormick, for the appellant.

Kunkle, for the appellee.

By Court, BELL, J. It is not pretended the sheriff's claim is sanctioned by the fee-bill. Giving to his testimony, heard in the court below, all he can possibly claim for it, we have the case of a private debt due to him individually, for services rendered to the defendant in the execution. We are thus presented with a novel attempt by a sheriff to appropriate the remaining avails of an execution in his hands, in satisfaction of his private debt, as against the assignee of the execution debtor. How the court below could have hesitated at once to dispose of such a claim, it is somewhat difficult to imagine. There is no pretense the sheriff had a lien upon the fund, and any supposed right to set off the debt due to him, as against the transferee of the defendant, or even against the defendant himself, is repudiated by all the authorities, as is shown by *Miles v. Richwine*, 2 Rawle, 199 [19 Am. Dec. 638], and *Irwin v. Workman*, 3 Watts, 357. After payment of the execution creditors, the residue of the money levied belongs to the defendant, just as the sum necessary to satisfy the execution belongs to the plaintiff. The last case is therefore directly in point, so far as the notion of set-off is involved. To permit a sheriff, or other executive officer, thus to intermingle his private affairs with his official duties, would be attended with the most monstrous results. The law, therefore, wisely forbids it. It gives him no grasp upon the money raised, further than is warranted by his writ. Beyond this, he has not a shadow of right to detain the avails of his sale, nor can he assume the character of debtor in respect to the fund, so as to invest himself with the right of one. If he has a claim against either the plaintiff or defendant in the execution, he is left to his remedy at law. But did this admit of the slightest doubt, it would vanish upon payment of the money into court. After this, any other simple contract creditor of the original defendant would come in, with the same show of reason, to demand an application of the sum in custody, in dis-

charge of his debts. In this particular the sheriff stands on no higher or better ground than any other person stranger to the legal process. In directing the money to be paid to the sheriff, the common pleas committed an error. It clearly belonged to Barron's transferee, Fitch.

Were this otherwise, the court should not have ordered the money to the sheriff, irrespective of his right to it as a creditor. Being *in gremio legis*, by the payment into court, it was the duty of the court to determine which of the claimants was entitled to it. They could not shuffle off this duty by turning round the defendant or his assignee to a suit at law.

Decree reversed, and it is ordered the said money in court be paid over by the prothonotary of the said court to the said John W. Fitch, as assignee of the said Michael Barron.

SHERIFF CAN NOT APPROPRIATE MONEY OBTAINED UNDER AN EXECUTION to the satisfaction of his own claim, before payment of the demand of the execution creditor: *Harwell v. Worsham*, 37 Am. Dec. 572.

KRAUSE v. DORRANCE.

[10 PENNSYLVANIA STATE, 462.]

ATTORNEY AT LAW, IN THE ABSENCE OF FRAUD OR NEGLIGENCE, is not liable for failure to turn over money collected to his client, until demanded so to do.

ASSUMPSIT for money had and received against two attorneys. The lower court ruled that the client need not make a demand for the money collected before bringing suit. This was assigned as error. The further facts appear in the opinion.

McCormick and Boas, for the plaintiffs in error.

Rawn, for the defendant in error.

By Court, ROGERS, J. An attorney is not liable to suit for money collected for another, till demand, or direction to remit. As is said in one of the cases, he is not considered in default until he receives orders from his principal. This principle seems to be well settled in several states, including New York, Virginia, Alabama, and Arkansas, as may be seen from the following cases: *Taylor v. Bates*, 5 Cow. 376; *Ex parte Ferguson*, 6 Id. 596; *Rathbun v. Ingals*, 7 Wend. 320; *Taylor v. Armstead*, 3 Call, 200; *Cummins v. McLain*, 2 Ark. 402; and *Mardis v. Shackelford*, 4 Ala. 493. In Maine it has been ruled by the same judge in both ways: *Staples v. Staples*, 4 Me. 532, and *Coffin v. Coffin*, 7 Id.

298. This is a case of the first impression in this state, but we feel disposed to follow the current of decisions, for we agree that for a client to sue his attorney for money collected, without notice, would be very harsh, if not reprehensible conduct; and for this reason it is, that this is the first time the point has arisen in this state, for no counsel would be so unconscientious to a brother as to sue him without demand. It is, perhaps, but an act of justice to the attorney to state, that, although not proved, yet he alleges notice was given before the commencement of the suit.

The point is not of much practical importance, as the case will seldom arise, and never unless there are some improper feelings to gratify. But, although the general rule be as stated, it is not without exception, for circumstances may exist which will dispense with the necessity of a demand; as, when the attorney has been guilty of fraud or malpractice, or of culpable negligence in not giving notice of the receipt of the money in a reasonable time; or when he puts in a sham plea for delay; or when he exhibits a manifest desire to baffle the plaintiff, and withhold from him his just demand.

Do such facts exist here as will dispense with the necessity of notice before suit brought? We think not. The defendants have been unfortunate in employing a dishonest agent, for whose fraud they are doubtless liable, but they are not culpable. They never received or pocketed one cent of their client's money, although the agent did; nor is there any evidence of any supineness on their part, or that they knew or concealed the fact of his dishonesty from their client. The most that can be laid to their charge is, that they did not immediately pay the money to their client on being informed their agent had collected it. They resisted payment under the erroneous belief that they were not liable for his acts. Nor do we think there is anything to take the case out of the operation of the rule that they plead the general issue, and put the plaintiff to the proof of a partnership.

Judgment reversed, and *venire de novo* awarded.

ATTORNEY'S LIABILITY FOR NEGLIGENCE AND WANT OF SKILL: See this subject discussed at length in note to *Fitch v. Scott*, 34 Am. Dec. 89. When liable for failure to proceed against all the parties to a note placed in his hands for collection: *Cox v. Sullivan*, 50 Id. 386.

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FARMERS AND MECHANICS' BANK v. GALBRAITH.

[10 PENNSYLVANIA STATE, 490.]

PURCHASER OF SPECIFIC TRACT OF LAND, ERRONEOUSLY DESIGNATED ON SURVEYOR'S MAP as containing a certain number of acres, can not, in the absence of deceit or fraud on the part of the grantor, recover a proportionate part of the purchase price, upon discovering that there was a less quantity of land than that shown on the map, although the land was paid for at so much per acre.

ERROR from the common pleas. The plaintiff in error, being the owner of a large tract of land, employed a surveyor to divide it into tracts, and prepare a map of the same. This was done. The defendant in error purchased one of such tracts, which was designated on the map as containing a certain number of acres. He paid for it at the rate of seventeen and one half dollars per acre for the amount thus designated. Upon discovering that, owing to an error in computation by the surveyor, the tract was marked on the map as containing a larger number of acres than was really the fact, the vendee brings this action to recover a proportionate part of the purchase price paid. Judgment below was given for the plaintiff.

Reed, for the plaintiff in error.

Moore, Biddle, and Watts, for the defendant in error.

By Court, GIBSON, C. J. The execution of a conveyance is the consummation of a purchase; after which, the parties have no recourse to each other, except for imposition or fraud. Such is the rule established by *Bailey v. Snyder*, 13 Serg. & R. 160, and several other cases, in which it was ruled that when a conveyance has been made without a survey, and a bond taken for the purchase money, the contract is definitively closed, except where the actual quantity differs so grossly from the estimate as to be evidence of deceit. Here, it is conceded, that there was no deceit, and that the difference was produced by the mistake of the surveyor; but mutual misapprehension is not a ground to recall a contract which is past and gone. Here a year had elapsed between the payment of the money and the inception of this action to recover it back; and if it were sustainable now, it would be sustainable at any time within six years from the discovery of the mistake. In *Bailey v. Snyder*, the whole contract had not been closed; for the purchaser was suing on the bond for the purchase money, and the deficiency was set up as matter of defense; here, the vendee is suing for the deficiency

as an original and independent ground of action to recover a part of the purchase money back; and, in this particular, our case is stronger than that. It is stronger, also, in another. Could the vendor have recovered beyond the stipulated purchase money, had the difference been the other way? *Glen v. Glen*, 4 Serg. & R. 488, decides that he could not. And the principle of *Bailey v. Snyder* equally holds, in cases of defect of title, as is shown by *Dorsey v. Jackman*, 1 Id. 42 [7 Am. Dec. 61], in which a purchaser, after deed executed, was not allowed to recover back the purchase money, for a defect of title, in the absence of warranty or fraud; in accordance with which, are: *McLelland v. Creswell*, 13 Id. 143; *Boar v. McCormick*, 1 Id. 166; *Frederick v. Campbell*, 13 Id. 136; *Phillips v. Scott*, 2 Watts, 318; *Galbraith v. Galbraith*, 6 Id. 117; and *Cronister v. Cronister*, 1 Watts & S. 442. All our decisions have gone upon this principle; and it would now be too late, were we so disposed, to question it.

Judgment of the court below reversed, and judgment rendered here for the defendant.

VENDEE'S RIGHT TO RELIEF IN CASE OF DEFICIENCY IN QUANTITY OF LAND: See *Morris Canal Co. v. Emmett*, 37 Am. Dec. 388; *Couse v. Boyle*, 38 Id. 514; *Jones v. Platter*, 41 Id. 408, and previous cases collected in the note thereto.

COMMONWEALTH v. MOLTZ.

[10 PENNSYLVANIA STATE, 527.]

CONFIRMATION OF REPORT OF AUDITORS APPOINTED TO EXAMINE a guardian's account is equivalent to a decree that the sum ascertained by the auditors was due and payable to the ward by her guardian, and conclusive and unimpeachable until reversed or modified on appeal.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST AN EXPRESS TRUST, in favor of the trustee or his personal representatives.

ESTOPPEL IN PAIS ARISES WHEREVER AN ACT IS DONE or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair.

NON-PAYMENT OF DEBT BY ADMINISTRATOR is not such a breach of the condition of his administration bond as will enable the creditor to sue on it before any steps have been taken to charge the administrators with a *devastavit*.

ACTION against the administrators of the defendant in error, on their official bond. The further facts appear in the opinion.

Reed, for the plaintiff in error.

Graham and Biddle, for the defendant in error.

By Court, BELL, J. A guardianship account has been settled, against the representatives of the deceased guardian, under the authority and direction of the proper tribunal. The auditors appointed for the purpose, after a full hearing of both parties, reported there was due from the estate of the late guardian, to his ward, the sum of one thousand nine hundred and seventy-two dollars and nineteen cents, after allowing the guardian a credit for the receipt of June 8, 1835. The account, thus reported, was confirmed by the court on the twelfth of December, 1845. This act of confirmation is equivalent to a decree, that the sum ascertained by the auditors, was due and payable to the ward, by her late guardian in his life-time. In this particular, it is unlike the decree in *Foult v. Brown*, 2 Watts, 214, for there the object was, to ascertain the general balance in the hands of the executors, and not how much was due to the legatees, under the will of the testator; a subject of which the orphans' court had then no jurisdiction. In this instance, the orphans' court, in the exercise of its general powers, might have compelled payment of the amount found to be due, by the representatives of the deceased guardian, just as it could have enforced payment by himself, were he living: *Bowman v. The Executors of Herr*, 1 Pen. & W. 282; unless, indeed, there be something peculiar in the case, prohibitory of the exercise of this authority. The leading inquiry then is, whether, under the facts disclosed by the evidence, the defendants, as administrators of Jacob Moltz, are at all liable to answer to the plaintiffs; and, secondly, if so, whether a recovery can be had against them in this action.

The defendants, by the course of their argument, seemed disposed to deny the indebtedness of their intestate. But this is not permissible in this proceeding. Upon that point, the decree of the orphans' court is conclusive, until it be reversed or modified on appeal. No such appeal has been taken, and, consequently, nothing can be heard in impeachment of the account accepted and confirmed.

The defendants next set up the statute of limitations as a bar to the plaintiffs' recovery. But to say nothing of the decree, which is in the nature of a judgment, and therefore not within the act, the case presents a direct and express trust, over which, in the first instance, the orphans' court has exclusive jurisdiction. The act has no terms that can be made to embrace claims of this character. This has been so repeatedly settled, that it

is only necessary to refer, among the multitude of cases, to *Thompson v. McGaw*, 2 Watts, 161, *Doebler v. Snavely*, 5 Id. 225; *Patterson v. Nichol*, 6 Id. 379.

It is obvious, this defense would not be open to the guardian, were he alive, nor is it more available to his personal representatives; for none of the statutes that have relation to remedies for the recovery of a decedent's debts, are applicable here. It is obvious, then, there is no such laches, from the mere running of time, as could operate to bar the claim of the ward against her living guardian. Were he in existence, nothing that has been suggested in the progress of the investigation could shield him from the successful attacks of the plaintiffs. It is almost needless to say, that after *Say v. Barnes*, 4 Serg. & R. 112 [8 Am. Dec. 679], and other like cases, which frown upon voluntary settlements made with and releases procured from wards, shortly after their minority, the receipt of the eighth of June would afford scarcely a cobweb resistance. Indeed, it would afford none, for it is convicted of gross error, if not stamped with fraud, by the report of the auditors and the decree of the court. One effect of this is, to set the receipt aside as entirely worthless for proof of the value of the ward's estate in the hands of the guardian.

Were, then, Jacob Moltz before us, he would stand utterly defenseless. In the present state of the record in the orphans' court, nothing but his insolvency would defeat the claim of the ward. Do his administrators occupy a more favorable position? As the plaintiffs have, *prima facie*, an undoubted legal right, the defendants must be able to answer this question very clearly in the affirmative, ere they can hope to escape.

They place their defense upon the following grounds: That, in 1835, the ward, who had shortly before attained full age, settled with her guardian, and, on receiving from him seven hundred and twenty-eight dollars and ten cents, gave him a receipt in full; that he died in 1838, leaving that receipt among his papers, and which afterwards came to the hands of his administrators, who, in August, 1843, settled a final account of their administration, ascertaining, for distribution among the heirs of the decedent, the sum of two thousand three hundred and forty-seven dollars and twenty-four cents, which sum was shortly after accordingly distributed by the administrators, without requiring refunding bonds; that the ward was married in 1842, and, though she and her husband must have known the estate of her late guardian was in course of administration,

no notice was given of her claim until April, 1844, and after the distribution of the balance in the hands of the administrators. They claim to have relied on this silence and the receipt of the ward, in neglecting or declining to take refunding bonds from the distributees; but of this there is no proof, beyond their assertion. Do these enumerated facts estop the ward from claiming the sum ascertained to be due to her, from the administrators of the guardian?—for, if they operate at all, it must be by way of equitable estoppel, springing from matters *in pais*.

It is not to be questioned, that, both in England and in this country, the courts have of late years given to the doctrine of estoppel *in pais* a much wider scope than was formerly allowed, founding themselves in equitable considerations. In pursuance of this policy, it is now established that, in all cases where an act is done, or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair, the character of an estoppel shall be given to what would otherwise be mere matter of evidence: *Stephens v. Baird*, 9 Cow. 274; *Dewey v. Field*, 4 Met. 381 [38 Am. Dec. 376]; *Congregation v. Williams*, 9 Wend. 147. In the application of this general rule, Lord Denman, in *Pickard v. Sears*, 6 Ad. & El. 469, declared, “the rule of law is clear, that, where one, by his words or conduct, willfully causes another to believe in the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter, a different state of things, as existing at the same time.” This principle was recognized in *Cregg v. Wells*, 2 Per. & Dav. 296; S. C., 10 Ad. & El. 90; and *Coles v. Bank of England*, Id. 437. To the same effect, though somewhat more strongly expressed, is the definition of a modern or equitable estoppel *in pais*, given by Mr. Justice Cowen in *Dezell v. Odell*, 3 Hill (N. Y.), 219 [38 Am. Dec. 628], as “an admission intended to influence the conduct of the man with whom the party is dealing, and actually leading him into a line of conduct which must be prejudicial to his interest, unless the party estopped be cut off from the power of retraction.” Our own cases proceed upon the same idea. Thus in *Nass v. Vanswearingen*, 10 Serg. & R. 146, it was declared, that a party who stands by at the sale of his property, though under a void authority, and encourages purchasers to bid, is guilty of a direct fraud. In such a case, a trust arises in favor of the purchaser *ex maleficio*, which chancery may execute. So if one, at a sheriff’s sale of his lands, declares a certain tract to be included in the levy,

and thereby the purchaser was induced to purchase, it gives him an equity that chancery will enforce, though the declaration was made under a misapprehension: *Buchanan v. Moore*, 13 Id. 304 [15 Am. Dec. 601]. And the effect is the same if one, seeing another acting under a delusion, stands quietly by, without giving notice of his superior right: *Epley v. Witherow*, 7 Watts, 165; *Carr v. Wallace*, Id. 400.

In all these cases, there is some ingredient which would make it a fraud in the party to insist on his legal right: *Per Sergeant, J.*, in *Crest v. Jack*, 3 Watts, 238 [27 Am. Dec. 352]. It is the presence of this fraud, either in the intention of the party, or the effect which would be worked by permitting him a negation, that distinguishes this species of estoppel, from what was so considered by the old common law. But it is obvious there can be no such fraud where the purchaser or other actor was, or ought to have been, acquainted with the subject of his action, or even had the means of knowledge and neglected to avail himself of them: *Hepburn v. McDowell*, 17 Serg. & R. 383 [17 Am. Dec. 677]; or where the silent person was himself unacquainted with the important fact uncommunicated; or where the party was not influenced to act on the faith of the false suggestion, or silence of one bound to speak; or where no injury has, in fact, arisen from the declarations or conduct complained of: *Wallis v. Truesdell*, 6 Pick. 455; *Whitney v. Holmes*, 15 Mass. 152; *Miller v. Cresson*, 5 Watts & S. 284; *Welland Canal Co. v. Hathaway*, 8 Wend. 480-482 [24 Am. Dec. 51]. To the constitution of this species of estoppel, at least three ingredients seem to be necessary; first, misrepresentation, or willful silence by one having knowledge of the fact; second, that the actor having no means of information, was, by the conduct of the other, induced to do what otherwise he would not have done; and, thirdly, that injury would ensue from a permission to allege the truth. And these three things must appear affirmatively.

In the case at hand, the injury feared by the defendants, in the event of a recovery, will, if it be felt at all, flow immediately from their neglect to exact refunding bonds from the distributees of the estate administered by them. To require such bonds is made their duty by the act of 1834. Had this duty been performed, there would have been no room whatever to question the plaintiffs' title to recover. Now, how far one derelict of duty, from which the injury apprehended must immediately spring, can aver it as a bar against another, not immediately active in inducing it, may admit of much doubt. It is not

necessary to discuss it here, for the defense set up must fail on other grounds less doubtful.

Barbara Oliver, the late ward, is proved to be so illiterate as to be unable to read or write the English language. It is evident the friends and relatives by whom she was surrounded, previous to her marriage, were but little, if any, better instructed. She married in June, 1842, and in April, 1844, her husband, the present plaintiff, instituted the proceeding, of which the present suit is the sequel. Now, how can we undertake to say that, prior to that time, and even before the distribution of the fund in the hands of the administrators, he or his wife knew of the facts subsequently developed? If we look to the result of that development, as compared with the guardian's voluntary statement submitted to her, it is scarcely to be denied a fraud was committed upon her, or, at least, she was grossly deceived. When did she make the discovery of this fraud or deceit? The defendant has not proved it was before the distribution of the intestate's estate. How can we aver it was? Probably, if the exact truth were known, it would turn out the discovery of a deficiency, to some extent, was won only by dint of inquiry, on the part of the husband, awakened to action by the dawn of some vague suspicion, which ripened not into certainty until the first report of the auditors. But it is enough that it is not shown when the knowledge was attained to by the plaintiffs. In this particular, the defense founded on estoppel, differs from a plea of the statute of limitations, which by positive law, the mere lapse of time creates a flat bar, and it is, therefore, incumbent on the party who would take his case from under the operation of the act, to prove the exception. But he who avers an estoppel, either by pleading or evidence, must establish by proofs, positive or circumstantial, every fact that essentially enters into the character of such a reply to the plaintiffs' suit. It is to be considered that the doctrine of estoppel is an exception to the general rule for the prevention of fraud, and is not to be extended beyond the reasons on which it is founded: 1 Greenl. Ev., sec. 204.

Then as to the ward's receipt of June, 1835. There was certainly misrepresentation in this; but who was the party that concocted it? Certainly not the ward. She trusted entirely to the guardian, and he deceived her. But it is said, she and her husband, knowingly, left it in the hands of the administrators, whereby they also were deceived. How does that appear? The road of inquiry was as open to them as to her. And, were this other-

wise, how is it made manifest they were influenced, by the receipt, to neglect a positive duty? All the difficulty felt originates here; and there is nothing to show the omission is at all ascribable to the plaintiffs. They had no control over it—they could neither command nor advise. There is the utter absence of proof that the action of the administrators was at all dependent on their course. One was entirely independent of the other, and it would, therefore, be dangerous to say one was influenced by the other. It is not even so asserted in the answer of the administrators to plaintiffs' petition in the orphans' court. In all this, there is the absence not only of fact, but of the precision necessary to make an estoppel. But here the defendants are again met by the objection before considered. When did the plaintiffs discover the falsity of the receipt? That it was known to the intestate, from the beginning, would seem certain. That it was not so known to the ward is also certain. Of course there was no such default as will estop her, until at least she was in possession of the fact; and the inquiry constantly recurs, When was this?

Yet the plaintiffs can not recover in this action. A decree has been procured against the administrators, in the nature of a judgment. But no steps have been taken to charge them with a *devastavit*. Without this it is settled by *The Commonwealth v. Evans*, 1 Watts, 437, and the cases there cited, that the non-payment of a debt by the administrator is not such a breach of the condition of his administration bond as will enable the creditor to sue on it, and recover his debt. We are, therefore, reluctantly compelled to turn the plaintiffs round to another action. Upon this point, and this alone, the judgment rendered below is to be affirmed.

Judgment affirmed.

CONCLUSIVENESS OF DECREES OF PROBATE COURT SETTLING ACCOUNTS AND MAKING DISTRIBUTION: See this subject discussed at length in note to *Green v. Creighton*, 48 Am. Dec. 742-744.

STATUTE OF LIMITATIONS, WHEN RUNS AGAINST TRUSTEES AND CESTUIS QUE TRUST: See the prior cases in this series cited in note to *Williams v. Oley*, 47 Am. Dec. 638; also *Collins v. Loftus*, 34 Id. 719, and note 724; *Herron v. Marshall*, 42 Id. 444, and note; *Haynie v. Hall*, Id. 427, and note.

ESTOPPEL IN PARI, REQUISITES OF: See this subject discussed, and the prior cases in this series cited, in note to *Dezell v. Odell*, 38 Am. Dec. 631; also *Thompson v. Sanborn*, 35 Id. 490, and note; *Brown v. Wheeler*, 44 Id. 550, and note; *Gray v. Allen*, 45 Id. 523. Also *Boggs v. Merced Mining Co.*, 14 Cal. 368; *Davis v. Davis*, 26 Id. 40; *Henshaw v. Bissell*, 18 Wall. 271, in which the principal case is cited

HINDS' HEIRS v. SCOTT ET AL.

[11 PENNSYLVANIA STATE, 19.]

STATUTE LIMITING JUDGMENT LIEN TO FIVE YEARS in Pennsylvania does not apply as against the debtor.

SHERIFF'S SALE OF LAND AFTER EXPIRATION OF LIEN OF JUDGMENT as limited by statute, without a revival, can not be collaterally impeached by the debtor or those claiming under him.

LIEN IS INSEPARABLE INCIDENT OF SEIZURE ON EXECUTION at common law. SHERIFF'S DEED IS NOT INVALIDATED BY NON-RETURN OR MISRECITAL OF WRIT under which the sale was made.

POSSESSION OF SHERIFF'S DEED BY REPRESENTATIVE OF DECEASED PURCHASER is *prima facie* evidence of its delivery and payment of the purchase money, though there is no receipt of payment at the foot of it.

TITLE PASSES BY SHERIFF'S DEED WITHOUT PAYMENT, it seems.

EJECTMENT by the plaintiffs, heirs of Stephen Hinds, to recover certain land purchased by him at sheriff's sale. The plaintiffs exhibited a sheriff's deed for the land, which was found among the papers of the said Stephen's administrator. The deed contained no receipt for the payment for the purchase money, and recited a *vend. ex.*, tested November 3, 1835, whereas the only *vend. ex.* shown to have been issued was tested December, 1834, and was never returned by the sheriff, but was found among his papers after his decease and returned into the prothonotary's office long after the sale. Other facts appear from the opinion. The sheriff's deed was rejected, and the defendants had verdict and judgment, whereupon the plaintiffs brought error.

Benedict, for the plaintiffs in error.

J. T. Hale, *contra*.

By Court, BELL, J. The sheriff's deed, offered in evidence by the plaintiffs, was objected to, and rejected on two grounds: first, because it was not shown the officer had authority to make sale of the land he professed to convey; and, secondly, that the lien of the judgment, upon which the process offered was founded, had expired by lapse of time. As the latter objection goes to the very root of the plaintiffs' title, it will be convenient first to consider it.

The land in dispute was sold by the sheriff, as the property of George Bell, second, and for the purposes of the present inquiry, must be so regarded. The judgment, under which the sale was made, was recovered against him on the twenty-fourth of September, 1829. A writ of *fiери facias* sur *luis* judgment, was issued to November term, 1829, and levied on the land, which was afterwards condemned by an inquisition held on the fourth of

December, 1834. On the eighth of the same month, a *vend. ex.* was issued, by virtue of which the plaintiffs allege the land was sold on the ninth of January, 1835. On the next day a deed was duly executed to Stephen Hinds, the purchaser; and this was acknowledged on the fifth of August, 1835. From this brief statement, it will be perceived, that more than five years elapsed between the rendition of the judgment and the date of the sheriff's sale. Had subsequent incumbrances intervened in the mean time, they would, undoubtedly, have taken precedence of the first judgment, which, notwithstanding the levy, must have been postponed in their favor. This, and no more, was decided in *Jameson's Appeal*, 6 Pa. St. 280, as is shown by the subsequent case of *Packer's Appeal*, Id. 277. But when the contest is, simply, between the debtor and creditor, the mere running of time, short of the period necessary to raise a presumption of payment, is not permitted to interpose between the latter and the estate of the former, as a source from whence satisfaction of the judgment may be drawn. In this respect there is no distinction recognized between real and personal estate. Both are equally subject to respond in payment of the recorded debt, when called to do so by legal process, for both are regarded as chattels in reference to their liability to be levied in discharge of judgments recovered against their owner. This point has been more than once considered, and, as I thought, settled by this court. It will, therefore, be little more than necessary to refer to the cases in which the doctrine has been reviewed, with some slight notice of the reasoning upon which it is based.

As early as the agreement called fundamental laws, settled in England, between William Penn and the freemen and planters of the province of Pennsylvania, it was established: That all lands and goods should be liable to pay debts, except where there is legal issue, and then all goods and one third of the lands only. In 1682 the liability was extended by the legislature of the infant community to one half the lands purchased before the debts were contracted, where there was issue. This principle of liability was further extended in 1688, when it was enacted that all lands and houses of a debtor should be liable to sale upon judgment and execution; with a saving of one year, after judgment obtained, in favor of the mansion tract of the debtor. This statute, which was limited to one year, was re-enacted in 1695, without limitation, and again repeated in substance by the act of 1700, when, I believe, for the first time the sheriff making the sale was directed to convey the lands sold

under his hand and seal to the purchaser. The subject was revised, with the addition of many details, by the act of 1705, and subsequent enactments, but without any alteration of the principle upon which the original law was based. Most of these statutes will be found collected in the very elaborate opinion delivered by the late Mr. Justice Kennedy, in *Bellas v. McCarty*, 10 Watts, 31, to whose researches I am indebted. Under them the common-law lien of a judgment, and the right of the plaintiff to take the lands of the defendant in execution, was perpetual against all the world. In partial regulation of this lien, statutes were from time to time ordained. Among these were the statute of frauds and perjuries of 1772, which, as against *bona fide* purchasers for value, took away the common-law relation of the judgment to the first day of the term, and confined it to the time of signing; the act of April, 1791, providing for the entry of satisfaction on the call of the defendant or of a subsequent purchaser; the act of 1794, discharging lands sold by order of the orphans' court from the lien of the debts of the intestate; and perhaps some others. Then followed the act of April, 1798, the preamble of which has been supposed to refer to the statutory provisions just cited. It recites that "the provision heretofore made by law for preventing the risk and inconvenience to purchasers of real estate, by suffering judgments to remain a lien for an indefinite length of time, without any process to continue and revive them, had not been effectual," and by its second section enacts "that no judgment to be thereafter entered in any court of record shall continue a lien for a longer term than five years from the first return day of the term of which it was entered, unless revived by *sci. fa.* within the said five years. Much difficulty was felt in construing this statute, in reference to the persons and interests to be protected by it.

In 1807, Judge Washington, who then presided in the circuit court of the United States for this district, after much deliberation, looking to the preamble and the prior state of the law, held that it extended only to the protection of subsequent purchasers for value, and did not include posterior incumbrances: *Hurst v. Hurst*, 3 Binn. 347, in note. In 1811, the same question arose in this court, in *The Bank of North America v. Fitzsimons*, Id. 342. After a very able argument, the court, looking to the generality of the enacting clause; and conceiving it to be unrestricted by the language of the preamble, held that the intention was to protect younger judgment creditors, as well as purchasers. Brackenridge, J., grounds his conclusion on

the position that a judgment creditor who has trusted his money on the faith of the security, is to be deemed a special purchaser, having an equitable interest in the land. Throughout the discussion by the bar and the bench, no one broached the notion that the act would operate to discharge the land in favor of the defendant alone. It is true, the case did not call for the expression of an authoritative opinion upon that point. But had it been supposed the statute worked an entire dissolution of the lien, under all circumstances, the course and character of the discussion must have led to an expression of such an opinion. The very silence of the judges is, therefore, pregnant with meaning, to say nothing of the general direction of their reasoning in negation of such a doctrine.

In a more modern case, however, the exact question was presented under facts involving so peculiar a hardship, imposed on the representatives of the debtor, as might naturally have led the court to strain a point in their favor, had any room been afforded for the indulgence of sympathetic feeling, or the entertainment of doubt. I allude to *Fetterman v. Murphy*, 4 Watts, 424 [28 Am. Dec. 729].

It is unnecessary to cumber this opinion with a statement of the features of that case, further than to say, that a satisfied judgment had been fraudulently revived against the representatives of a deceased debtor, long after the expiring of five years from its rendition, and his estate swept from the heirs by means of executions founded upon it. The leading point of the case was, whether the land could be so levied and sold. The learned judge who delivered the opinion of the court, after characterizing the steps taken to enforce a second payment of the judgment as a robbery, found the law was too strongly settled to enable the tribunal to afford relief as against one who was no party to the fraud. After considering the rule as it stood before the act of 1798, he proceeded to observe, that act "does not operate on the judgment, but on the lien; that is, on the right to follow the lands and take satisfaction out of them, though such proceeding may affect those who acquired an interest in them after judgment. The right to follow the lands and take the proceeds of them from those who have acquired an interest in them after judgment, is what is affected by the act of 1798. The word 'purchaser' was not introduced because it would have limited the operation and benefit of the act to purchasers, and have excluded from its benefits those who, though not strictly purchasers, had acquired some interest in or lien on the land after

judgment. 'No judgment shall continue a lien,' etc., then has no relation to the defendant in the judgment; it leaves the rights of the plaintiff as to him precisely as they stood before 1798; but it limits the rights of a creditor (unless he revives his judgment according to the act and its supplements) to five years, as respects those who purchase or acquire subsequent liens on lands bound by the judgment." I have extracted this passage, not only because it is direct to the purpose, but, being expressive of the judgment of the whole court, as shown by the succeeding remarks of the chief justice, ought to be accepted as decisive of this dispute. It is, in truth, but a recognition of a doctrine I have always understood as perfectly settled since *The Bank v. Fitzsimons*, and so accepted by every member of the profession. I received, therefore, with some surprise the intimation that a difference of opinion existed.

But the validity of this sheriff's sale does not altogether depend on the continued existence of the lien of the judgment, irrespective of the levy made under the *fi. fa.* It is not pretended that by a failure to revive the lien by *sci. fa.* the judgment creditor forfeited his debt. That, at least, still continued to exist against the defendant, and might be enforced against any property possessed by him, provided in so doing the plaintiff did not impinge upon the interests of others. The process issued for the purpose, when levied on the land, became of itself a lien, for this quality is said to be a necessary and inseparable incident of seizure in execution, by the principles of the common law: *Stauffer v. Commonwealth*, 1 Watts, 300 [26 Am. Dec. 69]; *Shaeffer v. Child*, 7 Id. 86; *Packer's Appeal*, 6 Pa. St. 277. And this is true even as against those who acquire an interest in the thing after the levy. In the first of these cases the chief justice observed: "Property seized is in the custody of the law, the end of which might be prevented if creditors could subsequently acquire a paramount interest in it. In regard to chattels this undoubtedly holds, so far as to afford the creditor an opportunity to obtain satisfaction by a reasonable pursuit of his remedy, and it equally holds in respect of land, which with us is a chattel for the payment of debts." As between debtor and creditor, the land of the former is as accessible to the latter, in payment of his debt, as would be a horse or any other personal chattel, and a complaint that either species of property was applied in discharge of an unrevived judgment is entitled to equal favor. The question, in this aspect of it, has nothing to do with the lien of the judgment.

It is simply a question whether the property of a debtor is liable to be sold in satisfaction of an execution issued against him. It would be strange indeed if, in Pennsylvania, such a debtor, seised of real estate, could hold his creditor at arm's length, until he had revived his judgment under the act of 1798. True, there ought regularly to be a *sci. fa. post annum et diem*; but this is equally necessary where the object is the seizure of personalty. It is objected there is none such here.

Had this objection been made by the defendant in proper time, the execution against him must have been set aside. But it is an irregularity insufficient to avoid the sheriff's sale, and, therefore, can not be taken advantage of in this collateral proceeding. Indeed, it lies only in the mouth of the defendant himself, to take the exception in proper time, for he may choose to, and frequently does, waive the writ of *sci. fa.* It is intended for his personal protection. Should he choose to suffer his land to be sold by execution without it, neither he, nor those claiming under him, can afterwards be permitted to call in question the validity of the sale; more especially, this can not be done, as is here attempted, in a collateral action of ejectment: *Vastine v. Fury*, 2 Serg. & R. 426; *Bailey v. Wagoner*, 17 Id. 327; *Speer v. Sample*, 4 Watts, 373.

This part of the case has been considered more elaborately than was perhaps necessary, with a view to put at rest the doubt which seems recently to have arisen.

The remaining objection to the evidence offered may be disposed of in a few words. It is true that a sheriff's sale made without the proper writ is void for want of authority. The judgment and execution must be shown. But the non-return of the latter by the officer will not affect the validity of his conveyance. The omission to make a return of these writs is of very common occurrence, and to hold it essential would, as is remarked in *Smull v. Mickley*, 1 Rawle, 95, be very hurtful to the security of many titles. For all the purposes of information to the court, the sheriff's deed may be considered a return of his proceedings.

In the instance in hand, there was a *feri facias*, levy, and condemnation of the land undisputed. There was also shown in the possession of the sheriff, a *venditioni* commanding the sale of the particular tract in pursuance of the levy. This was followed by a deed regularly executed and acknowledged by the sheriff, conveying the land to the plaintiffs' ancestor—afterwards, found in the possession of his representative. This of itself

was *prima facie* evidence of a due delivery by the officer: *Hartman v. Stahl*, 2 Pen. & W. 223; and payment of the purchase money; for, as the sheriff has the right to demand and receive payment before delivering his conveyance, it is not to be presumed, in the absence of proof, that he parted with the deed before satisfaction. Delivery being an act regularly subsequent to payment, the presumption accords with the common practice: *Scott v. Greenough*, 7 Serg. & R. 197; *Negley v. Stewart*, 10 Id. 207. Nor is this presumption rebutted by the want of the usual receipt at the foot of the deed. Upon the question of payment, this is considered as of little importance; and is frequently omitted, as being supplied by the acknowledgment contained in the body of the deed. But I take it the title passes, even without payment, by acknowledgment and delivery of the conveyance. By his return, or, what is equally efficacious, making a deed, the sheriff fixes himself for the price bid. That is a matter, thenceforth, between him and the purchaser. After this the defendant in the execution can have no title in the land, and it can not be in the sheriff. It must, consequently, be in the sheriff's vendee: *Hartman v. Stahl*, *supra*. Now what is there here to defeat this title? A misrecital of the *venditioni* in the sheriff's deed: nothing more. It is conceded, that, were this writ correctly described in the recital, the title would be perfect. But it is not to be tolerated that a mere clerical mistake like this, probably susceptible of easy explanation were the parties to the sale living, should operate to defeat a proceeding regular in every other respect. Recitals in sheriffs' deeds are of little weight, and are open to correction. Where it is plain they are inaccurate, a fatal effect is not to be ascribed to them. No one, I think can look at the connected chain of evidence offered, without being convinced of the regularity of this sale. At the very least, the judgment, execution, and deed tended to establish that fact, and all of them ought therefore to have been given to the jury. Judgment reversed, and a *venire de novo* awarded.

Mr. Justice COULTER dissented as to the first point in the case.

STATUTE LIMITING JUDGMENT LIENS DOES NOT APPLY TO DEBTOR or heirs, and a sale under a judgment revived more than twelve years after the debtor's death will divest the title of his heirs: *Fetterman v. Murphy*, 23 Am. Dec. 729, and citations in the note thereto.

EXECUTION SALE ON DORMANT JUDGMENT: See *State v. Morgan*, 47 Am. Dec. 329; *Ingram v. Belk*, Id. 591, and the cases collected in the notes thereto.

LIEN IS INSEPARABLE INCIDENT OF LEVY OF EXECUTION: *Stauffer v. Commissioners*, 26 Am. Dec. 69, and note. The levy of an execution gives a lien,

though the judgment has none: *Glass v. Gilbert*, 58 Pa. St. 289, citing *Hinds v. Scott*.

FAILURE TO RETURN EXECUTION DOES NOT INVALIDATE PURCHASER'S TITLE: See the note to *Bybee v. Ashby*, 43 Am. Dec. 52. See also *Banks v. Evans*, 48 Id. 734. So held, citing the principal case, in *Gibson v. Winslow*, 38 Pa. St. 49, 54, and in the opinion of Butler, P. J., in the court below, in *Buehler v. Rogers*, 68 Id. 11. And the sale is not invalidated because made after the return day: *Kelly v. Green*, 53 Id. 305.

MISRECITAL OF WRIT IN SHERIFF'S DEED, or variance between the deed and writ: See *Harrison v. Maxwell*, 10 Am. Dec. 611; *McGuire v. Kouns*, 18 Id. 187; *Martin v. Wilbourn*, 27 Id. 393; *Doe v. Rue*, 29 Id. 368; *Gourdin v. Davis*, 45 Id. 745; *Humphrey v. Beeson*, 48 Id. 370.

SHERIFF'S DEED WITHOUT PAYMENT IS SAID TO BE VOID, in *Chapman v. Harwood*, 44 Am. Dec. 736; and see the note to that case.

CUMBERLAND VALLEY R. R. Co. v. HUGHES.

[11 PENNSYLVANIA STATE, 141.]

RAILROAD COMPANY IS BOUND TO KEEP ROAD IN REPAIR, so that persons and property may at all proper times pass over it in safety, and is liable for injuries from neglect of this duty.

OWNER OF FREIGHT CAR INJURED BY DEFECT IN ROAD over which it is running under a "clearance" from the railroad company, owing to the company's neglect to repair, may recover therefor, though the "clearance" was obtained by another person who was at the time in possession of the car.

RAILROAD COMPANY'S LIABILITY FOR NEGLIGENCE SHOULD BE STRICTLY ENFORCED on grounds of public policy.

CASE for the loss of a car belonging to the plaintiff's testator, which was thrown from the track while running on the defendants' road under a license or clearance from the defendants. It appeared that the injury happened through the defendants' neglect to repair their road. It also appeared that the car was running on the defendants' road in charge of a conductor furnished by J. S. & J. D. Grier, who obtained a license or clearance from the company in their own names. The Griers were running the car under a private contract with the plaintiff's testator. The court charged that, although the clearance was not in the plaintiff's testator's name, and he did not pay the tolls, yet if the car was run for his benefit, he paying freight and employing the conductor, he could nevertheless recover. Verdict and judgment for the plaintiff. The defendants brought error, assigning error in the instructions.

Bard, for the plaintiff in error.

Denny, contra.

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By Court, BELL, J. This writ of error is founded in a misapprehension of the nature of the plaintiff's action. It is case for negligence, not springing, as seems to have been supposed by the defendant below, from any implied contract, originating in the clearance given by the officers of the company to Messrs. Grier. This is only valuable in the cause, as showing that the car destroyed, was placed upon the railway with the defendant's assent, and in consideration of toll paid or to be paid; which, however, might have been shown by other evidence or necessarily inferred from the fact that, at the time of the accident, the car was propelled by the company's engine. Nor has the plaintiff's right to sue any necessary connection with the express contract between his intestate and the Griers. It served the purpose, undoubtedly, of proving the car belonged to Hughes, though temporarily in the possession of the Griers. But this is not necessary to the action, which does not arise from privity of contract. The plaintiff's right to damages rests in the universal principle that he who, to the injury of another, neglects a duty that by law he ought to perform, is liable to compensate the injury, and under our system this is effected by an action on the case. This principle is as old as the common law itself: 1 Rolle Abr. 103.

Thus if a man, by prescription, is bound to repair fences between him and another, and doth not do it, whereby the cattle of the other perisheth, or enter and do damages, the defaulting party may be called to answer: *Anonymous*, 1 Vent. 265; *Star v. Rookesby*, 1 Salk. 335. So if one be bound to repair a bridge, by neglect whereof A. hath special damage: *Steinson v. Heath*, 3 Lev. 400; 11 Hen. IV. 82, 83. An artificial person is equally liable to the operation of the rule. It was applied to turnpike companies in *Randall v. The Cheshire Turnpike Co.*, 6 N. H. 145 [25 Am. Dec. 453]; *Townsend v. The Susquehanna Turnpike Co.*, 6 Johns. 90; and *Goshen etc. Turnpike Co. v. Sears*, 7 Conn. 86. In these and numerous other cases, the responsibility of such corporations for the safety and sufficiency of their road and its appurtenances, so long as they exact toll, was recognized and enforced.

The duty to keep the road in sufficient order and repair, so that persons and property may at all proper times pass in safety, is an implied one, resulting from ownership and the receipt of tolls. This duty is said to be perfect, founded in a valuable consideration, and not a mere casual or contingent one: *Bartlett v. Crozier*, 17 Johns. 451 [8 Am. Dec. 428]. It is, in truth,

a condition attendant upon a grant of the privilege to construct a public road or highway for profit, which from its very nature inures to the benefit of all who may have occasion to use the thoroughfare. To found a right of action on this general obligation, it is only necessary to show an injury to person or property, sustained through the negligence of the corporation or its servants. Where a chattel has been the subject of the injury, actual possession of it by the owner is not required. A general property in the thing injured, gives a right to sue, though no doubt one having a special interest at the moment might also sustain an action. In the present case the Griens must be regarded as the representatives of the owner, in causing the carriage to be placed on the road, under the license recited in the *narr.*; and it may, therefore, be considered as having been in the actual custody of the plaintiff's intestate, by his agents, at the moment of its destruction.

This wholesome rule of liability for neglect ought, if a distinction in practice were permitted, to be most stringently enforced against railroad corporations, whose slightest inattention to the duties they assume may be, and frequently is, attended with the most frightful results. The almost daily loss of life and property, resulting from the indifference but too often manifested by the agents of these companies, in the discharge of their obligations, carries with it an admonition that the public safety calls for a strict adherence to a rule suggested by considerations of policy and humanity.

Judgment affirmed.

DUTY OF RAILROAD COMPANY AS TO STRUCTURE AND CARE OF TRACK, especially with reference to the safety of passengers in its cars: See *McElroy v. Nashua etc. R. R. Co.*, 50 Am. Dec. 794. That it is the duty of a railway company to keep its road in repair is a point to which the principal case is cited in *Pennsylvania etc. Canal Co. v. Graham*, 63 Pa. St. 296, where it is held, on analogous principles, that a canal company bound by its statute to keep a bridge in repair, where its canal crosses a public highway, is liable for an injury to a traveler occasioned by a failure to repair such bridge.

COMMONWEALTH, USE OF STUB, v. STUB.

[11 PENNSYLVANIA STATE, 150.]

SURETY ON EXECUTOR'S BOND IS NOT LIABLE UNTIL EXECUTOR IS FIXED personally for the debt by a proper proceeding against him, whether the debt be due a creditor, legatee, or distributee.

SETTLEMENT OF EXECUTOR'S ACCOUNT showing a general balance due the estate, without any decree ascertaining the amounts due the distributees,

is not sufficient to render the executor's sureties liable on their bond to a distributee.

SURETIES ON BOND OF ONE JOINT EXECUTOR taken long after administration granted for the faithful performance of his duties stand on the same footing as sureties on original administration bonds, and are not liable until the principal is fixed.

JUDGMENT OR DECREE OF ORPHANS' COURT FIXING EXECUTOR'S LIABILITY is sufficient to sustain a suit against the sureties on his bond.

DEBT on a bond given by the defendants, Stub as principal and the others as sureties, conditioned for the faithful performance of the duties of the said Stub as one of the executors of the will of his father, Adam Stub, and that the principal should "render a true and just account of his management of the property and estate of said deceased under his care," the action being brought to recover the distributive shares of the plaintiffs as children and distributees under the will of the said Adam Stub. It appeared that letters testamentary were issued to the defendant and another as executors, on November 12, 1832; that the executors had filed an account in March, 1834, showing a balance due from them to the estate. It was to recover a part of this balance that this action was brought. The bond in suit was executed in June, 1838. It was claimed by the defendants that it was given specially as security for the just and legal administration of a certain fund in court belonging to the estate, which was on the day of the date of bond paid over to the said Stub, and that by mistake it was drawn as a general administration bond, but that it was not intended as security for assets previously received. They claimed also that although a balance appeared to be due on the administration account, yet this was not true, the heirs being indebted to the estate for advancements and for goods purchased at a sale of the effects of the estate. It is not necessary to detail the evidence which was offered by the defendants and admitted against the plaintiffs' objection, as in the court below and in the supreme court the case went off on a single point of law. The court below charged the jury that the plaintiffs could not recover, whether this was a voluntary or official bond, because the executors had not been fixed for the amount of their indebtedness to the plaintiffs. Verdict and judgment for the defendants, and the plaintiffs brought error.

N. D. Strong and W. Strong, for the plaintiffs in error.

H. W. Smith, for the defendants in error.

By Court, ROGERS, J. The liability of a surety in an official bond being contingent, suit can not be brought against a surety by a party in interest, without proceeding in the first place against the administrator or executor, and fixing him personally for the debt. This was first ruled in *The Commonwealth v. Evans*, 1 Watts, 437, in the case of a creditor; next, *The Commonwealth v. Wenrick*, 8 Id. 160, a legatee; afterwards extended in *Myers v. Fretz*, 4 Pa. St. 346, to a distributee. The first two are conceded to be ruled correctly, but doubts are expressed as to the last. The *dictum* in *Myers v. Fretz*, as applied to distributions, is said to be new, and it is insinuated that perhaps the court were inclined to extend the principle of the contingent liability of sureties beyond its legitimate limits, by the suspicion that a fraud had been attempted in that case. As *The Commonwealth v. Evans* was the first case where the principle was ruled as to creditors, so *Myers v. Fretz* was the first where it was applied to distributees. In that aspect both cases may be said to be new. It was there thought, as it is still, that the principle which governs one also governs the other; that there was no perceptible distinction between creditors, legatees, and distributees. It must be remembered that in that case, as in this, although the administrator settled his general account with the estate, disclosing a general balance in his hands, yet there was no decree of the orphans' court ascertaining the amount owing by the administrator to the respective distributees; nor has there been any judgment at common law, fixing the extent of his indebtedness. The settlement of the account exhibits only the residue of the estate after payment of debts. The payments that from time to time may be made to the distributees, form no part of the account, and when properly settled, can not appear except as an apparatus which sometimes exhibits the state of the accounts as between him and the distributees. It consequently happens that a settlement confirmed by the court may exhibit the administrator largely in arrears, when he may owe little, if anything, to the respective distributees. The report of the auditors here only ascertains that a certain sum is due the estate of George Adam Stub from the executor, but it nowhere appears how much the plaintiffs, who are some of the heirs and distributees, may have been advanced, or what debts there may be against the estate. There has been no distribution, or decree of the orphans' court ascertaining these essential matters; nor has there been any suit at law in which their rights have been

investigated and fixed. Clearly, therefore, the same reason applies to distributees, as to creditors and legatees.

But it is contended the principle ought not to be extended to this case, because this is not an original administration bond, nor a joint administration bond. That it was given in part at the instance of the co-executor, and for his security. That the co-executor petitioned for the citation, and resisted the payment to William Stub, the other executor, of any portion of the proceeds of the real estate. That a suit against the executors must be a suit against both; but the bond is given by one. To hold, therefore, as the defendants in error contend, that both executors must be prosecuted to insolvency, before the bond, specially and voluntarily given, can be made available to the distributee, of which the co-executor is one, is carrying the doctrine much further than in the case of *Myers v. Fretz*, and is defeating the very object of the bond. These suggestions are more plausible than sound. Although this is neither an original nor a joint bond, it comes within the reason of a rule designed for the protection of the sureties, who ought not to be held liable until the amount of the indebtedness of the principal is ascertained. It is not intended for the security of the co-executor alone, but for the benefit of every person interested in the estate, whether they be creditors, legatees, or distributees. Although not an original administration bond, it partakes of the nature of an original bond, and is designed for the same purpose. If, as supposed, the distributee would be bound to sue both the executors, and prosecute them to insolvency, it would present some difficulty; but I do not see the necessity of either course. It is not required that the principal should be pushed to insolvency, as may be inferred from an inadvertent expression in *Myers v. Fretz*. A judgment at law, or a decree of the orphans' court, fixing the amount of their personal responsibility, is all that is necessary as a prerequisite to suit on the bond: *Commonwealth v. Evans*, 1 Watts, 437; *Commonwealth v. Wenrick*, 8 Id. 160. Nor would it be required, under the facts disclosed, to bring an action against both the executors. A suit against William Stub, who alone sealed the bond, or, what perhaps would be the better mode, a decree against him by the orphans' court, would suffice.

As the cause is affirmed for the reasons given, it becomes unnecessary to notice the bill of exceptions to the admission of the testimony, except merely to remark that we see no material

difference between the case as now presented, and the same case reported in *Stub v. Stub*, 3 Pa. St. 251.

Judgment affirmed.

PROCEEDINGS ON EXECUTORS' AND ADMINISTRATORS' BONDS are so entirely regulated by statute, and the statutes of the different states vary so greatly, that it is exceedingly difficult to lay down general rules upon the subject. It would swell this note to undue proportions to attempt a collection of these differing statutory provisions, and we shall, therefore, content ourselves with an examination of the adjudged cases relating to the principal branches of the subject, occasionally referring to peculiarities in local legislation which have produced apparent conflict in the decisions.

BOND COULD NOT BE REQUIRED OF AN EXECUTOR BY THE ECCLESIASTICAL COURTS in England for the due administration of assets, where the testator did not direct that a bond should be given: 4 Burn's Ecc. Law, 176; 1 Wms. on Ex'rs, 6th Am. ed., 275; *Rex v. Raines*, 1 Ld. Raym. 361; S. C., 1 Salk. 299; *Jones v. Hobson*, 2 Rand. 488; *Eaton v. Benefield*, 2 Blackf. 52. But where the executor was insolvent, the court of chancery could intervene and require security, as in the case of any other trustee: 1 Wms. on Ex'rs, 6th Am. ed. 276. And, in most of the American states, bonds are required of executors the same as of administrators, except where a bond is dispensed with by an express provision in the testator's will; although in some states a bond will be required of an executor only when it appears to be necessary for the security of the estate: Id. 277, Perkins' note. When bonds are required they are governed by the same rules, with respect to the liability of the obligors, as the bonds of administrators: *Hood v. Hood*, 85 N. Y. 561.

EXTENT OF SURETIES' LIABILITY ON BONDS. 1. *Generally*.—The rule applicable to official bonds in general, that the sureties therein are liable only for the official acts and defaults of the principal, and for funds in his hands in his official capacity, applies also to administrators' and executors' bonds: *Gregg v. Currier*, 36 N. H. 200. So the principal himself is liable on his bond only for official acts and defaults. Hence, as respects any remedy for his misconduct by a proceeding on the bond, his liability and that of his sureties are co-extensive: *Wattles v. Hyde*, 9 Conn. 10; *Hobbs v. Middleton*, 1 J. Marsh. 178. "They are responsible on their bond whenever he is; and when he is not, they are not; and consequently, when they are not, he is not." *Hobbs v. Middleton*, *supra*. This is, no doubt, the general rule; but it does not follow that there can always be a recovery on the bond against the sureties whenever there can be a recovery against the principal, for although, as respects the act or default which constitutes the cause of action, their liability may be the same, he may, in certain cases, be estopped by some act or admission from making a defense which is open to them.

2. *Liability for Proceeds or Rents and Profits of Realty*.—At common law land was not assets for the payment of the decedent's debts, and the executor or administrator had nothing to do with it, except where it was devised to be sold, and even then the proceeds were equitable and not legal assets: 1 Wms. on Ex'rs, 6th Am. ed., 728, 729. And under statutes subjecting the realty of a decedent to the payment of his debts, the general rule is that it can be sold only upon an order of the probate court in case of a deficiency of the personal estate; and, subject to this contingency, it descends to the heir. In some states it has been held that the sureties on an administration bond are not liable for the proceeds of the sale of realty, even though sold under an

order of court for the payment of debts: *Beall v. Commonwealth*, 17 Serg. & R. 392; *Commonwealth v. Hilgert*, 55 Pa. St. 236. So in Maryland prior to the act of 1831, but otherwise under the provisions of that act: *Cornish v. Wilson*, 6 Gill, 299. So in Indiana under a statute requiring a separate bond to be given upon an application for an order for the sale of realty: *Reno v. Tyson*, 24 Ind. 56. But in Alabama the administration bond covers the proceeds of a sale of realty, even though a special bond is required on the application for sale: *Clarke v. West*, 5 Ala. 117. And in other states it is held that the administration of such proceeds is within the bond: *Governor v. Chouteau*, 1 Mo. 731; *Waile v. Graham*, 4 Ohio, 126. So under the express provisions of the statute in Massachusetts: *Bennett v. Overing*, 16 Gray, 268; *Hannum v. Day*, 105 Mass. 38. In Missouri it is held that the sureties are liable for a failure to account for the proceeds of a sale of realty made without an order of court: *State v. Scholl*, 47 Mo. 84. And in Indiana, where a sale is made without an order, but the probate court takes cognizance of it and requires the execution of a bond to account for the proceeds, the sureties thereon are liable for a failure to account therefor: *Fleece v. Jones*, 71 Ind. 340. But in New Jersey, where lands not specified in an order of sale were sold, the sureties of the administrator were adjudged not to be liable for the application of the proceeds: *Matter of Givens*, 34 N. J. Eq. 191. In Virginia, in some early cases, it was determined that where lands were sold under a direction in the will, the proceeds were equitable assets, and the sureties on the executor's bond were not responsible therefor: *Jones v. Hobson*, 2 Rand. 483; *Burnett v. Harwell*, 3 Leigh. 89. So in Kentucky, upon a bond executed under the statute of 1797, conditioned to account for and faithfully administer the "goods, chattels, and credits" of a decedent, it was held that the sureties were not liable for the misapplication of equitable assets; otherwise under the act of 1838: *Speed's Ex'r v. Nelson's Ex'r*, 8 B. Mon. 505. But in Pennsylvania, under a bond conditioned to account for goods, chattels, and credits, it has been held that the sureties of an executor or administrator *cum testamento annexo* are liable for the proceeds of a sale of land under a power in the will: *Commonwealth v. Forney*, 3 Watts & S. 353; *Zeigler v. Sprinkle*, 7 Id. 175. So in New York, the sureties of an executor are liable for the misapplication of the proceeds of realty sold under a direction in the will, the direction to sell being regarded as an equitable conversion of the realty into personalty: *Hood v. Hood*, 85 N. Y. 561.

Money paid to an executor or administrator by the owners of realty liable to be sold for the payment of debts and legacies, is assets for which the sureties are liable on their bond: *Fay v. Taylor*, 2 Gray, 154. So money awarded for land taken for public use, where the administrator has levied thereon and the time for redemption has expired: *Phillips v. Rogers*, 12 Met. 405. So in Pennsylvania, notwithstanding the rule in that state that sureties of an administrator are not liable for the proceeds of realty sold for the payment of debts, if the administrator embezzles the personalty, so that it is necessary to sell the realty to pay debts, the sureties of the administrator are liable to the heirs: *Commonwealth v. Keil*, 9 Phil. 140, distinguishing *Commonwealth v. Hilgert*, 55 Pa. St. 236. Where land is sold in another state, and the administrator receives the proceeds, his sureties are liable therefor: *Judge of Probate v. Heydock*, 8 N. H. 491.

As a consequence of the doctrine that realty descends immediately to the heirs under statutes making it liable for the payment of debts upon a deficiency of the personalty, subject to a contingent power of sale in the administrator, under the order of the court, the sureties of the administrator are

not, as a general rule, liable for the rents and profits of such realty collected by their principal after the intestate's death: *Brown v. Brown*, 2 Harr. (Del.) 5; *Slaughter v. Froman*, 2 T. B. Mon. 94; *Hartz's Appeal*, 2 Grant, 83; *Allen v. Burton*, 1 McMull. 249; *Hutchenson v. Pigg*, 8 Gratt. 220. So even where the word "rents" is used in the bond, that term being held to apply to rents due at the time of the decedent's death: *Wilson v. Unsell's Adm'r*, 12 Bush, 215. So where an executor is directed by the will to sell realty and fails to do so, his sureties are not liable for the rents and profits thereof, as they follow the title: *Gregg v. Currier*, 36 N. H. 200. But in Missouri the sureties of an administrator are liable for the application of rents and profits of realty received by him: *Strong v. Wilkinson*, 14 Mo. 116. So in Massachusetts, under a statute requiring an executor to account for rents, unless they are collected after his removal from office: *Brooks v. Jackson*, 125 Mass. 307. So in Alabama it is held that an executor and his sureties are liable for the rental value of land which he could have rented, but did not: *May v. Kelly*, 61 Ala. 489.

3. *Liability for Proceeds of Sale of Slaves.*—In the late slave states slaves were regarded as partaking, in some respects, of the nature of real property; and under a devise of such property to be sold, it was held in Tennessee that the proceeds were equitable assets, for which the sureties on the executor's bond were not liable: *Wall v. Allen*, 4 Baxt. 210. So where they were sold under an order of the probate court for the payment of debts, the sureties of the executor or administrator were not liable for the proceeds: *Gambill v. Campbell*, 12 Heisk. 737; *Barksdale v. Butler*, 6 Lea, 450.

4. *Liability for Assets Received from Another State.*—The sureties of an administrator are liable only for assets received within the state, or which should have been received there: *Fletcher v. Weir*, 7 Dana, 345; *Governor v. Williams*, 3 Ired. L. 152. But where the administrator of the domicile receives within the state property or funds of the decedent from an ancillary administrator in another state, his sureties are liable therefor: *Fletcher's Adm'r v. Sanders*, 32 Am. Dec. 96; *Pratt v. Northam*, 5 Mason, 95. A judgment in favor of the decedent in another state is assets there, and the sureties of the administrator of the domicile are not liable for his omission to include the same in the inventory; but if the administrator sues on the judgment within the state, and recovers and appropriates the amount to his own use, and fails to account for it, the sureties are liable: *Strong v. White*, 19 Conn. 238. So where the administrator goes into another state where the intestate died, and where no administrator has been appointed, and, without qualifying there, receives assets and brings them within the state of his appointment, his sureties are liable therefor: *Andrews v. Ivory*, 14 Gratt. 229. The sureties of an ancillary administrator are not liable for assets beyond the jurisdiction appointing such administrator: *Fletcher's Adm'r v. Sanders*, *supra*. As to liability for proceeds of a sale of land in another state, see *ante*, 2.

5. *Liability for Debt Due from Principal to the Estate.*—As a general rule, the sureties of an administrator or an executor are liable only to the extent of assets actually received by the principal; but where the assets consist, in whole or in part, of a debt due the estate from the principal, the law, from the necessity of the case, presumes that it has been paid, and therefore received by the executor or administrator, and his sureties are accountable for it: *Seawell v. Buckley*, 54 Ala. 592; *Wright v. Lang*, 66 Id. 389. And this is held to be so in *Lambrecht v. State*, 57 Md. 240, whether the executor is able to pay or not. But in *Piper's Estate*, 15 Pa. St. 533, the liability is said to extend only to cases where the administrator is able to pay the debt. So in *Spurlock*

v. Earles, 8 Baxt. 437, it is held that the sureties are liable only in case the debt could have been collected with reasonable and proper diligence if it had been due from a third person. Where, upon a sale of property of the estate, the administrator himself becomes the purchaser, the fact that the purchase is ratified by the heirs does not relieve the sureties from liability for the purchase money if not accounted for: *Todd v. Sparks*, 10 La. Ann. 668.

6. *Liability for Other Funds.*—Damages collected by an administrator under a statute, for an injury causing the death of his intestate, are assets for which he and his sureties are liable on their bond: *Goltra v. People*, 53 Ill. 224; *Glass v. Howell*, 2 Lea, 50. Where an executor, with intent to defraud his creditors, inventories his own property as property of the estate, it is held that the sureties on his administration bond are accountable for the property: *Wattle v. Hyde*, 9 Conn. 10. Profits of investments of trust funds are also assets for which the sureties are liable: *Watson v. Whitten*, 3 Rich. 224.

7. *Liability for Acts or Defaults as Trustee, Devisee, or Otherwise than Officially.*—It is settled, in some of the states, that the bond of an executor does not cover duties imposed upon him, not in his representative character, but as trustee under the will. Thus, it is held that the sureties are not liable for the executor's management of a fund set apart by the will for the support of the testator's widow: *Warfield v. Brand's Ex'r*, 13 Bush, 77; nor for a breach of duty as to property devised to him for the use of certain legatees in trust to sell and divide the proceeds: *Perkins v. Lewis*, 41 Ala. 649; or for the mismanagement of a business directed by the will to be carried on: *Carter v. Young*, 9 Lea, 210; nor for funds turned over to him as trustee for any other purpose: *Barker v. Stanford*, 53 Cal. 451; nor for breach of any duty imposed upon him in his character as a devisee under the will: *Sims v. Lively*, 14 B. Mon. 348. But in Tennessee, under the statute of 1838, sureties on an executor's bond are liable for his defaults as a trustee under the will: *Lester v. Vick*, 2 Heisk. 476; *Porter v. Moores*, 4 Id. 16. So, though the condition of the bond is not in the statutory form, if it calls for the performance of all duties "enjoined by the will:" *Walker v. Potilla*, 7 Lea, 449. So in Virginia, where property was devised to a wife for life, with directions to the executor to sell the same at her death and divide the proceeds among the testator's heirs, the sureties of the executor were held liable for his failure to pay over the proceeds upon a sale of the property: *Almond v. Mason's Adm'r*, 9 Gratt. 700. So in *United States v. Parker*, 2 McArth. 444, where an executor was directed to invest a fund bequeathed for the benefit of the legatee. So where one of two executors was constituted a trustee under the will to invest funds and pay them over to the devisees as they came of age, and the executors having rendered an account, the balance in their hands was retained by the one who was trustee, but who gave no bond as such, and such trustee afterwards returned an account upon which a decree was passed for the payment of the shares as directed by the will, upon his failure to perform the decree, an action was held to lie on the bond of both executors: *Newcomb v. Williams*, 9 Met. 525. So, where an executor was directed by the will to carry on the testator's business for the benefit of the estate, his sureties were held liable for the proceeds of such business: *Gundolfo v. Walker*, 15 Ohio St. 251.

Where an administrator is appointed a commissioner, by an order of the court, to sell property belonging to the estate, and fails to pay over the proceeds, his sureties as administrator are not liable therefor: *Rieves v. Steele*, 2 Head, 647. Nor are the sureties of an executor liable for his intermeddling with property without right or authority under the will or the statute: *Mc-*

Campbell v. Gilbert, 6 J. J. Marsh. 592. Nor for his acts or defaults as agent for the heirs or distributees, and by their authority: *Hebert v. Hebert*, 22 La. Ann. 308; *Shields v. Smith*, 8 Bush, 601. Nor are they liable for the proceeds of bonds held by the testator in trust for others which the executor collects and fails to pay over to the beneficiaries: *Quimby v. Walker*, 14 Ohio St. 193. Where the administrator of a deceased sheriff was authorized by a private statute to collect certain arrearages of taxes on a warrant committed to the sheriff, the sureties on the administration bond were held liable for the moneys so collected: *Morton v. Ashbee*, 1 Jones L. 312. Where a public administrator is appointed executor of a will and gives bond, takes possession, and administers the estate in the latter capacity, undoubtedly his sureties as public administrator will not be liable for his doings. But where he takes possession and proceeds to administer without executing a bond as executor, or giving the notice required by law, and the probate court recognizes his acts as those of the public administrator, the sureties on his bond as such administrator will be liable for his defaults: *State v. Purdy*, 67 Mo. 89. Where administration was fraudulently taken out on the estate of a living person, and the estate was squandered, the sureties were held liable on the administration bond in an action by the alleged decedent, on the ground that this was a breach of duty as administrator; but Davis, P. J., dissented, holding the liability to be merely personal: *Williams v. Kiernan*, 25 Hun, 355.

8. *Liability for Defaults Committed or Funds Received before Appointment or Execution of Bond.*—No doubt the sureties of an executor or administrator are liable generally only for faults committed and funds received after the execution of the bond. Hence, the sureties of an executor upon a bond conditioned that he "shall well and duly perform his duties as executor" are not liable for defaults prior to the making of the bond: *State v. Hood*, 7 Blackf. 127. So undoubtedly the sureties will not be liable, as a general rule, for funds received by the principal before the execution of the bond, or, *a fortiori*, before grant of administration, unless they remain in his hands when the bond is executed. But where goods are received by an administrator before letters of administration are issued under an agreement to take out letters, the presumption is that he holds them at the time of his appointment, in the absence of contrary proof, and his sureties are liable therefor: *People v. Hascall*, 22 N. Y. 188. So where an administrator receives funds in a fiduciary capacity, which he inventories as part of the estate: *Goode v. Buford*, 14 La. Ann. 102. So as to funds received by a special administrator before his appointment, while acting as agent for a prior administrator, and for which he gives a receipt to the prior administrator: *Gottsberger v. Smith*, 5 Duer, 566; *Gottsberger v. Taylor*, 19 N. Y. 150.

Where a new bond is given by an executor, pursuant to an order of the surrogate, under the statute, upon the application of parties interested that a new bond be executed, or in default thereof, that the executor be removed, the sureties on such bond will be liable for a misappropriation and loss of assets before its execution, because if the bond had not been given, the executor would have been removed: *Schofield v. Hustis*, 9 Hun, 157; *Schofield v. Churchill*, 72 N. Y. 565. So where upon a settlement of an administrator's account a balance was found due from him to the estate, and the probate court required a new bond, which was executed three days afterwards, the sureties thereon were held liable for a previous conversion: *Brown v. State*, 23 Kan. 235. So where a new bond was given after a conversion by pledging the assets for the administrator's debt, and the administrator subsequently failed to recover the same, as he might have done, the new sureties were held

liable: *State v. Berning*, 74 Mo. 87; *Wolff v. Schaeffer*, Id. 154. And where a new bond is given upon the application of the sureties in a prior bond, and a default is discovered many years afterwards, it will not be presumed to have occurred before the new bond was given, and the sureties thereon will be *prima facie* liable: *Phillips v. Brazel*, 14 Ala. 746. Generally, the sureties on an additional bond will be liable for the proceeds of property sold before, where the facts warrant the presumption that the money is still in the administrator's hands: *May v. Kelly*, 61 Ala. 489. In *Morris v. Morris*, 9 Heisk. 814, it is held that where, upon a petition of the sureties of an administrator to be released, a new bond is given, the sureties therein are primarily liable, to the extent of the penalty, first, for defaults occurring after the execution of the second bond, and second, for prior defaults; and that the sureties on the first bond are liable for the prior defaults only so far as they are not covered by the new bond. The giving of a new bond does not release the sureties on the prior bond, even though intended for that purpose, if not given for one of the causes specified in the statute: *Wood v. Williams*, 61 Mo. 63. In *Enicks v. Powell*, 2 Strobb. Eq. 196, it is held that where an additional bond is given, the sureties in the two bonds are parties to a common undertaking. Where a new bond is given upon a discharge of the sureties in a prior bond, and a *devastavit* occurs, it is held, in *Alexander v. Mercer*, 7 Ga. 549, that a bill will lie against both sets of sureties for a discovery of the amount and date of the *devastavit*, so as to charge the sureties according to their respective liabilities. Where a new bond is given, under the statute, upon an application for a sale of realty, the sureties therein are liable only for the proceeds of such sale: *Worgang v. Clipp*, 21 Ind. 119. And in *Salyers v. Ross*, 15 Id. 130, it is said that such bond is subsidiary to the administration bond, and that no action is maintainable thereon till the penalty of the administration bond is exhausted. In *Powell v. Powell*, 43 Cal. 234, it is held that where a bond given on an application for the sale of land contains the same condition as the original administration bond, the sureties on both bonds may be joined in an action for a default. Where an administrator resigns after an account showing a balance against him, and is afterwards appointed administrator *de bonis non*, giving bond as such, the sureties therein will be liable for such balance, upon the presumption that he received it as administrator *de bonis non*, although he and the sureties in the first bond are insolvent: *Modawell v. Hudson*, 57 Ala. 75.

9. *Termination of Liability*.—Of course, where the sureties in an administration bond are released by the giving of a new bond, pursuant to statute, they are not liable for subsequent defaults: *State v. Stroop*, 22 Ark. 328. Nor are the sureties liable for defaults occurring after the termination of the period of administration as limited by law: *Flores v. Houth*, 5 Tex. 329; *Jones v. Perkins*, 8 Id. 337. So the sureties on the bond of a public administrator are liable only for his defaults with respect to estates committed to him during his term of office, though he is reappointed: *Buckley v. McGuire*, 58 Ala. 226. But they continue liable for acts done after the expiration of his term in finishing the administration of estates previously committed to him: *Estate of Aveline*, 53 Cal. 259. Where an executor sells property for notes not maturing until after the expiration of his appointment, and fails to account for them, his sureties are liable: *Verret v. Belanger*, 6 La. Ann. 109. A surety who becomes administrator upon the death of his principal is liable as a surety on his former bond only for defaults occurring during the prior administration: *People v. Allen*, 86 Ill. 166. The death of a surety does not terminate his liability, and his estate is responsible for subsequent de-

faults in administration: *Mundorff v. Wangler*, 12 Jones & S. 495. Nor is his liability terminated by the revocation of the letters of administration: *Neal v. Becknell*, 85 N. C. 299. Where the will is annulled under which an executor or administrator *cum testamento annexo* is acting, his sureties remain liable for the property coming into his hands: *Crow v. Crow*, 14 B. Mon. 176. But they are not liable for property distributed by him, in good faith, in the payment of legacies: *Jones v. Jones*, Id. 373. In *Bell v. People*, 94 Ill. 230, it is held that where a decree is made setting aside a will under which an administrator *cum testamento annexo* is acting, but directing him to administer the estate as intestate property, and he continues to act, his sureties continue liable. Where an administrator is also guardian of the sole heir and distributee of the estate, and pays all the debts with a few trifling exceptions, closes his account but makes no report, charges himself in his private book with the balance on hand as due the heir, pays the ward's expenses, collects rents, etc., and a reasonable time has elapsed, his sureties as administrator are released and his sureties as guardian are liable: *Bell v. People*, 94 Ill. 230. So where an administrator becomes guardian of a distributee after a decree ascertaining his share, he is deemed to hold the same as guardian by way of retainer, and the sureties on the administration bond are not liable therefor: *Taylor v. Deblois*, 4 Mason, 131. So where an administrator becomes executor of the sole distributee, his sureties as administrator are not liable for property in his hands after the debts are paid: *Weir v. People*, 73 Ill. 192. But where an administrator who is also guardian of minor distributees receives assets from an ancillary administrator, but does not inventory or account for them or obtain an order of distribution, he is deemed to hold them as administrator and not as guardian, and the sureties on the administration bond are liable therefor: *Pratt v. Northam*, 5 Mason, 95. And it is held in *Harrison v. Ward*, 3 Dev. L. 417, and *Clancy v. Carrington*, Id. 529, that the sureties of an administrator who is also guardian of the next of kin, are not released by his returning an account and acknowledging the balance due his ward, unless the money to pay such balance is identified and retained by him as guardian. In *Wilson v. Wilson*, 17 Ohio St. 150, it is decided that to release his sureties as administrator, in such a case, he must credit himself with the fund as administrator and charge himself with it as guardian.

BREACH OF BOND OF EXECUTOR OR ADMINISTRATOR, WHAT CONSTITUTES.

1. *Neglect to File an Inventory* within the time limited by law or by the condition of the bond is no doubt a breach of an administration bond, and an action will lie before the time for rendering an account has expired: 1 Wms. on Ex'rs, 6th Am. ed., 606; *Greenside v. Benson*, 3 Atk. 252; *Minor v. Mead*, 3 Conn. 289; *People v. Hunter*, 89 Ill. 392; *Gilbert v. Duncan*, 65 Me. 469; *McKim v. Harwood*, 129 Mass. 75; *Edmundson v. Roberts*, 2 How. (Miss.) 822; *Johannes v. Youngs*, 45 Wis. 445. So a neglect or omission to include in the inventory property known to the administrator or executor: *Bourne v. Stevenson*, 58 Me. 499; *State v. Scott*, 12 Ind. 529. But neglect to file an inventory, or to include therein all the property of the estate, is no breach unless it appears that the executor had knowledge of property which ought to have been and was not inventoried: *State v. Scott*, *supra*; *Judge of Probate v. Lane*, 6 N. H. 55. Failure to file an inventory is no breach of the bond, however, where the estate has been declared insolvent by a decree of the orphans' court, in Alabama: *Edwards v. Gibbs*, 11 Ala. 292. And where a failure to file an inventory constitutes a breach, it is held, in Massachusetts,

that it will be cured by filing the inventory before suit where there are no creditors: *McKim v. Harwood*, 129 Mass. 75.

2. *Neglect to Render Accounts*, as required by statute or the condition of the bond, within the time limited, or when properly cited or decreed to account, is also a breach: 1 Wms. on Ex'rs, 6th Am. ed., 606; *Canterbury v. Wills*, 1 Salk. 152, 315; *Prindle v. Holcomb*, 45 Conn. 111; *Clark v. Cress*, 20 Iowa, 50; *Williams v. Esty*, 36 Me. 243; *Coney v. Williams*, 9 Mass. 114; *Bennett v. Russell*, 2 Allen, 537; *McKim v. Harwood*, 129 Mass. 75; *Dickerson v. Robinson*, 6 N. J. L. (1 Halst.) 195; *Ordinary v. Barcalow*, 36 Id. (7 Vroom), 15; *Matthews v. Page*, Brayt. 106; *French v. Winsor*, 24 Vt. 402; *Probate Court v. Chapin*, 31 Id. 373; *Johannes v. Youngs*, 45 Wis. 445. But though the time for rendering the account has expired without an account, it is held, in *McKim v. Harwood*, 129 Mass. 75, that the technical breach is cured by filing an account after suit commenced where there are no creditors. But in *Clark v. Cress*, 20 Iowa, 50, it is said that an account after suit commenced is no defense, and nominal damages are at least recoverable in an action by the widow and heir. A settlement with the heirs out of court is not a compliance with a condition to account when required in the probate court: *Clarke v. Clay*, 31 N. H. 393.

3. *Converting, Wasting, or Misappropriating Assets* is of course a breach of the bond: *Canterbury v. Robertson*, 3 Tyrw. 390; S. C., 1 Crompt. & M. 691; *State v. Scott*, 12 Ind. 529; *Owen v. State*, 25 Id. 371; *Edmundson v. Roberts*, 2 How. (Miss.) 822. So though the conversion takes place before inventory: *Canterbury v. Robertson*, *supra*. So where the property converted was received before the bond was executed if converted afterwards: *Owen v. State*, 25 Ind. 371. Where an administrator applies the proceeds of land upon which there are judgment liens to the payment of other debts, it is a breach for which the lien creditors may sue: *State v. Brown*, 80 Ind. 425. But where an administrator in good faith, and under the order of the court, pays off an incumbrance out of the proceeds of lands sold, no action will lie therefor on his bond, on the ground that the equity of redemption alone was sold, and that the incumbrancer must still look to the land: *State v. Schleifarth*, 9 Mo. App. 431. Suffering a fraudulent and collusive judgment to be taken against the estate, upon which realty is seized in execution, is held to be no breach of a bond conditioned to administer according to law the goods, chattels, and credits, etc., of the estate: *Gilbert v. Duncan*, 65 Me. 469. So held, also, as to a confession of judgment upon which realty is sold to pay debts posterior to those which would have been paid if the property had been brought into due course of administration: *Reed v. Commonwealth*, 11 Serg. & R. 441. Permitting waste or trespass upon the realty of the decedent by third persons is no breach of a condition to account for thrice the amount of waste and trespass after a representation of insolvency, under Maine R. S., c. 64, sec. 19, unless the estate has been represented as insolvent: *Gilbert v. Duncan*, 65 Me. 469.

4. *Non-payment of Debts, Legacies, and Distributive Shares*.—Subject to the condition that the personal liability of the administrator or executor has been previously established by appropriate proceedings, as hereinafter mentioned, the non-payment of a debt, which is a proper claim against the estate where the administrator or executor has received sufficient assets which are appropriate for its payment, is no doubt a breach of the administration bond: *Warren v. Powers*, 5 Conn. 373; *Hobbs v. Middleton*, 1 J. J. Marsh. 191, 192; *Coney v. Williams*, 9 Mass. 114, 117; *Hazen v. Durling*, 2 N. J. Eq. 133; *Washington v. Hunt*, 1 Dev. L. 475; *Lining v. Giles' Ex'r*, 3

Brev. 530. Non-payment of a claim barred by the statute of limitations, because not presented in time, is no breach: *Gookin v. Sanborn*, 3 N. H. 491. So where, in an action against an administrator for a claim barred by statute, he appeared and pleaded the statute but was afterward defaulted: *Robinson v. Hodge*, 117 Mass. 222. But where a claim barred by statute because not presented in time was afterwards presented and allowed by the administrator, and ordered paid by the court, the non-payment of it was held a breach of the bond: *Weber v. North*, 51 Iowa, 375. Non-payment of a debt contracted by the administrator himself in settling the estate for services rendered, or the like, is not a breach of the administration bond, because it is the personal debt of the administrator: *Baker v. Moore*, 63 Me. 443; *Taylor v. Mygatt*, 26 Conn. 184; and in the latter case probate fees are said to stand on the same ground. But where an administrator brought replevin for goods claimed to belong to the estate and failed in the action, and the surety on the replevin bond was compelled to pay the judgment and afterwards took judgment on motion against the administrator, the sureties on the administration bond were held liable for the non-payment of the judgment, because it was the debt of the estate: *State v. Dailey*, 7 Mo. App. 549. Where the creditor of an intestate estate has taken the note of a third person in payment, and the maker of the note proves insolvent, the sureties on the administration bond are not liable for the debt: *Rawson v. Piper*, 34 Me. 98.

Non-payment of a legacy is also a breach of an executor's bond, if the amount due and the sufficiency of the estate, etc., have previously been ascertained by a judgment or decree against the executor, as hereinafter stated: *Perkins v. Moore*, 16 Ala. 9; *American Board's Appeal*, 27 Conn. 344; *Ruby v. State*, 55 Md. 484; *Judge of Probate v. Emery*, 6 N. H. 141; *Gardolfo v. Walker*, 15 Ohio St. 251. So whether the legacy grows out of realty or personalty, if the executor is chargeable with it: *Moore v. Waller*, 1 A. K. Marsh. 488. Neglect to pay legacies is a breach of a bond conditioned to deliver and pay over the residue of the effects and credits at the close of administration "unto such person or persons respectively as the same shall be due unto:" *McLane v. Peoples*, 4 Dev. & B. L. 9. A bond conditioned "well and truly to administer" covers the duty of paying a legatee for life the interest and dividends of the fund bequeathed, and a non-payment thereof is a breach: *Sanford v. Gilman*, 44 Conn. 461. In *Fulcher v. Commonwealth*, 3 J. J. Marsh. 502, the non-payment of a legacy by an administrator *cum testamento annexo* is held not to be a breach of the administrator's bond where the bond is not in the form required of such an administrator, but is an ordinary administrator's bond.

Non-payment of a distributive share of an estate to an heir or distributee is also a breach, for which an action lies on an administration bond after the liability and default of the administrator have been duly established: *Ralston v. Wood*, 15 Ill. 159; *Tracey v. Hadden*, 78 Id. 30; *Dawes v. Sweet*, 14 Mass. 105. But if by mistake the bond contains no condition covering the interests of distributees, a refusal to distribute is no breach: *Arnold v. Babbit*, 5 J. J. Marsh. 665. And in *Barbour v. Robertson*, 1 Litt. 93, it is held that a condition "to well and truly administer according to law" does not protect the interests of distributees, but that such condition relates to creditors only.

5. *Neglect or Refusal to Deliver Assets to Successor, or to Pay into Court.*—Where an administrator or executor has resigned or been removed and fails to deliver or pay to his successor the assets in his hands or a balance due

from him to the estate, it is a breach of the bond for which an action will lie after proper proceedings to fix the principal, or, in some cases, without such proceedings: *State v. Rogers*, 1 Houst. 569; *Lane v. State*, 27 Ind. 108; *Succession of Johnston*, 1 La. Ann. 75; *State v. Bartlett*, 68 Mo. 681; *Beall v. Territory*, 1 N. M. 507; *Harrison v. Clark*, 87 N. Y. 572; *Neal v. Becknell*, 85 N. C. 299; *Franklin Co. v. McIlvain*, 5 Ohio, 200; *O'Connor v. State*, 18 Id. 225; *Martel v. Martel*, 17 Tex. 361; *Baldwin v. Dearborn*, 21 Id. 446; *Boulware v. Hendricks*, 23 Id. 667. So in *O'Gorman v. Lindeke*, 26 Minn. 93, an omission by an administrator to pay into court the amount found due on an accounting was held to be a breach for which an action would lie on his bond. But the contrary was held in *Willson v. Hernandez*, 5 Cal. 437, in case of a refusal by an administrator who had resigned, to pay into court, in accordance with its order, a balance found due from him, on the ground that the order was *coram non judge*, because the court could not constitute itself the financial agent of the estate.

6. *Other Breaches*.—Disobedience of a void judgment or decree is no breach of an administration bond: *Dickerson v. Robinson*, 6 N. J. L. 195; *Hancock v. Hubbard*, 19 Pick. 167; *Willson v. Hernandez*, 5 Cal. 437; as where the probate court made a decree that the share of an heir who was indebted to the estate should be paid to the other heirs: *Hancock v. Hubbard*, *supra*. Generally, acts of non-feasance, as well as acts of misfeasance, are breaches of the administration bond, as where the administrator neglects to collect assets: *Beall v. Territory*, 1 N. M. 507.

REMEDY ON BOND, AND STATUTES AFFECTING REMEDY.—As a general rule, the only remedy for a breach of an administration bond is by an action at law thereon: *Teague v. Dendy*, 16 Am. Dec. 643; *Hagthorpe v. Hook*, 1 Gill & J. 270; *Boston v. Boylston*, 4 Mass. 318; *Buckingham v. Owen*, 6 Smed. & M. 502; *Smith v. Everett*, 50 Miss. 575. The probate court has no jurisdiction to decree against the sureties on such a bond unless the statute expressly authorizes it: *Schnell v. Schroder*, 1 Bailey Eq. 334; *Ordinary v. Bonner*, 2 Hill Ch. 468; *Maguire's Estate*, 12 Phil. 12. Nor is a bill in equity ordinarily maintainable: *Teague v. Dendy*, *supra*; *Buckingham v. Owen*, *supra*; *Smith v. Everett*, *supra*. But there are exceptions to the rule. In *Moore v. Waller*, 1 A. K. Marsh. 488, it is held that a court of equity has jurisdiction of suits on administration bonds, notwithstanding a statute giving a remedy at law. So in Indiana under the statute of 1843, a suit in equity on an administration bond for waste was decided to be maintainable: *Anthony v. Negley*, 2 Ind. 211. And in a number of cases it is held that where an administrator dies, before his liability is fixed by judgment, order, or decree, leaving no personal representative within the jurisdiction, a suit in equity will lie against his sureties for a waste or conversion of assets: *Moore v. Armstrong*, 9 Port. 697; *Carrol v. Connet*, 2 J. J. Marsh. 195; *Carow v. Mowatt*, 2 Edw. Ch. 57; *Haines v. Meyer*, 25 Hun, 414; *Spottswood v. Dandridge*, 4 Munf. 289. And where an administrator who has given two bonds is guilty of a *devastavit* and becomes insolvent, a suit in equity is maintainable, as heretofore stated, against both sets of sureties to establish the amount and date of the acts of waste, in order to ascertain their respective liabilities: *Alexander v. Mercer*, 7 Ga. 549. So a court of equity may adjudicate on a joint administration bond coming incidentally before it, and refer the matter to a master to ascertain the respective liabilities of the parties for a *devastavit*: *Knox v. Pickett*, 4 Desau. 92, 199. A statute prescribing penalties against an administrator for not accounting is not exclusive, and does not preclude an action on his bond: *Beall v. Territory*, 1 N. M. 507. Statutes prescribing the mode of

proceeding on administration bonds may apply to bonds previously executed, because they relate only to the remedy, and are therefore not unconstitutional as impairing the obligation of contracts: *Johnson v. Koochokey*, 23 Ga. 183; as where a statute gives a right of action on such a bond to an administrator *de bonis non*: *Graham v. State*, 7 Ind. 470; *Rairden v. Holden*, 15 Ohio St. 207.

LIABILITY OF EXECUTOR OR ADMINISTRATOR MUST BE FIXED BEFORE ACTION ON BOND.—It is undoubtedly the general rule that before an action can be maintained upon the bond of an executor or administrator for a breach thereof, the default constituting the breach and the consequent personal liability of the principal must be first established by appropriate proceedings against such principal. Therefore, where the breach assigned is a failure to account, the administrator or executor must ordinarily be cited to account before the default is fixed, so as to maintain an action on the bond: *Judge of Madison County Court v. Looney*, 2 Stew. & P. 70; *Potter v. Cummings*, 18 Me. 55; *Gilbert v. Duncan*, 65 Id. 469; *People v. Corlies*, 1 Sandf. 223. But where a testamentary trustee fails to render an annual account as required by law, no order to account is necessary before suing on his bond: *Prindle v. Holcomb*, 45 Conn. 111. The statute is a sufficient order. Where the breach consists of the non-payment of a debt or claim against the estate, as the sureties on an administration bond are not guarantors, but are liable only in case the debt is a proper claim against the estate, and the principal has received sufficient assets to pay it, and has wasted or converted them, or refuses to apply them in payment—which amounts to the same thing—no action is maintainable against the sureties unless the amount of the debt, the liability of the estate therefor, the sufficiency of the assets, the fact of waste or conversion, and the consequent personal liability of the principal has been first established by the judgment or decree of a competent court in a proper proceeding against such principal duly prosecuted. There must therefore be, generally, in the absence of a statute dispensing with it, at least a judgment or decree against the administrator, or executor *de bonis intestatis*, or *de bonis testatoris*, establishing the amount of the debt and the sufficiency of the assets: 1 Wms. on Ex'rs, 6th Am. ed., 598, note; *Thompson v. Bondurant*, 50 Am. Dec. 136; *Cameron v. Justices*, 44 Id. 636; *Faulk v. Judge*, 2 Port. 538; *Thomson v. Searcy*, 6 Id. 403; *May v. Kelly*, 61 Ala. 480; *Territory v. Redding*, 1 Fla. 242; *Justices v. Sloan*, 7 Ga. 31; *Henderson v. Levy*, 52 Id. 35; *Biggs v. Postlewait*, Breese, 154 (Beecher's ed. 198); *Eaton v. Benefield*, 2 Blackf. 52; *Hobbs v. Middleton*, 1 J. J. Marsh, 180, 181; *Lee v. Waller*, 3 Metc. (Ky.) 61; *Phelps v. Sawyer*, 7 La. Ann. 551; *Lobit v. Castille*, 13 Id. 563; *Williams v. Cushing*, 34 Me. 370; *Robbins v. Hayward*, 16 Mass. 524; *Dinkins v. Bailey*, 23 Miss. 284; *Jones v. Irvine*, Id. 361; *Matter of Webster*, 5 N.J. Eq. (1 Halst.) 89; *State v. Cutting*, 2 Ohio St. 1; *Douglas v. Day*, 28 Id. 175; *Everett v. Waymire*, 30 Id. 308; *Commonwealth v. Evans*, 1 Watts, 437; *Commonwealth v. Fretz*, 4 Pa. St. 344, 346; *Commonwealth v. Moltz*, ante, p. 499; *Commonwealth v. Dill*, 1 Phil. 556; *Jones v. Anderson*, 4 McCord, 113; *Ordinary v. Hunt*, 1 McMull. 382; *Burnett v. Harwell*, 3 Leigh, 80.

But in some of the states it has been held that a prior judgment against an administrator or executor, in his representative capacity, was not a necessary preliminary to a suit on his bond: *Oldham v. Trimble*, 15 Mo. 225; *Washington v. Hunt*, 1 Dev. L. 475. Especially where judgment has been recovered against the testator or intestate, and revived against his personal representative: *Lewis v. Fagan*, 2 Id. 298; *State v. Murphy*, 7 Jones, 242. It is generally said, as in the principal case, that in order to maintain an action on an administration bond for non-payment of a debt, there must be a judgment or

decree establishing a *devastavit* against the principal: *Commonwealth v. Evans*, 1 Watts, 437; *Commonwealth v. Fretz*, 4 Pa. St. 344, 346. See also *Cameron v. Justices*, 44 Am. Dec. 636. But it is not exactly clear as to what is essential to fix an administrator or executor for a *devastavit*, so as to maintain a suit on the bond. The better opinion would seem to be, that there must be at least a judgment or decree against the administrator or executor *de bonis intestatis* or *de bonis testatoris*, and a return of *nulla bona*: *Thompson v. Bondurant*, 50 Id. 136; *Hobbs v. Middleton*, 1 J. J. Marsh. 180, 181. And in such a case, a return that the "defendant has no property upon which to levy," is insufficient, because it does not show that he has not sufficient property of the estate: *Beasley v. Mott*, 11 Rich. 354. But in some cases it is held that a return of *nulla bona* is unnecessary: *Ward v. Yonge*, 5 Ala. 474; *Jeeter v. Durham*, 6 J. J. Marsh. 228; *McCalla's Adm'r v. Patterson*, 18 B. Mon. 201. So in Alabama it was held that even an issuance of the execution on the judgment or decree was not essential, in *Burke v. Adkins*, 2 Port. 236. In his learned note to *Wheatley v. Lane*, 1 Saund. 219, Mr. Sergeant Williams, after describing the various methods by which an executor or administrator was rendered personally liable for a debt, in the courts of king's bench and common pleas, says that the most usual mode was to obtain a judgment against the administrator or executor *de bonis intestatis* or *de bonis testatoris* with a return of *nulla bona*, and then to bring debt on that judgment suggesting a *devastavit*. In accordance with this doctrine, it was held, in some early cases in Virginia and other states, that there must be three suits brought in order to reach the sureties in an administration bond and render them liable for a debt of the estate: 1. A suit against the executor or administrator in his representative capacity, with a judgment *de bonis testatoris* or *de bonis intestatis*, and a return of *nulla bona* on an execution issued thereon; 2. An action on debt on that judgment suggesting a *devastavit*, against the executor or administrator personally, and a judgment *de bonis propriis*; and, 3. An action on the bond founded upon that judgment: *Brandt on Suretyship*, sec. 494; *Brazton v. Winslow*, 1 Wash. 31; *Gordon's Adm'r v. Justices*, 1 Munf. 1; *Catlett v. Carter's Ex'rs*, 2 Id. 24; *Hairston v. Hughes*, 3 Id. 568; *Carow v. Mowatt*, 2 Edw. Ch. 57; *Stewart v. Chapline*, 4 Ohio, 98; *Justices v. Sloan*, 7 Ga. 31, 38. But the second of these actions was dispensed with by the statute of 1813, in Virginia, and by the statute of 1820, in Georgia: *Bush v. Beale*, 1 Gratt. 229; *Justices v. Sloan*, 7 Ga. 31.

In other states this second action has been held unnecessary before suing on the bond: *Thomson v. Searcy*, 6 Port. 403; *Dean v. Portis*, 11 Ala. 104; *Hobbs v. Middleton*, 1 J. J. Marsh. 189, overruling *Clarke v. Commonwealth*, 5 T. B. Mon. 99; *Clarkson v. Commonwealth*, 2 J. J. Marsh. 19. See also *People v. Dunlap*, 13 Johns. 437; *Hazen v. Durling*, 2 N. J. Eq. (1 Green), 138. So in Mississippi, under the statute, after a judgment against an administrator as such, and a return of *nulla bona*, a second action against him suggesting a *devastavit* is not required before suing on the bond: *Dobbins v. Halfacre*, 52 Miss. 561. So under the Massachusetts statute, it is sufficient to show a judgment against the executor or administrator, and a neglect to pay the same, or to turn out sufficient goods of the estate to satisfy it: *Mass. Gen. Stat.*, c. 101, sec. 19.

In Illinois, since *Biggs v. Postlewait*, Breese, 154 (Beecher's ed. 198), a statute has been passed dispensing with the necessity of establishing a *devastavit* before suing on an administration bond: *Tucker v. People*, 87 Ill. 76. Even where, after a judgment against an administrator as such, and a return of *nulla bona*, a second action against him suggesting a *devastavit* was re-

quired, before suit on the bond, it was not necessary to maintain the suit on the bond as against the administrator himself: *Mcade v. Brooking*, 3 Munn. 548.

In South Carolina it has been held, that after a judgment against an administrator in his representative capacity, and a return of *nulla bona*, the creditor, before suing on the bond, must either bring an action of debt against the administrator suggesting a *devastavit*, or cite him to account and establish a *devastavit* in the orphans' court: *Lining v. Giles' Ex'r*, 3 Brev. 530. But where, after such judgment and return, it is established by proceedings in equity, to which the administrator is a party, that he has received sufficient assets, but has applied them to debts of an inferior degree, an action will lie on the bond: *Ordinary v. Hunt*, 1 McMull. 380.

Under a statute in Arkansas, it was decided that a judgment against an administrator as such, with a return of *nulla bona*, was not sufficient to support an action on his bond, but that the judgment must be allowed, classified, and ordered paid by the probate court: *Outlaw v. Yell*, 5 Ark. 468; *Porter v. State*, 9 Id. 226; *State v. Ritter*, Id. 244; *Gordon v. State*, 11 Id. 12. But in Illinois, a creditor having a judgment against the estate can sue on the administrator's bond for a *devastavit*, though the claim has never been presented or allowed: *People v. Allen*, 8 Brad. App. (Ill.) 17.

Statutes requiring claims against decedents' estates to be allowed and ordered paid by the probate court are, in general, substitutes for the common-law method of fixing the personal liability of the administrator or executor, and such allowance and order must be obtained before suit on the administration bond: *State v. Stafford*, 73 Mo. 658; *First National Bank v. How*, 28 Minn. 150; *Probate Court v. Kent*, 49 Vt. 380; *Hood v. Hood*, 85 N. Y. 561. And non-compliance with the order of payment is sufficient to maintain an action on the bond, without any prior judgment establishing a *devastavit*: *Weber v. North*, 51 Iowa, 375; *Warren v. Powers*, 5 Conn. 373; *Brewster v. Balch*, 9 Jones & S. 63. Under the New York statute, when the plaintiff in an action on an administration bond proves an order or decree of the surrogate's court, for the payment of his claim, together with facts showing it within the jurisdiction of the court, omission to perform the decree, a certificate of the surrogate under the decree duly docketed, execution issued and returned *nulla bona*, and the bond duly assigned, a *prima facie* case is made out entitling him to a verdict under the direction of the court: *Mundorff v. Wangler*, 12 Id. 495. But the facts necessary to give the court jurisdiction to make the order must be shown: *Behrle v. Sherman*, 10 Bosw. 292. An order of distribution in the probate court, under the Tennessee code, operates as a judgment in favor of the creditors, and any creditor may, after ten days' notice, have execution for his debt, which, if returned *nulla bona*, entitles him to judgment against the sureties on the administration bond, without notice: *Cooper v. Burton*, 7 Baxt. 406. Under the Oregon statute, where a claim has been allowed by the administrator, no action will lie on the administration bond for its non-payment until proper steps have been taken in the probate court for its payment without avail: *Hamlin v. Kinney*, 2 Or. 91.

Even in those states in which it is the general rule that a prior proceeding fixing the administrator or executor personally is necessary before suing on his bond for non-payment of a debt, the rule is not universal. Thus where the administrator dies leaving no personal representative within the state, it is held that a suit may be maintained in equity upon his bond, without previously fixing his liability at law: *Moore v. Armstrong*, 9 Port. 697; *Carow v. Mowatt*, 2 Edw. Ch. 57. So where his estate is shown to be insolvent by a

tableau of distribution filed in due course of administration: *Lynch's Succession*, 14 La. Ann. 235. So where he is insolvent, though not deceased, an attachment may be awarded by the chancellor against his sureties, though no judgment has been obtained against him; where it appears that he has received sufficient assets: *Farrow v. Barker*, 3 B. Mon. 217. So especially where two bonds have been given, a suit in equity will lie without a prior judgment against the insolvent administrator to determine their respective liabilities for a *devastavit*: *Alexander v. Mercer*, 7 Ga. 549. But where an administrator dies insolvent, it is held, in *Pickett v. Gilmer*, 32 La. Ann. 991, that his insolvency must be established by judicial proceedings before suing on his bond. Under the Georgia code, a prior judgment against an administrator establishing a *devastavit* is not essential to enable a creditor to sue on his bond, where the administrator has absconded: *Henderson v. Levy*, 52 Ga. 35. Under the statutes of Massachusetts, a suit on an administration bond may, it seems, be authorized by the probate court at the instance of any person aggrieved by any act of maladministration, without any prior adjudication of the default: See Mass. Gen. Stat., c. 101, sec. 21. So in New Jersey, it is held that a general creditor who has not obtained judgment is a "party aggrieved," upon whose application a forfeited bond may be ordered by the probate court to be put in suit if a *prima facie* case of indebtedness and forfeiture of the bond is shown: *Matter of Honnass*, 14 N. J. Eq. (1 McCart.) 493.

Where a creditor has judgment against an administrator he may sue on the administration bond, under the Mississippi statute, without waiting for a final settlement of the estate: *Dobbins v. Halfacre*, 52 Miss. 561. And a creditor who has obtained a judgment against an administrator *de bonis non* may sue on the bond of the prior administrator: *Pitcher v. Drennan*, 51 Id. 873. In case of a joint administration bond by two administrators, a judgment against one, with a return *nulla bona*, is not evidence of a joint *devastavit*: *Cameron v. Justices*, 44 Am. Dec. 636.

The non-payment of a legacy or distributive share of an estate affords no ground of action on an executor's or administrator's bond, as a general rule, until there has been a judgment or decree therefor: *Judge of Madison Co. Court v. Looney*, 2 Stew. & P. 70; *Limestone Co. Court v. Coalter*, 3 Id. 348; *Pickett v. Gilmer*, 32 La. Ann. 991; *Thornton v. Glover*, 25 Miss. 132; *Dobbins v. Halfacre*, 52 Id. 561; *Judge of Probate v. Adams*, 49 N. H. 150; *Treasurer v. Hall*, 3 Ohio, 225; *Dawson v. Dawson*, 25 Ohio St. 443; *Douglas v. Day*, 28 Id. 175; *Commonwealth v. Wenrick*, 8 Watts, 159; *Municipal Court v. Henry*, 11 R. I. 563; *Ordinary v. Pettus*, 11 Rich. 543; *Mackey v. Cox*, 18 How. 100; *Canterbury v. Tapper*, 8 Barn. & Cress. 151; S. C., 2 Myl. & R. 136. But in *Williams v. Hicks*, 1 Murph. 437, and *Chairman v. Moore*, 2 Id. 22, it is held that the next of kin may sue on an administration bond without any prior proceeding against the administrator, and notwithstanding the fact that there has been no settlement. So it is held in *Roland v. Isaacs*, 15 Conn. 115, that it is no defense to an action on such a bond, by or on behalf of the distributees, that there has been no order of distribution, because it is the duty of the administrator to apply for the order. Nor is any request by the distributees to the executor or administrator to apply for such order necessary: *Davenport v. Richards*, 16 Conn. 310. Where an executor dies and has no personal representative, a legatee may, without a previous suit against him convicting him of a *devastavit*, maintain a bill in equity against his sureties, convening all the parties interested, to establish a misapplication of assets: *Spottswood v. Dandridge*, 4 Munf. 289. So where an executor absconds or conceals himself, a legatee may maintain an action on

his official bond without recourse to him in the first instance: *Commonwealth v. Wenrick*, 8 Watts, 159. In *Smith v. Lambert*, 30 Me. 137, and *Williams v. Cushing*, 34 Id. 370, it is held to be an exception to the rule requiring a judgment ascertaining the amount due where an action is brought on an executor's bond by a residuary legatee.

A decree in the probate court ascertaining the share of a distributee is sufficient for the maintenance of an action on the bond, where such share is unpaid, without any other judgment against the administrator: *Judge of Probate v. Fillmore*, 1 D. Chip. 420. And where the decree of the ordinary is of a gross sum due from the administrator to the estate, without ascertaining the shares of the distributees, it is held, in *Ordinary v. Mortimer*, 4 Rich. 271, sufficient to maintain an action on the bond by the ordinary for the benefit of those interested. A judgment or decree against the executor, without more, is held sufficient to support an action on the bond by a legatee: *Commonwealth v. Wenrick*, 8 Watts, 159, 161. The Maryland statute, requiring a return of *nulla bona* or *non est inventus* upon a judgment and execution against an administrator before suit on the administration bond, does not apply to a suit by an heir for his distributive share: *United States v. King*, 1 McArthur. 499.

An action will not lie on an executor's or administrator's bond, as a general rule, for not paying over a balance of assets in his hands to his successor without a settlement and a decree for such balance: *County Court v. Price*, 6 Ala. 36; *People v. Corlies*, 1 Sandf. 228; *Davant v. Pope*, 6 Rich. 247; *Mackey v. Caze*, 18 How. 100; *Beall v. New Mexico*, 16 Wall. 535, reversing *Beall v. Territory*, 1 N. M. 507. So in case of a public administrator, where an administrator for the estate is afterwards appointed: *Baker v. State*, 21 Ark. 405. But in Texas it is held, that to enable an administrator *de bonis non* to sue on his predecessor's bond, it is not necessary that the amount of the indebtedness should have been previously established: *Francis v. Northcote*, 6 Tex. 185. So in Ohio: *Douglas v. Day*, 28 Ohio St. 175. Certainly if the account of an administrator who has been removed has been settled by the probate court, and the balance ascertained, no further judgment is necessary to enable his successor to sue on his bond: *Treasurer v. McElvain*, 5 Ohio, 200. In *State v. Johnson*, 7 Blackf. 529, under a statute expressly authorizing the successor of a removed administrator to sue on his bond for waste, fraud, or negligence, a previous judgment for waste was held unnecessary to maintain such action. Where an administrator dies insolvent before a decree of the surrogate against him, so that compliance with the requirements of the statute before suing on his bond becomes impossible, an administrator *de bonis non* may sue in equity without such compliance: *Haines v. Meyer*, 25 Hun, 414.

Generally, an administrator and his sureties are not liable on the administration bond for a non-performance of the conditions expressed therein, without an order of the probate court requiring performance: *Ordinary v. Martin*, 1 Brev. 552. And it is equally true, that where a non-compliance with any requirement of the statute is impossible, a party aggrieved by a breach of the bond may sue therefor without compliance; as where an alleged decedent is in fact alive and sues on the administration bond for a conversion of assets by the administrator, and the requirements of the statute before suit are such as to be inapplicable to a case of that kind: *Williams v. Kiernan*, 25 Hun, 355.

JUDGMENT AGAINST ADMINISTRATOR OR EXECUTOR, effect of, against sureties on administration bond: See the note to *Heard v. Lodge*, 32 Am. Dec. 202.

In the case of guardians, the general rule is, that no suit can be maintained against them or their sureties until such guardians have been called to account before some appropriate tribunal, and the account there adjusted and the amount due determined: *O'Brien v. Strang*, 42 Iowa, 644; *Stillwell v. Mills*, 19 Johns. 304; *Critchett v. Hall*, 56 N. H. 324; *Hailey v. Boyd*, 64 Ala. 400; *Harrison v. Heflin*, 54 Id. 557; *Allen v. Tiffany*, 53 Cal. 16. While the guardian is alive, the proper tribunal is the one by which he is appointed, to wit, the probate, surrogate, or orphans' court. But upon his death, these courts have not jurisdiction to compel his administrator to render an account to them. Resort must, therefore, be had to courts of equity, which have jurisdiction to compel the administrator of a deceased guardian to account before them, and to render a decree settling such account, both as against the administrator and sureties of the deceased guardian: *Bush v. Lindsey*, 44 Cal. 124; *Wetzlar v. Fitch*, 52 Id. 638; *Chaquette v. Ortel*, 9 Pac. C. L. J. 602; S. C., 60 Cal. 594.

READING v. COMMONWEALTH.

[11 PENNSYLVANIA STATE, 196.]

MANDAMUS DOES NOT LIE WHERE OTHER EFFECTUAL REMEDY exists, but is to be invoked only in cases of the last necessity.

MANDAMUS TO MUNICIPAL CORPORATION TO REMOVE OBSTRUCTIONS and keep open a public street will not lie where no special injury to the relators is alleged, because an indictment for nuisance is an effectual remedy.

ACT LEGALIZING EXISTING NUISANCE IN STREET of a city is a mere license for its continuance, and is revocable at pleasure where there is no consideration for it.

MANDAMUS applied for by the relators to compel the councils of Reading to keep open a certain street, it being alleged that they had neglected to do so, and had allowed certain persons to encroach with their houses upon the sidewalk of said street, to the obstruction of public travel. An alternative writ was granted, to which the defendants made return, setting forth that the alleged obstructions were legalized and suffered to continue by the act of September 12, 1783, they having been in existence long before that act; that the defendants were not legally bound to open said street, because the steps prescribed by an act of 1825-6 as to opening streets in the borough of Reading had not been complied with; and that *mandamus* would not lie in this case, because there was another adequate remedy. The plaintiffs pleaded to this return that the statute of 1783 had been repealed, and that the other matters were not sufficient in law to prevent a peremptory *mandamus*. They also demurred to the return, and the defendants joined in the demurrer. Peremptory *mandamus* awarded, and the defendants brought error. The points relied on sufficiently appear from the opinion.

Barclay, for the plaintiffs in error.

J. Glancy Jones, for the defendants in error.

By Court, GIBSON, C. J. As there is one conclusive point in the cause, it might be unnecessary to consider any other. A *mandamus*, though a prerogative writ and demandable of right in a proper case, is justly said to be grantable at discretion. Hence it is that it is to be invoked only in cases of the last necessity: not where there is another effectual remedy. The principle is a clear one, and abundantly sustained, not only by the English authorities, but by the decisions of this court. Is there not then a specific remedy equally potent to which these relators might resort? True, it was said *arguendo*, and sanctioned by the court in *The King v. The Commissioners of Dean Inclosure*, 2 Mau. & Sel. 83, that an "indictment is only a proceeding *in pœnam*, and not a remedy for the future." That was a prosecution for disobedience of an order of the sessions to set out a public road: but it was held in *Rex v. Pappineau*, 1 Stra. 686, that a part of the proper sentence for a continuing nuisance, is that the defendant stand committed till he abate it at his proper costs; and such was the sentence in *The King v. Incledon*, 13 East, 164, and *The Commonwealth v. McDonald*, 16 Serg. & R. 402. The offense might indeed be pardoned, and the remedial part of the sentence frustrated; but that done, it would be a question whether a *mandamus* ought not then to be allowed. It is not to be presumed, in the first instance, however, that more than the fine and imprisonment would be remitted, or that the nuisance would be suffered to stand to the injury of the public. The nuisance, in this case, is a public one, and it does not appear, from the statement of the relators, that they have received any special injury from it to entitle them to any civil remedy whatever. The obstruction of the sidewalk is not more injurious to them than it is to the inhabitants at large; and it would consequently seem that an indictment is exclusively the means to abate it. It is proper to add that the act of 1783, legalizing, for the time being, erections in that borough—these among the rest—which were then nuisances, was no more than a license for their continuance, dependent on the will of the legislature, and consequently revocable at its pleasure. Nothing was done or suffered as a consideration of the license which, as it did not partake of the nature of a contract in any respect, it was competent for the legislature to withdraw.

Judgment reversed.

MANDAMUS WILL LIE WHERE THERE IS CLEAR LEGAL RIGHT, and no other remedy to enforce it: *Moody v. Fleming*, 48 Am. Dec. 210. And see the citations in the note to that case. See also *Board of Police v. Grant*, 47 Id. 102, and cases cited in the note thereto. The writ of mandamus, though a prerogative writ, and demandable of right in a proper case, lies only in extraordinary cases, where there would otherwise be a failure of justice. Hence it will not lie to compel a transfer of stock where an adequate remedy exists by an action at law for damages: *Birmingham etc. Ins. Co. v. Commonwealth*, 92 Pa. St. 72, 77. Nor will it lie to compel the performance of a public duty where the relator has no special and peculiar interest independent of that of the public. Hence it can not be maintained to compel the opening of an alley by a municipal corporation which it is required by statute to open, at the suit of a property holder on such alley: *Hefner v. Commonwealth*, 28 Id. 114, both citing the principal case.

NUISANCE IN HIGHWAY, WHAT CONSTITUTES, AND REMEDIES FOR: See *Stetson v. Faxon*, 31 Am. Dec. 123; *Thayer v. Boston*, Id. 157; *Martin v. Bliss*, 32 Id. 52; *Lexington etc. R. R. Co. v. Applegate*, 33 Id. 497; *Dygert v. Schenck*, 35 Id. 575; *Johnson v. Whitefield*, 36 Id. 721; *Linsley v. Bushnell*, 38 Id. 79; *French v. Brunswick*, Id. 250; *State v. Knotts*, 42 Id. 395; *People v. Cunningham*, 43 Id. 709; *Lancaster Turnpike Co. v. Rogers*, 44 Id. 179; *Vosburgh v. Moak*, 48 Id. 613, and the notes thereto. As to nuisances in public rivers, see *Martin v. Bliss*, 32 Id. 52; *Stump v. McNairy*, 42 Id. 437; *Commonwealth v. Church*, 44 Id. 112; *State v. Thompson*, 47 Id. 588; *People v. St. Louis*, 48 Id. 339; *Gold v. Carter*, 40 Id. 712; *Frink v. Lawrence*, 50 Id. 274, and notes.

PRIVATE PERSON CAN NOT COMPEL PERFORMANCE OF PUBLIC DUTY, and, therefore, such a person can not maintain a bill to compel a navigation company to repair its dams: *Buck Mountain Coal Co. v. Lehigh etc. Co.*, 50 Pa. St. 100, citing *Reading v. Commonwealth*.

INGERSOLL v. LEWIS.

[11 PENNSYLVANIA STATE, 212.]

OWNER'S ENTRY ON LAND AVOIDS STATUTE OF LIMITATIONS as against an adverse occupant, if accompanied by an explicit declaration or act of notorious dominion.

ENTRY BY OWNER'S AGENT TO SURVEY LAND AVOIDS STATUTE OF LIMITATIONS as against an adverse occupant having knowledge thereof and assenting thereto.

ACKNOWLEDGMENT OF OWNER'S TITLE BY ADVERSE POSSESSOR of land interrupts the running of the statute of limitations.

AGREEMENT BY ADVERSE POSSESSOR TO PURCHASE PART of the tract in his occupancy from the true owner, recognizing the latter's title to a larger tract, of which the whole land is a part, tolls the statute as to all.

EJECTMENT, by the trustees of William Bingham's estate, for a tract of land. Defense, the statute of limitations. The plaintiffs, to toll the statute, relied upon an entry in 1834, and an agreement by the defendant, with the attorney for the plaintiff,

iffs, in 1823, for the purchase of part of the land described as "being a part of No. 1835." The land in controversy consisted of two adjoining lots, one called the "Baker lot," and the other the "Schoonover lot." The former, the defendant purchased of one Baker; the latter, he entered upon and began to clear about the same time, and afterwards permitted it to be occupied by one Schoonover. The other facts and the rulings of the court below sufficiently appear from the opinion. Verdict for the plaintiffs, under the instructions of the court, for all the land except the Schoonover lot, and judgment thereon, and the plaintiffs brought error.

Elwell and Overton, for the plaintiffs in error.

Cone, *contra*.

By Court, ROGERS, J. This is an action of ejectment to recover possession of a tract of land, containing about two hundred acres, now in the possession of the defendant. The tract in controversy is part of a warrant in the name of Thomas Willing, containing by survey about one thousand and ninety-nine acres. To the whole tract, No. 1835, the plaintiffs have shown a clear and indisputable title.

The defendant admits the plaintiffs' title, and puts his defense exclusively on the act of limitation; proving, as he contends, a notorious adverse possession in himself, and those under whom he claims, of more than twenty-one years before the commencement of the action.

In avoidance of the defense, the plaintiffs insist that such an entry was made on the premises as bars the running of the act; and secondly, that the agreement of the twenty-second of November, 1823, signed by Lorentus Jackson, agent of Dr. Rose, who was the agent of the trustees, and the defendant, is such a recognition and admission of the plaintiffs' title as tolls the statute.

The first point is based on the uncontroverted testimony of Messrs. Goodspeed and Metcalf. This evidence admitting its truth, the court rule peremptorily not sufficient to destroy the effect of the defendant's adverse possession. From this direction we entirely dissent; for, granting the facts to be as stated, we think they toll the statute. An entry on land, as is ruled in *Altemas v. Campbell*, 9 Watts, 28 [34 Am. Dec. 494], avoids the operation of the act of limitation, if accompanied by an explicit declaration, or an act of notorious dominion, by which the claimant challenges the right of the occupant. So where a person

enters *animo clamandi*, as where he enters and surveys the land, it operates as a bar to the act of limitation; and where the intent with which the entries are made is doubtful, the question of intention must be submitted to the jury: *Miller v. Shaw*, 7 Serg. & R. 129.

The learned judge admits the principle ruled in *Altemas v. Campbell*, but denies that there is such an explicit declaration, such an act of notorious dominion as brings the case within the principle there decided. He instructs the jury, as a matter of law, that the entry, as testified to by the witnesses named, did not toll the statute, a charge which, with all respect, is in direct opposition to *Miller v. Shaw*, as above cited. Goodspeed and Metcalf, whose testimony is incontestable, prove unequivocally that in April, 1834, Goodspeed, as the agent of the plaintiff, surveyed the whole of the land now in controversy, including not only the old lot, as it is called, on which Lewis resided, but also the Schoonover lot, lying north of the old lot, and running to the New York line; and further, that the surveys were made with the knowledge, and, if Metcalf is believed (and there is no reason to doubt his testimony), with the assent and concurrence of Lewis. In view of these facts, if believed by the jury, the plaintiff had a right to claim a binding direction that they toll the statute. There was an actual entry on the land, by the agent of the owner, with the avowed object of claiming the land, accompanied with an unequivocal act of dominion or ownership, by making the survey with the knowledge and assent of the person in possession. It is a stronger case than *Miller v. Shaw*, for here we are not left in doubt that the person making the survey was the agent of the owner. He enters *animo clamandi*, which tolls the statute, as is there ruled.

We agree with the court, as far as they go, as to the effect of the agreement of the twenty-second of November, 1823, between Robert H. Rose, as attorney of the devisees of William Bingham, and the defendant. The court decide that it tolls the act as to the one hundred and four acres purchased by Lewis, but that it is no recognition or admission of the plaintiff's title to the remainder of the tract, including the sixty-two acres adjoining the New York line. It must be remembered that it is conceded that the plaintiffs had a clear and indisputable title at the time of the contract to all the land embraced in the warrant No. 1835, warranted and surveyed in the name of Thomas M. Willing, which includes not only the Baker lot, but the Schoonover lot also.

Now what is the meaning of the sentence in the latter clause of the agreement, which, after reciting the purchase of the one hundred and four acres, concludes with the words, "being a part of No. 1835"? For what purpose were they introduced? Is it not and was it not intended as an express admission, that the one-hundred-and-four-acre lot was part and parcel of the warrant No. 1835, of which the plaintiff was the uncontested owner? Is it not a clear recognition of title to all the land embraced in that warrant? If so, there is an end to the defense; for, after admitting the title, he shall not afterwards be permitted to dispute it, so as to give title to himself by the act of limitation, for that would enable the defendant to commit fraud by putting the plaintiff off his guard. With such an agreement as this in his hands, would it ever enter the mind of the plaintiff, that after purchasing part of the tract, he would attempt to toll the remainder by virtue of an adverse hostile possession? If Lewis, at the time of the contract, knew that the plaintiff was the owner of all the land included in the warrant, it was his duty to state openly and explicitly, that as to the warrant he held adversely. But, instead of pursuing this honest course, he signs the agreement, the evident effect of which was to deceive the plaintiff. That the acknowledgment of the owner's title interrupts the running of the statute is ruled in *Sailor v. Hertzogg*, 2 Pa. St. 184; in *Criswell v. Allemus*, 7 Watts, 581; and in other cases which might be cited. Mr. Justice Kennedy says in *Criswell v. Allemus*, that it is sufficient to prevent the possession from being adverse, that the party taking possession intends to occupy the land subject to the will of the owner; and that if this be made to appear clearly by the evidence, the statute of limitations will form no bar to the owner's possession, whenever he demands it.

And in *Sailor v. Hertzogg*, the chief justice says: "How can his intention be made to appear by anything else than his declaration, which has always been received as evidence of the nature of an occupant's possession?" Here we have a written recognition of the plaintiff's title, which tolls the statute.

Judgment reversed, and a *venire de novo* awarded.

ENTRY BY TRUE OWNER TO AVOID STATUTE OF LIMITATIONS running in favor of a disseisor: See *Allemas v. Campbell*, 34 Am. Dec. 494; *Watson v. Gregg*, 36 Id. 176; *Campbell v. Wallace*, 37 Id. 219, and notes. A formal entry *animo clamandi*, or an act of notorious dominion challenging the right of the occupant, will avoid the statute: *Douglass v. Lucas*, 63 Pa. St. 12. An entry and making a survey, claiming title, by one having a paramount right, tolls the statute: *Hole v. Rittenhouse*, 19 Id. 309. So where the claim-

ant enters for the purpose of surveying an entire tract, of which that in controversy is a part, the occupant not objecting nor declaring his title, the facts should be left to the jury, and it is error to rule the entry insufficient: *Hoope v. Carver*, 15 Id. 525. An entry by an agent must be with the avowed object of claiming the land for the principal, or it will be insufficient, but the avowal may be by acts significant of the intent as well as by words: *Hood v. Hood*, 25 Id. 417, 423. The mere act of making a survey, unless it be *animo clamandi*, is not a sufficient entry: *McCombs v. Rowan*, 59 Pa. St. 414, 418. In all the foregoing cases *Ingersoll v. Lewis* is cited as authority.

ACKNOWLEDGMENT OF TRUE OWNER'S TITLE interrupting the running of the statute of limitations in favor of an adverse possessor, what sufficient, and what not: See *Daniel v. Ellis*, 10 Am. Dec. 707; *Mitchell v. Walker*, 16 Id. 710; *Crane v. Marshall*, 33 Id. 631; *Watkins v. Peck*, 40 Id. 156.

REARICH v. SWINEHART.

[11 PENNSYLVANIA STATE, 233.]

EVIDENCE OF VERBAL UNDERSTANDING CONTEMPORANEOUS WITH WRITTEN AGREEMENT, absolute on its face, is admissible to control or defeat it in Pennsylvania, when necessary to prevent fraud originally intended or subsequently attempted in the use of the instrument. Thus, in case of a written agreement between a father and son for the conveyance to the latter of certain land, to be paid for at a specified price one year after the father's death, where the father's executors attempt to enforce payment, evidence of an understanding at the time of the agreement that the land was to be the son's portion, and was not to be paid for unless the father should come to want, but that the title should remain in such a condition that the father could resort to the land for his support, if necessary, is admissible to defeat the action.

EVIDENCE OF SUBSEQUENT DECLARATIONS OF PARTY TO WRITTEN AGREEMENT is admissible to corroborate proof of a contemporaneous verbal understanding controlling or defeating the written agreement.

WRITTEN AGREEMENT SHOULD NOT BE MODIFIED OR OVERTHROWN BY PAROL without clear and satisfactory proof, but of this the jury must judge.

UNDER PLEA OF COVENANTS PERFORMED, upon notice to the plaintiff, the defendant may give any matter in evidence which he might have pleaded.

OBJECTION TO WANT OF NOTICE OF SPECIAL MATTER of defense admitted in evidence can not be taken in the appellate court unless the evidence appears to have been specifically objected to on that ground in the court below.

TENDER BY EXECUTOR OF DEED EXECUTED BY TESTATOR in his life-time, in accordance with a direction in the will, is good.

COVENANT ON an agreement executed by the plaintiffs' testator, Henry Rearich, deceased, and the defendant, Christian Rearich, son of the said Henry, whereby the former covenanted to convey to the latter certain land at a certain price, and the latter covenanted

to "pay the whole amount what arises from said tract" one year after the father's death. Pleas, covenants performed and release. The plaintiffs offered in evidence, among other matters, the testator's will, dated thirteen years after the agreement, which stated in substance that his sons had been provided for in purchases of land under certain agreements, which he wished to be carried out, and that he had executed deeds therefor of the same date as the will, which he directed to be delivered at or before his death. And the plaintiffs also offered in evidence a deed to the defendant, executed as stated in the will, with proof of a tender thereof by one of the executors, with a release of dower by the testator's widow, and a prior tender of the deed without the release by one executor in the other's presence. The evidence was admitted against the defendant's objection that there was no authority for the tender, and the defendant excepted, which constituted the first bill of exceptions. The defendant then offered proof successively of the following facts: 1. A parol understanding between the defendant and his father when the agreement sued on was executed, to the effect that the former was to have the land as his portion of the estate, but was not to pay for it unless the father should be in needy circumstances, but that the title papers should be so arranged that the father could resort to the land for support if necessary. 2. Declarations by the father at the execution of his will that the land was to be the defendant's, and that he was not to pay for it. 3. Other declarations to the same effect before and after the making of the will. 4. Evidence of the value of the land at the time of the agreement. 5. Evidence of the parol understanding at the time of the agreement, offered a second time in connection with the subsequent declarations above mentioned. These several offers were rejected, and constituted the grounds of the second, third, fourth, fifth, and sixth bills of exceptions. Verdict for the plaintiffs directed by the court, and the defendant brought error.

Casey and Merrill, for the plaintiff in error.

Slenker and Miller, contra.

By Court, BELL, J. In Pennsylvania, perhaps, the door has been opened wider than elsewhere for the admission of parol proof to reform, modify, and even to extinguish a written instrument, in cases of fraud, mistake, or trust. Of the wisdom of this liberality, or, it may be, laxity, much diversity of opinion has been entertained and expressed. But it is now too late

to question the doctrine, since the long series of cases, from *Hurst v. Kirkbride*, cited in 1 Binn. 616, down to the recent determination in *Renshaw v. Gans*, 7 Pa. St. 117, with very little wavering, establish the rule, that with us, oral proof of the acts and declarations of the parties at or about the time of the execution of the writing, is receivable to affect it, unless, indeed, these be in direct and express contradiction of the instrument. An instance of this exception is afforded by *Heagy v. Umberger*, 10 Serg. & R. 339, where, by the terms of a written assignment, the assignor declined to guarantee the solvency of the obligor; it was held that parol evidence was inadmissible to show an undertaking to guarantee, there being no allegation of a mistake or omission by the scrivener, though, as was afterwards said in *Lyon v. The Huntingdon Bank*, 14 Id. 283, had deceit been averred, the case would have been different. In *Bollinger v. Eckert*, 16 Id. 424, it was ruled, that whatever material to the contract was agreed to when the bargain was concluded, and the article in course of preparation, may, if not expressed in the article, be proved by parol, unless, perhaps, it is expressly contrary to the writing. But in the instance now in hand, it is unnecessary to speculate upon the extent to which the rule has been carried, or to invoke the aid of the principle in its general application, since our books furnish us with determinations of undisputed authority, that must be accepted as ruling the question here presented. These cases ascertain that a deed or other instrument, absolute and unconditional upon its face, may be controlled or otherwise defeated by a contemporaneous verbal understanding, or a series of facts constituting an adverse equity, where a recognition of these is necessary to defeat fraud.

Of this class is *Hartzell v. Riess*, 1 Binn. 289, where a defendant was permitted to answer in bar of a *scire facias sur* judgment, that when he executed the bond and warrant of attorney the plaintiff agreed to cancel it upon the performance of a collateral act by the defendant, which had been performed since the entry of the judgment. To the same effect is *Parke v. Chadwick*, 8 Watts & S. 98, in which an absolute conveyance was overturned by oral proof that it was given and accepted as a security for the payment of a debt, and to be surrendered when that was discharged: *Miller v. Henderson*, 10 Serg. & R. 290, the soundness of which has been repeatedly recognized, touches still more nearly our case. There three single bills executed by the defendant as the surety for one Patton, were disproved as evi-

dences of debt by testimony showing that their execution and delivery by the defendant was induced by the declaration of the plaintiff that the signature of the former was required as mere form, and that he should never be called on for payment. "It is objected," said Chief Justice Tilghman, "that no adjudged case goes so far as the present; because here the evidence is in total destruction of the defendant's obligation. But the principle is the same, whether the obligation be destroyed in whole or in part. In either case it is broken in upon. The destruction of a written instrument by parol evidence may seem dangerous, and in fact it is so. But the community would be in a still worse condition if it were established as an inflexible rule that when a man's hand was once got to an instrument, no matter by what means, the door should be shut against all inquiry."

This was followed by *Lyon v. The Huntingdon Bank*, 12 Serg. & R. 283, than which it would be difficult to produce an adjudication more strongly illustrative of the doctrine we are considering, or one furnishing a clearer light to guide us to a correct conclusion. It was an action of debt brought upon a bill single, executed in satisfaction of a prior promissory note, drawn by the defendant in favor of the plaintiff for ten thousand dollars. Though several years had elapsed between the first and last transaction, the defendant was permitted to prove in bar of the action, that when the first note was given, certain securities held by the defendant were assigned to the plaintiff, under the express stipulation and agreement that those should be looked to as the source of payment, and that the defendant was in no event to be held liable upon his notes. In delivering the opinion of the court, the late chief justice, after stating the general rule prohibitory of the introduction of parol proof to control or alter a written agreement, observed: "But the evidence offered in this case does not fall within that rule. It was not pretended that there was anything wrong in the single bill, or that any alteration whatsoever should be made in it. The object of the evidence was to show that it was subject to an agreement, made long before its date;" and he then proceeded to make it manifest that, under such circumstances, a chancellor would grant relief upon the ground that the attempt to enforce payment was fraudulent and against conscience. As authority, favoring the receipt of parol testimony to prevent fraud, it goes further than those cases which confine such testimony to what occurred at the execution of the written instrument; but all proceed upon the same

principle, forbidding the fraudulent application of a rule in itself intended to prevent fraud.

To the cases already cited may, I think, fairly be added *Hain v. Kalbach*, 14 Serg. & R. 159 [16 Am. Dec. 484], which recognizes fully the power of a parol understanding or agreement to defeat, in whole or in part, a specialty for the payment of money, where the understanding was the inducement leading to the execution of the specialty.

Nor is it essential to the admission of parol evidence that a fraud was originally intended. It is enough that, though the parties acted in mutual good faith at the inception of the transaction, an attempt is made to wrest the instrument to a purpose not contemplated, or use it in violation of the accompanying agreement. It is as much a fraud to obtain a paper for one purpose, and use it for a different and unfair purpose, as to practice falsehood or deceit in its procurement. The primary honesty of purpose but adds to the moral turpitude of the subsequent effort to escape from it; or when moral guilt can not be imputed, as perhaps in our case, a legal delinquency attaches upon an attempted abuse of the writing sufficient to subject it to the influence of the oral evidence: *Lyon v. The Bank*, *supra*; *Oliver v. Oliver*, 4 Rawle, 141 [26 Am. Dec. 123]; *Parke v. Chadwick*, 8 Watts & S. 98; *Renshaw v. Gans*, 7 Pa. St. 117. What is the contest before us? In answering this question, we must accept the offers made by the defendant below as founded in truth, and capable of proof. These present us a case in which a father, with a view to the division of his estate, induces his son to enter into a contract for the purchase of a piece of land at a certain price, but subject to an express stipulation, that unless the future necessity of the father should compel it, no part of the purchase money was to be called for, and that in the event of the father dying without being compelled to make the call, the land was to be held by the son, free of claim, as his purpart of the ancestor's estate. The chance of thus escaping payment was the inducement for assuming the possible burden of the contract; but that possibility having passed, the effort of the executors is to convert the agreement into an instrument of profit, for the benefit of the devisees named in the father's will, irrespective of the rights of the son under it. This is a fraud upon the alleged contemporaneous agreement, sufficient, under the principles reviewed, to open the way for the rejected proof.

But the court below seems to have been misled by the idea that there was something in the deed and will made by the testator which forbade its introduction. I confess that, looking to the original written agreement, the deed executed, and the will, I am inclined to the opinion that they rather favor than repel the allegation of an oral arrangement. But were this otherwise, nothing contained in either of the latter instruments can be allowed to exclude the offered proof, for the simple reason that the posterior acts of the testator are of themselves incompetent, either to affect the original arrangement between the father and the son, or to change the medium of proof.

What has been said, we think, makes it clear the evidence mentioned in the first bill of exceptions ought to have been received. But this necessarily draws with it all the subsequent declarations of the testator on the same subject, not as explanatory of the deed, or elucidating the meaning of the will, but as corroborative of the original agreement. Having first proved that, there remains no technical difficulty barring the introduction of subsequent recognitions of it, to which frequent repetition might lend a powerful effect. This course of remark is not, however, intended to make us oblivious of the danger attendant upon the introduction of oral evidence in cases like the present. Of this we are fully sensible; and juries, upon whom devolve the duty and responsibility of weighing its value and estimating the degree of credit to which it may be entitled, should be warned against the indulgence of easy credulity, and instructed that the overthrow or modification of a solemn written agreement can only be safely ventured under clear, distinct, and entirely satisfactory proofs. Yet, to judge of this belongs to them; we can but declare the competency of the evidence; it is theirs to award the credit due to it.

But it is urged, the rejected matter was inadmissible under the pleadings in the cause.

The plea is, covenants performed. Under this plea, ever since *Bender v. Fromberger*, 4 Dall. 439, upon notice to the plaintiff, the defendant may give anything in evidence which he might have pleaded.

But, certainly, under the written rules of the common pleas of Union county, notice of the special line of defense assumed below was requisite; and, had this objection been specifically made on the trial, it would have been difficult, if not impossible, to answer it. But we never sustain the objection in this court, unless it clearly appears to have been taken below; for other-

wise it is impossible it should appear of record, whether there is notice or not, since this is never pleaded, nor otherwise made apparent unless specifically called for. Here the objection below may or may not have pointed to want of notice. It is general, and may have referred to the inaptitude of the plea, without reference to notice. Certain it is, the decision of the court did not proceed upon any alleged want of notice, and it is impossible for us to say, with safety, that ground was taken. It is a sufficient answer that it does not so distinctly appear of record. This has been more than once decided.

It follows that the court of common pleas erred in rejecting the offers mentioned in the second, third, fourth, and sixth bills of exception. The same is true of the fifth bill, for this is, also, corroborative of the defense. It may, in the end, weigh but little in determining the judgment, but it is certainly relevant, especially in connection with the terms of the will.

The evidence of tender of the deed, executed by the testator in his life-time, was rightly received. The objection made was that the executors had no authority to make the tender. But this is a misapprehension. The testator expressly directs the agreements between his three sons, Henry, Conrad, and Christian, to be carried into effect, and on his part, by his executors. This could only be done by tender of the deeds, noticed in the will as having been executed, one of which was the deed in question. The executors had, therefore, express authority to make the tender, and this sufficiently appears to have been done by both of them. The subsequent offer of the widow's release, by one of them alone, does not affect the prior tender. I do not, however, wish to be understood as ruling that a tender by one of the executors, with the approbation of the other, would have been insufficient.

Judgment reversed, and a *venire de novo* awarded.

EVIDENCE OF PRIOR OR CONTEMPORANEOUS PAROL AGREEMENT TO CONTROL WRITTEN CONTRACT: See *Wren v. Wardlaw*, 12 Am. Dec. 60; *Reed v. Van Ostrand*, 19 Id. 529; *Adams v. Gray*, 20 Id. 82; *Atwood v. Cobb*, 26 Id. 657; *Jones v. Hardesty*, 32 Id. 180; *Boyle v. Agawam Canal Co.*, 33 Id. 749; *Thompson v. Sloan*, 35 Id. 546; *Spann v. Baltzell*, 46 Id. 346, and notes. As to the admissibility of a subsequent parol agreement varying a writing, see *Cummings v. Arnold*, 37 Id. 155; *Spann v. Baltzell*, 46 Id. 346. See generally, as to the admissibility of parol evidence to contradict, control, or vary a writing, *Foley v. Cowgill*, 32 Id. 49; *Beach v. Packard*, 33 Id. 185; *Tucker v. Baldwin*, Id. 384; *Hayworth v. Worthington*, 35 Id. 126; *Osgood v. Davis*, 36 Id. 708; *Brooks v. White*, 37 Id. 95; *Henderson v. Mayhew*, 41 Id. 434; *Exeter Bank v. Stowell*, Id. 716; *Grice v. Scarborough*, 42 Id. 391; *Nor*

Wood v. Byrd, Id. 406; *Baldwin v. Carter*, Id. 735; *Holmes v. Charlestown etc. Ins. Co.*, 43 Id. 428; *Adams v. Wilson*, 45 Id. 240; *Reed v. Austin*, 46 Id. 336; *Allen v. Lee*, 48 Id. 352; *Bank v. Fordyce*, 49 Id. 561; *Union Bank v. Meeker*, 50 Id. 559, and numerous other cases cited in the notes to those decisions. The English rule, that parol evidence is inadmissible to vary the legal operation of a written instrument, is not the law of Pennsylvania: *Chalfant v. Williams*, 35 Pa. St. 212, 215. Where equity would set aside an instrument for fraud, accident, or mistake, parol evidence is admissible to contradict or vary it: *Martin v. Berens*, 67 Id. 463. So if it is attempted to be used in violation of a parol agreement accompanying its execution, though no moral guilt is imputable: *Levy v. Moore*, 1 Phil. 325. In an action on a written contract for the sale of a colliery for a gross sum to be paid at a certain rate per ton of coal mined, parol evidence is admissible to show that it was agreed at the time that the vendees should not be bound to mine the necessary amount, and that the vendor was to take the risk of their doing so: *Chalfant v. Williams*, 35 Pa. St. 212, 215. So parol evidence of the declarations of a grantee in a deed, showing fraud in obtaining it, are admissible: *Horn v. Brooks*, 61 Id. 407, 409. In all the foregoing cases, *Rearick v. Swinehart* is recognized as authority. In *Fullon v. Hood*, 34 Pa. St. 374, it is said that the principle of the case, and of *Renshaw v. Gans*, 7 Id. 117, cited therein, is, that where a paper is obtained for one purpose and is subsequently used for a different and unfair purpose, it is fraudulent, and the subsequent abuse will let in parol evidence of what took place at its execution, but that the doctrine extends no further. Evidence of the declarations of a party to a written agreement, at an indefinite time prior thereto, is inadmissible to introduce a new term into the contract, in the absence of any fraud or mistake: *Kirk v. Hartman*, 63 Pa. St. 97, 106, distinguishing the principal case.

DELIVERY OF DEED AFTER GRANTOR'S DEATH: See *Foster v. Mansfield*, 37 Am. Dec. 154, and note citing previous cases in this series.

WEST BRANCH BANK v. CHESTER.

[11 PENNSYLVANIA STATE, 282.]

MORTGAGE LIEN IS DIVESTED IN PENNSYLVANIA BY EXECUTION SALE of the mortgaged premises upon a subsequent judgment for the interest of the mortgage debt, the principal being not yet due, and is transferred to the proceeds of the sale, taking priority over all liens subsequent to the mortgage and prior to such judgment.

INTEREST STIPULATED FOR IN MORTGAGE IS PART OF THE DEBT.

DISTRIBUTION of a fund in court arising from the sale of certain premises under a judgment recovered by Henry Chester for the interest upon certain loan certificates of the Williamsport etc. R. R. Co. held by him. It appeared that in 1839 the corporation in question, under an act of the legislature, issued loan certificates for one hundred and fifty thousand dollars, the certificates being made payable in 1850, with interest at six per cent. per annum, payable semi-annually. To secure the same, the corporation at the same time executed a mortgage upon its

property, including the premises in question, to certain trustees for the benefit of the holders of the certificates, conditioned for the payment of the principal and interest thereon. Most of these certificates afterwards came to the hands of Henry Chester, the residue being held by certain other parties. In 1844 Chester recovered judgment against the corporation for the interest due on the certificates held by him, and under an execution issued thereon, a part of the mortgaged premises was sold, the proceeds constituting the fund now in controversy. After the execution of the mortgage, and before the recovery of Chester's judgment, certain other judgments constituting liens upon the premises were recovered by the West Branch Bank against the Williamsport etc. R. R. Co., and the bank now claimed the fund by virtue of those judgments, insisting that the sale was merely of the equity of redemption, that the mortgage remained a lien upon the land and was not transferred to the proceeds, and that the judgments in favor of the bank are prior liens to Chester's judgment. On the other hand, Chester and the other holders of the loan certificates claimed the money under the mortgage, insisting that the lien thereof was transferred, by the execution sale, from the land to the proceeds. The fund was not sufficient to pay any of the claims in full. Woodward, P., in the court below, delivered an elaborate opinion, maintaining the following propositions: 1. That, after considerable discussion, the law is settled in Pennsylvania that a sheriff's sale of mortgaged premises upon a judgment constituting a junior lien to the mortgage transferred, not merely the equity of redemption, but the whole estate to the purchaser, and divested the lien of the mortgage from the land and cast it upon the proceeds: *Willard v. Norris*, 2 Rawle, 56; *Presbyterian Corporation v. Wallace*, 3 Id. 194. 2. That notwithstanding the act of April 6, 1830, declaring that a mortgage which is prior to all other liens upon the property shall not be "destroyed or in any way affected by any sale made by virtue or authority of any writ of *venditioni exponas*," such prior mortgage lien is nevertheless diverted by a sale on *venditioni exponas* for the same debt: *Pierce v. Potter*, 7 Watts, 477; *Berger v. Hiester*, 6 Whart. 214; *McCall v. Lennox*, 9 Serg. & R. 303; and that, notwithstanding the *dictum* of Mr. Justice Duncan in the latter case, an execution sale for a single installment of the mortgage debt will have the same effect: *Donley v. Hays*, 17 Id. 400; *Cronister v. Weise*, 8 Watts, 215. 3. That the interest of a mortgage debt, especially where there is an express stipulation for interest, as in

this case, is a part of the substance of the mortgage debt, and belongs to it, not by tacking, nor as an incident, but is *pro tanto* the debt itself, citing Coote on Mort. 518, and *Gladwin v. Hitchman*, 2 Vern. 135, as to the right to foreclose for a default in the payment of an installment of interest. 4. That, though the judgment for the interest in this case was another security for part of the mortgage debt, and was a lien only from the time of its entry, and could not be tacked to the mortgage to the prejudice of intervening liens, yet the judgment and the sale thereunder did not impair the lien of the mortgage or affect it in any way except to transfer it from the land to the proceeds; that the judgment and sale brought the money into court, but the mortgage lien attended it, and though Chester could not claim the money under his judgment as against the prior judgments, yet by virtue of the mortgage lien, which was anterior to all the other incumbrances, he and the other holders of the loan certificates were entitled to the fund. Decree accordingly, and the bank appealed.

Armstrong, for the appellant.

Maynard and Watson, for the appellees.

By Court, BELL, J. Although the question is presented in an aspect somewhat new, its solution depends upon principles more than once recognized and enforced by this court. These are so broadly stated and applied in the opinion of Mr. President Woodward, that but little more is called for, than to refer to *Berger v. Hiestler*, 6 Whart. 214, as a pregnant instance, in which a judicial sale under a judgment recovered upon one of several bonds secured by mortgage, was held to divest its lien, though some of the bonds were not then due. This case proves that a mortgage may be swept away, not only by a sale for part of the debt secured, the whole being due, but even when a portion of it is not then payable. It therefore very closely resembles the present case, the only distinction being, that there the sum recovered was part of the principal, here it is the interest. But it is very clearly shown, by the reasoning of the judge below, that, under the terms of the mortgage in question, this distinction ought to work no difference in the result.

It may be added, as of some weight in the argument, that were the certificate holders excluded from this remedy, they would probably be without one for the recovery of interest, as the mere equity of redemption may be valueless. This consequence ought not to be hazarded in view of the many contracts

of this nature, produced within a few years past, by which the payment of interest is as solemnly guaranteed as the discharge of the principal, and without which, it may fairly be concluded, loans could not have been effected.

It is objected that the interests of certificate holders, other than those who sue, may all be jeopardized by the proceedings. The answer is, that they stand in no worse position than do the different assignees of bonds in the ordinary case of a mortgage, made to secure the payment of several obligations. As to the sale of the mortgaged premises, each is bound to take care of himself; and the court, in distributing the proceeds, will see that all entitled to the fund are brought in. In practice it can very seldom happen that notice of the proceeding will not reach all having an interest.

Judgment affirmed.

JUDICIAL SALE DIVESTS MORTGAGE LIENS, and other liens, in Pennsylvania, and transfers the same to the proceeds, when: See *McLanahan v. Wyant*, 21 Am. Dec. 363; *Luce v. Snively*, 28 Id. 725; *Roberts v. Williams*, 34 Id. 549; *Mohler's Appeal*, 47 Id. 413, and cases cited in the notes to those decisions. See also *Commercial Bank v. Yazoo Co.*, 38 Id. 447; *Andrews v. Doc*, Id. 450, and notes. Under the act of 1830, a sale on a junior judgment divests a mortgage lien only when the mortgage is not prior to all other liens, or where the judgment is for part of the mortgage debt: *Walker's Appeal*, 1 Grant, Cas. 436. But where the sale is made on a judgment for a part or all of the mortgage debt, or for interest thereon, the mortgage lien is divested, notwithstanding that statute: *Commonwealth v. Wilson*, 34 Id. 67. A sale for interest on the mortgage debt, before the principal is due, is substantially a sale on the mortgage: *Mendenhall v. West Chester etc. R. R. Co.*, reported in a note to *Bradley v. Chester Valley etc. R. R. Co.*, 36 Id. 149; all citing the principal case. That a mortgagee can not extinguish the equity of redemption in the mortgaged lands by a sale under a judgment for the mortgage debt is held in *Powell v. Williams*, 48 Am. Dec. 105; and see the note to that case.

THAT WHERE SEVERAL MORTGAGES ARE MADE AT SAME TIME FOR PARTS OF SAME DEBT, and are assigned at different times to different persons, and the premises are afterwards sold on execution, the assignees share *pro rata* in the proceeds, is a point upon which the principal case is cited, as recognizing *Donley v. Hays*, 17 Serg. & R. 400, in *Perry's Appeal*, 22 Pa. St. 45. See *Parker v. Mercer*, 38 Am. Dec. 438, and *Cage v. Iler*, 43 Id. 521, and notes.

INTEREST IS A SUBSTANTIVE PART OF THE DEBT, when it is comprehended in the express terms of the contract: *Hummel v. Brown*, 24 Pa. St. 313, citing the principal case. As to when a judgment lien extends to and covers interest as well as principal, and when not, see *Sims v. Campbell*, 16 Am. Dec. 507; *Mower v. Kip*, 29 Id. 748, and cases cited in note.

ROBB v. MANN.

[11 PENNSYLVANIA STATE, 300.]

PURCHASER AT ADMINISTRATOR'S SALE IS DREAMED OWNER OF PREMISES BEFORE CONFIRMATION and delivery of possession, in equity, and must bear any loss that may happen to the premises.

REMOVAL OF FIXTURES FROM LAND PURCHASED AT ADMINISTRATOR'S SALE BEFORE CONFIRMATION and delivery of possession, by a stranger under claim of right, is no defense to an action for the purchase money, and the purchaser's remedy is by an action on the case against the person committing the injury.

ADMINISTRATOR MAKING SALE OF LAND IS MERE OFFICER OF COURT, and has no possession, actual or legal, of the premises, which is in the heirs.

CAVEAT EMPTOR IS THE RULE OF ADMINISTRATION SALES as well as other judicial sales.

ADMINISTRATOR FAILING TO EXECUTE DEED ON DAY SPECIFIED in the conditions of an administration sale, owing to objections interposed by creditors, affords the purchaser no ground of rescission, for time is not of the essence of the contract.

PROMISE BY ADMINISTRATOR TO PURCHASER TO HAVE FIXTURES RETURNED which have been removed by a stranger from land purchased at an administration sale, after the sale and before conveyance, does not bind the estate, nor does it bind the administrator, where the only consideration for it is a payment of part of the purchase money.

ASSUMPSIT. The principal facts, as well as the material rulings of the court below, are stated in the opinion. Under the instructions given, the defendant had a verdict and judgment, and the plaintiff brought error.

Johnson and Armstrong, for the plaintiff in error.

Bancroft, contra.

By Court, ROGERS, J. This is an action of *assumpsit* to recover the amount due on the first installment of the purchase money of a farm, sold by the plaintiff as an administrator, pursuant to an order of the orphans' court, and purchased by the defendant. It is not disputed that the sale was made and confirmed by the court, and that possession was taken of the premises on the third of April, 1846, two days after the time when the possession was to have been delivered. It appears that possession was not delivered because Jacob Hill, a former owner, who was entitled to retain it, did so until that time, and because objections were made to the sale by some of the creditors, which were afterwards withdrawn. It is in evidence that between the time of the sale, viz., the thirty-first of January, 1846, and the time when the plaintiff was to deliver possession to the defendant, viz., the first of April, 1846, certain

machinery and apparatus, part of a distillery on the premises, were taken away by John F. Manville, as the agent of Jacob Hill, former owner, on the claim of right to the same. And this raises the principal point in the cause. The defendant insists, and so the court rule, this is a defense to the payment of the purchase money to the extent of the value of the property taken away. The point assumes that, by the sale, the property considered for this part of the case in the light of a fixture and part of the realty, passed to the purchaser in the same manner, and to the same extent as the farm itself, to which it was appurtenant. The first question, which solves the whole difficulty, is, to whom the property belonged in the intermediate time between the sale and its confirmation by the orphans' court, or, in other words, was it the property of the administrator or heirs, or the property of the purchaser? For the loss, of whatever kind, and by whom caused, must be borne by the owner. Had there been a private sale, it would hardly be considered as an open question; for if there be any point settled it is that when a contract is made for the sale of lands, equity considers the vendee as the purchaser of the estate sold, and the purchaser as a trustee to the vendor for the purchase money. So much is the vendee considered in contemplation of equity, as actually seised of the estate, that he must bear any loss which may happen to the estate between the agreement and the conveyance; and he will be entitled to any benefit which may accrue to it in the interval. And the reason assigned is, that by the contract he is the owner of the premises to every intent and purpose in equity: *Richter v. Selin*, 8 Serg. & R. 440; Sugd. on Vend., c. 4, pp. 131, 132, Am. ed. This principle, which is indisputable, would seem decisive of the question, unless a distinction can be taken between a private and a judicial sale.

But no such distinction has been recognized; rather the reverse has been ruled. Thus in *Stoeve v. Rice*, 3 Whart. 25 [31 Am. Dec. 495], a sale by a sheriff is said to be attended with the ordinary incidents of a sale by an individual. And in *Baschore v. Whisler*, 3 Watts, 494, it is said, that a sale by an administrator under an order of the orphans' court for payment of debts, is a judicial sale, and that the principles which govern the one are applicable to the other. Now, a purchaser at a sheriff's sale, as is ruled in *Morrison v. Wurtz*, 7 Id. 437, before his deed has been acknowledged, has an inceptive interest in the land by the contract, which may be bound by a judgment, and which, when perfected by payment, and a conveyance, gives the

incumbrancers, by relation, the benefit of his security to the extent of the whole estate. To the same effect is *Bellas v. McCarty*, 10 Id. 22. On the principles there settled, it can scarcely admit a doubt, that, had the buildings, including the machinery, been destroyed by fire, whether caused by accident or design, the loss would be borne by the purchaser, on the reasonable principle, that, in contemplation of equity, he is owner of the premises from the time of the sale. The law is equitable and just; for, as he must bear the loss, so, if any benefit accrues to the premises in the mean time, he is entitled to the advantage of it. The learned judge of the common pleas seems to have been carried away by the erroneous idea, that the administrator has a remedy for the injury, but the purchaser has none; that Mann, having no right to the possession of the farm until the first of April, 1846, and the stills and other apparatus being taken before that time, the administrator, and he alone, had power to bring suit.

It is very true that Mann can not maintain an action of trespass, because he was not in the actual possession of the premises; but what prevents him from sustaining a special action on the case? It must be recollected that the trespass complained of is an injury to the inheritance; and can it be doubted that the owner has a right of action in such a case against a wrong-doer? Is it in principle anything more than the case of an injury to the inheritance, when in possession of a tenant? and has it ever been questioned that an action by the owner lies for waste either against the tenant or a stranger? The court were of opinion that the remedy was with the administrator alone. In this view, it will be perceived we differ from the court of common pleas. The administrator who makes the sale is but the officer of the court: *Bashore v. Whisler*, 3 Watts, 494. He has not, by virtue of his power, either the actual or legal possession of the premises. That is in the heirs. He surely is clothed with no greater power than a sheriff, who is the officer of the law; and it will scarcely be pretended that the sheriff in such a case can sustain the suit. But, however this may be, and without attempting to define the extent, either of the power of the sheriff or of the administrator, we are of opinion that the remedy was vested in the purchaser; and, consequently, he must seek redress for the wrong done in taking and carrying away the apparatus pertaining to the distillery.

Although not perhaps very material, yet we would wish to correct an idea thrown out by the court, which, if left without

notice, might lead to error. I allude to that part of the charge where the court say: "Owing to an exception having been filed to the confirmation of the sale by the administrator, at the February term, he (the administrator) was not able to make a deed on the first of April, 1846, so that the purchaser was not bound to comply on his part, if he had seen proper to refuse." This has never been held to be law as to sheriff's sales, nor do we conceive this rule ought to be applied to sales by an administrator. Time is not of the essence of the contract, and the principle applied to all judicial sales, as has been repeatedly ruled, is *caveat emptor*. The purchaser knows that the sale is open to exception by creditors. Establish the principle ruled by the court, and it will be an easy matter for a purchaser to escape from an imprudent bargain by collusion with a creditor, inducing him to file exceptions so as to delay the confirmation of the sale.

But stress is laid on the evidence, which, if believed, proves that Mann told Robb, he would pay no more money, unless Robb would make good to him the utensils in the distillery, and that Robb replied, "If you will let me have one hundred dollars, I will have the utensils brought back, or make you compensation for them;" that relying on the promise of Robb, one hundred dollars were paid by Mann to him, and on the third or fourth of April he took possession of the farm. But, if we are right in the view we have taken, the objection to this part of the charge is conclusive. The promise, if made, can not bind the estate, but the administrator himself; nor him, if the promise is without consideration. The payment of the money was no consideration, because he merely did what he was bound to do by his contract. He in truth was guilty of a wrong, by refusing to pay according to his contract. This can not furnish a foundation for a promise, for it would enable the defendant to obtain an advantage by a refusal to perform his agreement. There are other points which have been argued by counsel, which it is unnecessary to notice because it is believed that the views of the case taken embrace the whole case, and there can be but little difficulty on another trial.

Judgment reversed, and a *venire de novo* awarded.

CONFIRMATION OF PROBATE SALE, necessity and effect of, and purchaser's rights before confirmation: See *Rea v. McEachron*, 28 Am. Dec. 471; *Klingensmith v. Bean*, 27 Id. 328; *Taylor v. Cooper*, 34 Id. 737, and the notes thereto. As to the necessity of confirmation of judicial sales generally, and the purchaser's title before confirmation, see *Tooley v. Gridley*, 41 Id. 623;

Wagner v. Cohen, 46 Id. 660, and cases cited in the notes thereto. The doctrine of the principal case, that a purchaser at an administrator's sale is deemed, in equity, to be the owner from the time of sale, is doubted by Strong, J., in *Demmy's Appeal*, 43 Pa. St. 169, where he says that the remarks of Rogers, J., on that point "seem to be outside of the case."

RIGHTS OF PURCHASER AT EXECUTION SALE BEFORE CONVEYANCE: See *Halley v. Oldham*, 41 Am. Dec. 262; *Oriatt v. Brown*, 45 Id. 539.

TITLE OF PURCHASER OF LAND GENERALLY BEFORE CONVEYANCE: See *Hampson v. Edelen*, 3 Am. Dec. 530; *Jackson v. Morse*, 8 Id. 306; *Holmes v. Schofield*, 29 Id. 364; *Pitts v. Bullard*, 46 Id. 405; *Ives v. Cress*, 47 Id. 401; *Chapman v. Glassell*, 48 Id. 41; *Rucker v. Abell*, Id. 406; *Doe v. Haskins*, 50 Id. 154, and notes. In *Siter, James & Co.'s Appeal*, 26 Pa. St. 180, the principal case is cited to the point that a vendee of land is regarded in equity as the owner after the agreement of sale and part payment, and that any increase in value is his gain and any decrease his loss.

THAT AN ADMINISTRATOR'S SALE IS REGARDED AS A JUDICIAL SALE is a point to which the principal case is cited in *Halleck v. Guy*, 9 Cal. 196.

RULE OF CAVEAT EMPTOR APPLIES TO EXECUTION SALES: *Danley v. Rector*, 50 Am. Dec. 242, and cases cited in the note thereto.

TIME IS OF ESSENCE OF CONTRACT, WHEN: See *Jones v. Robbins*, 50 Am. Dec. 593, and note. See also the note to *Johnson v. Evans*, Id. 675-679.

YOXTHEIMER v. KEYSER.

[11 PENNSYLVANIA STATE, 364.]

PROMISE BY BANKRUPT AFTER DISCHARGE TO PAY DISCHARGED DEBT "as soon as he got able," and to pay "all his honest debts as fast as he could," except certain ones in the city, will not revive such debt.

ASSUMPSIT. The debt sued for had been discharged by proceedings under the bankrupt act, but the plaintiff relied upon a promise made after the discharge to revive it. The promise is stated in the opinion. The court below being requested to charge the jury that the plaintiff could not recover by reason of the promise without proof that the defendant had afterwards acquired sufficient property to pay all his debts, the court charged that if the jury believed that the promise was made as stated, and that then and afterwards the defendant was able to pay this debt, the plaintiff should have a verdict. Verdict and judgment for the plaintiff, and the defendant brought error.

Jordan and Hegins, for the plaintiff in error.

Miller, contra.

By COURT. That the plaintiff in error came as near to fix himself by a promise to pay as he could without doing so, is extremely clear; but he seems to have studiously kept himself

on the windy side of the law. To an inquiry whether he would pay this debt, he replied that "he was going to pay it as soon as he got able," and that he was going to pay all his honest debts, except some in the city.

This, though expressive of an intention, did not constitute an engagement, which is necessary to give legal effect to a moral obligation; it is not enough that there was a recognition of the debt, which, in *McKinley v. O'Keson*, 5 Pa. St. 369 (where, however, there was an absolute promise), was perhaps too broadly said, in reference to a bankrupt, to be evidence of a promise to pay. The effect of such evidence has been carried very far to avoid the statute of limitations; much further than it ought to be in order to avoid a bankrupt's discharge, which would otherwise be a dead letter. The bankrupt in this case expressed the same intention to pay all his honest debts, except those in the city, and he certainly did not mean to waive the benefit of his discharge as to all the rest. If the foundation of the action fails, it is unnecessary to consider the other exceptions.

Judgment reversed.

PROMISE TO PAY DEBT DISCHARGED BY BANKRUPTCY, sufficiency of: See *Merriam v. Bayley*, 48 Am. Dec. 591, and cases collected in the note thereto.

McDONALD v. SCAIFE ET AL.

[11 PENNSYLVANIA STATE, 381.]

EVIDENCE OF OWNERSHIP IN REPLEVIN, BEING A DISPUTED FACT, IS FOR JURY, and the court can not instruct them that the evidence shows title in one of the parties.

MEASURE OF DAMAGES IN REPLEVIN, where the defendant retains the property, is ordinarily its value with damages for the detention, which is usually interest on the value from the taking.

EXEMPLARY DAMAGES ARE ALLOWABLE IN REPLEVIN where circumstances of aggravation and outrage attend the taking or detention.

REPLEVIN for a boat. One question in the case was as to the ownership, upon which there was an exception to the ruling of the court leaving the matter to the jury. Another exception was to an instruction that the jury, in assessing the damages, might take into consideration any circumstances of aggravation appearing in the case. Verdict for the plaintiff for the value of the property and for five hundred dollars damages, and judgment thereon. The defendant brought error.

Darragh, attorney general, for the plaintiff in error.

Shinn and Williams, contra.

By Court, ROGERS, J. Two errors are assigned, one of which only it will be necessary particularly to notice, as the first is clearly untenable. It would have been an unwarrantable interference with the province of a jury, for the court to have instructed them, as a matter of law, that the testimony given showed such a sale and delivery of the boat as vested the right in the owner of the steamboat Arrow. The evidence of ownership was a disputed fact, which was left properly to the decision of the jury. The only possible difficulty there can be in the case, is in the second error, in directing the jury to find the value of the property at the time of the taking, and also damages for the taking, according to the ordinary rule in trespass, taking into consideration any circumstances of aggravation that appear in the case. Of the charge in this respect, the plaintiff in error complains. He alleges that under the charge the jury gave exemplary damages, taking into consideration the personal violence of Captain McDonald to Captain Jones, an agent of the plaintiff; and also the defamatory words proved to have been used on that occasion. If the jury so far misunderstood the direction (which I can not well suppose), as to allow such considerations to swell the amount of damages, it is an injury which we can not redress. The defendant can only be relieved on a motion for a new trial. The jury were instructed, as in trespass, to take into consideration circumstances of aggravation which appeared in the case; that is to say, such outrages as attended the taking and detention of the property. With this explanation, was the court right in the rule given to the jury for estimating the damages?

In an action of replevin, where the defendant retains the property, the measure of damages is ordinarily the value of the property, and damages for the detention, which is usually the interest on the value from the time of taking: *Wilkinson on Replevin*, 6 L. L. 31; *Hosack v. Weaver*, 1 Yeates, 478; *Easton v. Worthington*, 5 Serg. & R. 130; *Eller v. Edwards*, 4 Watts, 63; *Moore v. Shenk*, 3 Pa. St. 20 [45 Am. Dec. 618].

But though this is the general, yet it is not the universal rule, for circumstances may attend the taking and detention which will justify the jury in giving exemplary damages. The exceptions are as well settled as the rule itself. Thus, when the taking or detention, or both, are attended with circum-

stances of aggravation, the party is entitled in some form, as is conceded, to more than compensatory damages, and why should he not have his full measure of redress in the action of replevin without compelling him to resort to an action to repossess himself of his goods, unlawfully taken, and to another for his damages? Multiplicity of actions is always avoided if possible. In molding the action of replevin the court have endeavored to give the remedy such a shape as to afford the injured party essential redress. For this reason, they have not confined the remedy to compensatory damages, but have, under peculiar circumstances of outrage and wrong, extended them far beyond these limits. And this is plain on authority. Thus in *Dennis v. Barber*, 6 Serg. & R. 426, the court say, the value of the property is usually the measure of damages, although the jury are justifiable in going further wherever there has been an outrage in the taking, or vexation and oppression in the detention. In *Taylor v. Morgan*, 3 Watts, 333, the court say, in Pennsylvania, in trover, the value of the property is usually the measure of damages, although the jury are justifiable in going further, where there has been an outrage in the taking, or vexation and oppression in the detention. Where there is more than ordinary wrong, either in the taking or detention, justice seems to require something in addition as a compensation to the injured party, and a punishment to the wrong-doer. And in *Harger v. McMains*, 4 Id. 420, as to damages, say the court, though the value of the property is the ordinary measure, it has been long settled, that, under circumstances, the jury may go beyond it.

The cases cited, it is true, are in trover, but trover and replevin are strictly analogous. The reasons which serve for one apply with equal force to the other. There is no room for any distinction between the actions. Why confine the damages to the value of the property taken and the interest, where the conduct of the defendant is attended with wanton outrage, oppression, and wrong? Why compel him to resort to an action of trespass for redress, rather than replevin, where, in the latter action, in addition to the punishment of the wrong-doer, the rightful owner regains his goods, or obtains security from the defendant? But we are not without authority leaning directly to the point. Where a writ of replevin is sued out fraudulently, and without color of right, the jury will be warranted in giving even exemplary damages, in the same manner they might do for a wanton and malicious trespass: *Brizsee v. Maybee*, 21 Wend.

144. And so in *McCabe v. Morehead*, 1 Watts & S. 513, an action of replevin, the same principle is ruled. In *Cable v. Dakin*, 20 Wend. 172, which was also an action of replevin, the court say: It was a most vexatious and unwarrantable proceeding; the jury would be well warranted in giving heavy damages. They might allow smart-money. Although the damages in that case were excessive (as perhaps they may have been here), yet the court refused to set aside the inquisition of damages, because the proceeding on the part of the plaintiff was vexatious and oppressive. And in *Hopkins v. Hopkins*, 10 Johns. 378, Kent, C. J., says: "The action of replevin is grounded on a tortious taking, and it sounds in damages, like an action of trespass, to which it is extremely analogous, if the sheriff has already made a return, and if the plaintiff goes only for the caption." On a review of the authorities, we have come to the conclusion that it is settled on reason and authority, that although the ordinary rule is to give damages for the value of the goods taken, with interest on the value, yet the jury may, under peculiar circumstances, go beyond it by giving exemplary damages, as in case of an action of trespass.

Judgment affirmed.

MEASURE OF DAMAGES IN REPLEVIN, GENERALLY: See *Moore v. Shenk*, 45 Am. Dec. 618; *Jennings v. Johnson*, 49 Id. 451, and cases cited in the notes thereto.

EXEMPLARY DAMAGES IN REPLEVIN: See the note to *Moore v. Shenk*, 45 Am. Dec. 621. See also *Dorsey v. Gassaway*, 3 Id. 557. That exemplary damages are recoverable in replevin, where the taking or detention is accompanied by circumstances of wrong and outrage, is held, following the principal case, in *Schofield v. Ferrers*, 46 Pa. St. 439; and *Herdie v. Young*, 55 Id. 177; and it is cited to the same point in discussing the subject of the allowance of exemplary damages in trover, in *Furlyth v. Wells*, 41 Id. 295.

EXEMPLARY DAMAGES GENERALLY, ALLOWANCE OF: See *Austin v. Wilson*, 50 Am. Dec. 766, and note discussing this subject, and referring to prior cases and notes in this series.

IRWIN v. NIXON'S HEIRS.

[11 PENNSYLVANIA STATE, 419.]

SCIRE FACIAS TO REVIVE DORMANT JUDGMENT IS MERE CONTINUATION of the former action.

REVIVAL OF JUDGMENT BY SCIRE FACIAS CONTINUES ITS VITALITY, WITH LIEN and other incidents, from the time of its rendition.

EXECUTION ON JUDGMENT REVIVED BY SCIRE FACIAS should be on the original judgment.

LIEN OF JUDGMENT AGAINST DECEDENT IS NOT LIMITED to seven years under the Pennsylvania act of 1797, but continues during the existence of the debt.

JUDGMENT ON SCIRE FACIAS REVIVING JUDGMENT IS CONCLUSIVE as to the existence of the debt, as respects innocent purchasers, though the original judgment was in fact satisfied, and the judgment reviving it was confessed by an attorney without authority.

LOSING PARTY AFTER ONE RECOVERY IN EJECTMENT STANDING BY AND ALLOWING IMPROVEMENTS upon the premises by a *bona fide* purchaser, upon the faith of the recovery, is estopped from afterwards recovering the land and improvements, on the ground of a mistake of himself and his counsel in not presenting all the legal aspects of his case on the former trial.

EJECTMENT to recover the same land sued for in *Fetterman v. Murphy*, 28 Am. Dec. 729, the plaintiffs relying upon the same title, the land having been reconveyed to them by the plaintiffs in that action after the decision therein. The facts appear from the opinion in connection with the statement of the case in *Fetterman v. Murphy*. The court below held that no title passed by the sheriff's sale under which the defendant claimed, and rejected, as irrelevant, evidence offered by the defendant as to improvements made by him. Verdict and judgment for the plaintiffs, and the defendant brought error.

Washington, and Darragh, attorney general, for the plaintiffs in error.

Shaler and Woods, contra.

By Court, ROGERS, J. The title, which is now the subject of controversy, has been already tried and adjudicated on writ of error to the supreme court, and this is an action of ejectment by the unsuccessful party, with the avowed object of reversing the judgment then rendered. The judge of the district court says: "This very title was in the supreme court several years ago, in the case of *Fetterman v. Murphy*, 4 Watts, 424 [28 Am. Dec. 729], and was then decided to be good on the points then raised. And it would seem the facts before the court were substantially the same as now." The district court, after full consideration, no doubt, have come to the conclusion, and have so ruled, that this court was in error, or, in other words, they have undertaken to decide that the title which the superior tribunal pronounced good is bad, and the title they adjudged bad is good. Without affirming or denying the propriety of the course which the court have thought proper to pursue, yet I may be permitted to observe, that it will hardly admit of doubt that a similar course

ought not to be adopted by a subordinate court, except in a case free from every doubt or difficulty. Whether this is a case of that description, it will be my duty to inquire.

The learned judge, if I understand him, rests his opinion on two points: 1. That the present question was not raised in the former action; and, 2. That if it had been merely suggested, the result would necessarily have been different. That the question, as he says, then decided by the court below, argued by the counsel in the supreme court, and decided by that court, was as to the effect of the act of the fourth of April, 1798, upon the continuance of the lien. It seems to have been taken for granted, as he thinks, that the reversal of the judgment having disproved the record of satisfaction, of consequence proved the continuance of the lien. In the confident language of the judge, this is a mistake which is readily made, though as readily seen when suggested. This is the error into which the court fell in ruling the case of *Fetterman v. Murphy*. This is the blunder which he now proposes to correct. Whether this be an error of the judge himself, or of this court, it is my duty most respectfully to examine.

In considering this case, I am perfectly willing to concede that the present question was not raised in the former action. After a careful examination of the case of *Fetterman v. Murphy*, with this view, I can not perceive the slightest reference to the point ruled by the court below; but whether the plaintiffs will gain anything by the concession, remains to be seen in another branch of this case. Although so plain that it need only be suggested to be readily perceived, yet, from some cause which it is difficult to explain, it escaped the attention of the president of the court of common pleas, before whom the trial was had, now the counsel for the defendant in error, and plaintiff below. It was not observed by the chief justice, nor by Justice Huston, both of whom delivered opinions in the case, nor by any one member of the court; and what is of more consequence still, as will hereafter appear, it was entirely overlooked, either through negligence, ignorance, or design, by the plaintiffs in the suit and their counsel, all of whom were among the most distinguished members of the bar. If the point is so plain as to be readily seen when suggested, then it must be confessed this is a case of such legal and judicial blindness as seldom occurs. The remarkable silence of the distinguished men taking part in it, can only be accounted for on the supposition that it was seen, and rejected as altogether untenable: for, if made, as I will presently en-

deavor, at least, to demonstrate, it would have produced no change in the judgment of the court. With these preliminary remarks, let us now examine the opinion itself. I begin by observing, with all due respect, that, in my judgment, a fundamental error pervades the opinion of the very able and learned judge who tried this cause. The error is this—and it is the key to the whole case—he assumes that the judgment on the *sci. fa.* has no effect antecedent to its own existence; in other and more intelligible words, he denies that it relates back for every purpose to the original judgment.

That I may not be charged with injustice to the judge, I quote his own language. It was this: “Since its renewal the existence of the debt can not, perhaps, be denied; but the record could not have an effect antecedent to its own existence.” From this mistaken principle he draws the following conclusion: “The renewal gave it new life, but did not restore vitality to these eighteen years of death [speaking of the time which elapsed from the rendition of the original judgment until its renewal by *sci. fa.*] During all that time [he proceeds] it was a common debt, or debt not secured by judgment; and its lien against the estate of the deceased, in the hands of his heirs, is governed by the act of the fourth of April, 1797. The defendant died in 1814, and, the debt not being then ‘secured by judgment,’ ceased to be a lien in seven years thereafter. After these seven years the administrator ceased to represent the heirs, as to all debts not then secured by judgment, and a revival against the administrator could not affect the heirs. After such a renewal, the heirs would stand very much in the same position as the alienee of a mortgagor where judgment is obtained without notice to the alienee.”

These are the principles on which the opinion is based, and, granting the premises assumed, I agree that the conclusion at which he arrives is inevitable. But, unluckily for the argument, nothing can be more erroneous than the assumed principle on which the case turns. So far from the court being correct in this important particular, it unfortunately happens that it is a common, plain, and familiar principle that a *scire facias*, to revive a judgment *post annum et diem*, is but a continuation of the original action, and the execution thereon is an execution on the former judgment.

The judgment on the *scire facias* is not, as the court erroneously supposes, a new judgment giving vitality only from that time. but it is the revival of the original judgment, giving or

rather continuing the vitality of the original judgment, with all its incidents, from the time of its rendition. This is clear on authority. Thus in Bouvier's Law Dict. 380, he says, citing *Wright v. Nutt*, 1 T. R. 388, and *Underhill v. Devereux*, 2 Saund. 72, that a *scire facias* is a judicial writ, founded on some record, and requiring defendant to show cause why the plaintiff shall not have the advantage of such record. When brought to revive a judgment after a year and a day, it is but the continuation of the original action. Thus, in *Wolf v. Pounsford*, 4 Ohio, 397, and *Blackwell v. State*, 3 Ark. 320, it is ruled that a *scire facias* to renew a judgment is only a continuation of the former suit, and not an original proceeding. It would be easy to multiply authorities, if a fact so plain and familiar needed their aid. In England the judgment on the *scire facias* is, that the original judgment be revived. Here the amount of the debt is ascertained, and judgment given for the sum due; and this unfortunate departure from precedents has given rise to the erroneous notion in the minds of some members of the profession that the judgment on the *scire facias* is a new and distinct judgment, and not, as it really is, nothing more than the revival of the original judgment, the sum being ascertained for which execution may issue. If we pay any regard to precedent, the execution ought always to be issued on the original judgment, and not, as is sometimes ignorantly done, on the judgment on the *scire facias*; an irregularity which ought never to have been tolerated by the courts. But notwithstanding this deviation from the usual practice, it has never yet been imagined that the law was fundamentally changed.

In Pennsylvania it never has, to my knowledge, been doubted before, that a *scire facis post annum et diem* is a continuation of the original action, and that judgment on the *scire facias* revives the original judgment, with all its incidents, whether of lien or otherwise. This, then, being the acknowledged law, how does this case stand? The eighth of April, 1808, judgment was confessed by William Nixon to David Wilson. To the April term, 1827, a *scire facias* was issued to revive the judgment, which was served on the administrator of Nixon, the deceased; judgment confessed, and the amount due liquidated. To the April term, 1827, a *fi. fa.* was issued, the lot in dispute levied on, inquisition had, and property condemned. To the August term, 1827, a *vend. ex.* was issued, sale regularly made, and deed by the sheriff duly acknowledged to Samuel Kingston. Kingston conveys for the consideration of seven hundred dollars, to

Murphy, who afterwards conveys the same premises to Irwin, the party defendant, for the consideration of five thousand one hundred dollars. The latter conveyance, be it remarked, was after the decision of this court in *Fetterman v. Murphy*. The defendants offered to prove, and this we must take to be true, and part of the case, that in the year 1844, nine years after the judgment in *Fetterman v. Murphy*, James B. Irwin erected two three-story brick houses on the lot, at the cost and value of about four thousand dollars, and the plaintiffs in the former suit, Fetterman and Metcalf, their heirs, and the heirs of Nixon, the now plaintiffs, resided in and about the city of Pittsburgh, continually since the purchase by Irwin. Stripped, then, of the erroneous assumption of the judge, this is but the ordinary case of a judgment against an intestate in his life-time, revived by *scire facias*, and confession of judgment by his administrator, relating back, as has been shown, to the original judgment, property sold by virtue of that judgment by the sheriff, for payment of the debt ascertained to be due. It being a judgment rendered in the life-time of the intestate, renewed by due course of law, it is a judgment with all its incidents.

It is not, as the court suppose, a mere revival of the debt, but of a judgment with the incident, which necessarily attends it, of a lien on all the real estate of the intestate. The case being under the act of 1797, the lien of the judgment continues during the existence of the debt, and does not, as in the case of a simple contract, or bond, or debts of the same class, expire at the end of seven years. The act says no debts of a decedent, except they be secured by mortgage or judgment, shall remain a lien on the real estate of such decedent longer than seven years (now five years) after the decease of such debtor, unless an action be commenced and duly prosecuted, etc. There is, then, no statute of limitations as respects the lien of mortgages, and judgments against the real estate, such as exists as to other debts, as ruled in *Kerper v. Hoch*, 1 Watts, 14. Nor is it necessary, in an action on that statute to enforce the payment of mortgages or judgments, to give notice to the heirs and devisees in order to continue the lien. The *sci. fa.* by the then universal practice, was served on the executors and administrators alone, as the representatives, so as far regards the existence of the debt, of all persons claiming an interest in the estate, whether as heirs, devisees, legatees, distributees, or creditors. Such was the unquestionable law before the passage of the act of the twenty-fourth of February, 1834, which has no bearing on this case. We must

not suffer our minds to be turned aside from the true question, by the alleged fact that at the time the *sci. fa.* was issued and judgment rendered, the debt was paid, and that there was fraud in procuring the sheriff's sale. That the debt was paid is a fact we can not judicially know; and that there was fraud in the principal actors in the sale, has already been ruled not to affect Murphy, who was a purchaser without notice. We are bound judicially to say the debt was not paid, as the existence of the debt is conclusively established by the judgment on the *sci. fa.*, so far as the present parties are concerned. Any argument drawn from such a source is a legal fallacy, which must be entirely disregarded.

This principle would scarcely admit of question, had the judgment in the *sci. fa.* been confessed by the administrator, and not by an attorney without authority, whether by ignorance, accident, or design. The parties injured would have their remedy against him, but this would not affect the title of an honest and unsuspecting purchaser. The learned judge would seem to have lost sight of the plain familiar principle, which prevents a party from going behind a judgment, so as to affect any person, except those who are parties to the fraud. This proper distinction is taken in *Fetterman v. Murphy*. It is there ruled: that Murphy, who purchased from Kingston, was a *bona fide* purchaser, having done all he was required to do to protect himself. The distinction between him and the actors in the fraud, commends itself to every mind, nor have the plaintiffs even attempted to impugn it.

The remarks already made dispose of the whole case, but it may not be unprofitable to consider it in another aspect. It will be remarked this is not precisely the case of *Fetterman v. Murphy*, another party being added to the record. Now, conceding that the plaintiff has a cause of action against Murphy, can he recover against Irwin, the present owner and defendant? It will be observed, some new features are presented, for it appears that after the judgment of the court of the last resort on this very title, the present defendant, relying on that judgment, purchased the property in controversy for a large and valuable consideration; that he proceeded to erect valuable improvements on the premises; that for the space of nine years the parties, and those under whom they claim, although residing in the same city, with full notice, made no objection whatever, nor did they indicate any intention hereafter to dispute the title, or in any manner to bring it again into controversy.

On this state of facts, the first inquiry which naturally presents itself is, Whose fault was it that the plaintiffs failed in the former action of ejectment? It is plain there must have been negligence, ignorance, or something worse somewhere; and to whom is the charge attributable, except it be to the plaintiffs themselves, or their counsel? Surely no blame can be properly attached to the defendant, who purchased the property at a fair price, and not until the title had been passed in review before the subordinate and supreme courts, both of whom, by their solemn judgments, declared it to be in the person from whom he purchased. It was the business of the plaintiffs and their counsel, as can not be denied, to present their case in all its various aspects to the court. If they have failed to do so, proceed from whatever cause it may, they have no person to blame but themselves. Can it be permitted that they (after having misled the court), either through ignorance, negligence, or design, should now turn round and throw all the loss caused by themselves on innocent purchasers? Are they to be allowed not only to recover the property as it stood when the defendant purchased, but also to pocket the value of the improvements since made on the premises? If this can be done, it is obvious that it is a premium to negligence and ignorance, and may lead to fraud. If there ever was a case in which it is right to apply the equitable rule, that where one of two innocent persons must suffer, he who causes the injury must bear the loss, this is that case. To what will a contrary doctrine lead?

For, let us suppose the plaintiffs recover on the new light so lately discovered, take possession, make valuable improvements, afterwards sell to others, who also improve, and this under the eye of the defendant, who by his silence acquiesces in the decision; would a court be justified, under a pretense that the case might be reviewed under other aspects, which he had failed to present, to reverse this judgment, turn them out of possession, with the loss of all the money expended, either as purchase money or in payment of improvements made on the premises? If this be the law of real estate, it is even more defective than I supposed it to be. As the law now stands, the title to real estate may be in controversy for sixty years. The party dispossessed has twenty-one years to recommence an ejectment, and the title may not be finally settled until after three trials may have been had. In the mean time neither party dares improve the property, except at the risk of losing all he expends. It is the case of all others, to which equitable principles should be ap-

plied. After the first trial, the parties stand in a different position; and it ought not to be permitted that the losing party may stand by, permit improvements to be made without objection, and afterwards reap the benefit of his own supineness and negligence. If not a legal, it is an equitable estoppel, upon every principle of common sense and common justice. But be this as it may, there is, in my mind, no doubt that a party is estopped by the mistake of himself and his counsel, when he fails to discover the true legal principle applicable to his case. It would be unjust to allow his mistake, arise from whatever cause it may, to inure to his own benefit, or operate to the injury of an innocent *bona fide* purchaser. It is neither equitable nor just, that an innocent purchaser should be punished for what the court below terms a misplaced confidence in a former decision upon another question. The court calls it another question; but in truth the question is precisely the same, to wit, whether Murphy acquired a title by his purchase from Kingston, who purchased at sheriff's sale. The point now urged was not another question, but merely a different view of the same question. On both grounds, we are of opinion the judgment of the district court should be reversed.

Judgment reversed.

COULTER, J., dissented.

SCIRE FACIAS TO REVIVE JUDGMENT IS CONTINUATION of original action: *Adams v. Roe*, 25 Am. Dec. 266. See also *Carter v. Carriger*, 24 Id. 585.

REVIVAL OF JUDGMENT BY SCIRE FACIAS, EFFECT OF, TO CONTINUE LIEN: See *Coombs v. Jordan*, 22 Am. Dec. 236; *Carter v. Carriger*, 24 Id. 585; *Mower v. Kip*, 29 Id. 748. See also *Fetterman v. Murphy*, 28 Id. 729.

LIMITATION OF JUDGMENT LIENS: See *Fetterman v. Murphy*, 28 Am. Dec. 729, and note. See also *Hinds' Heirs v. Scott*, ante, 506, and note.

GREENOUGH v. GREENOUGH.

[11 PENNSYLVANIA STATE, 489.]

LEGISLATURE CAN NOT EXERCISE JUDICIAL POWERS.

STATUTE INTENDED TO OPERATE ON WILLS ALREADY EXECUTED AND CONSUMMATED by the death of the testator, as well as upon future wills, prescribing what shall be deemed a sufficient signing of a will, is, so far as it is retrospective, an exercise of judicial power and therefore unconstitutional, and must be construed exclusively prospective.

STATUTE CONFIRMING WILLS DEFECTIVELY EXECUTED does not stand on the same ground as a statute confirming defective conveyances, because the devisee is a volunteer.

TESTATOR AFFIXING MARK TO HIS NAME, WRITTEN BY ANOTHER without his direction, is not a sufficient signing of a will under a statute requiring the will to be signed by the testator or "by some person in his presence and by his express direction."

MARK IS NOT A SIGNATURE at common law, or under the Pennsylvania statute of wills of 1833.

EXPRESS DIRECTION BY TESTATOR TO THIRD PERSON TO SIGN HIS NAME to his will is a substantive part of the execution, under the Pennsylvania statute of 1833, and must be proved expressly or presumptively by the oaths or attestations of two witnesses.

ATTESTATION OF WILL BY WITNESSES IS SUFFICIENT PROOF of a compliance with the statute where, from death, defect of memory, or other cause, the testimony of the witnesses can not be had.

POSITIVE TESTIMONY OF ONE WITNESS TO WILL WITH ATTESTATION OF THE OTHER, who has forgotten the facts, is sufficient *prima facie* evidence of a compliance with the statute.

EJECTMENT for certain land claimed by the defendant under the will of Elizabeth Greenough, who died in 1840, ten days after the execution of the alleged will. The name of the testatrix was written by Lowrie, one of the witnesses, who testified that he so signed it by her express direction, and the testatrix then affixed her mark. The testimony of this witness was positive as to a compliance with all the requisitions of the statute. The other witness testified that he could not recollect whether the testatrix asked Lowrie to write her name or not. Verdict directed, *pro forma*, that the will was proved and valid, reserving the questions of law. The presiding judge afterwards decided that the proof of execution was not sufficient under the statute of 1833, but was under the statute of 1848, which applied only to the remedy, and was constitutional. Judgment for the defendant, and the plaintiff brought error.

Darragh, attorney general, and Shaler, for the plaintiff in error.

Howard and Forward, contra.

By Court, GIBSON, C. J. So far as regards wills consummated by the testator's death—and this is one of them—the act of 1848 is founded on no power known to the constitution, but on the assumption of a power appropriated exclusively to the judiciary. Every tyro or sciolist knows that it is the province of the legislature to enact, of the judiciary to expound, and of the executive to enforce. These functions may, if the people will it, be performed by a single organ; but the people of Pennsylvania have not so willed it. They have ordained that the judicial power of the commonwealth be vested in a supreme court, in county

courts of common pleas, oyer and terminer, and quarter sessions, in a register's court, and an orphans' court: and in such other courts as the legislature may from time to time establish. But the judicial power of the commonwealth is its whole judicial power; and it is so distributed that the legislature can not exercise any part of it. Under the constitution, therefore, there is no mixed power—partly legislative and partly judicial—such as was recognized in *Bradee v. Brownfield*, 2 Watts & S. 280. Did it exist, it could be exercised only in concert or in common; for it would give the judiciary as much right to legislate as it would give the legislature right to adjudicate. Thus blended, I know of no constitutional power, principle, or provision that would give to either of them, as a co-ordinate branch, an exclusive right to the whole. What, then, did the legislature propose by the statute of 1848? This court had ruled in *Asay v. Hoover*, 5 Pa. St. 21 [45 Am. Dec. 713], directly, and in *Grabill v. Barr*, Id. 441 [47 Am. Dec. 418], *Cavett's Appeal*, 8 Watts & S. 21 [42 Am. Dec. 262] and perhaps *Hays v. Harden*, 6 Pa. St. 413, incidentally, that a testator's mark to his name at the foot of a testamentary paper, but without proof that the name was written by his express direction, is not the signature required by the act of 1833; and the legislature has declared, in order to overrule it, that "every last will and testament heretofore made, or hereafter to be made, except such as may have been finally adjudicated prior to the passage of this act, to which the testator's name is subscribed by his direction, or to which the testator has made his mark or cross, shall be deemed and taken to be valid."

How this mandate to the courts, to establish a particular interpretation of a particular statute, can be taken for anything else than an exercise of judicial power in settling a question of interpretation, I know not. The judiciary had certainly recognized a legislative interpretation of a statute before it had itself acted, and consequently before a purchaser could be misled by its judgment; but he might have paid for a title on the unmistakable meaning of plain words; and for the legislature subsequently to distort or pervert it, or to enact that white meant black, or that black meant white, would in the same degree be an exercise of arbitrary and unconstitutional power. All *ex post facto* laws are arbitrary; and it is to be regretted that the constitutional prohibition of them has been restricted to laws for penalties and punishments. In a moral or political aspect, an invasion of the right of property is as unjust as an invasion of the right of personal security. But retroactive legislation began

and has been continued, because the judiciary has thought itself too weak to withstand; too weak, because it has neither the patronage nor the prestige necessary to sustain it against the antagonism of the legislature and the bar. Yet, had it taken its stand on the rampart of the constitution at the onset, there is some little reason to think it might have held its ground. Instead of that, it pursued a temporizing course till the mischief had become intolerable, and till it was compelled, in *Norman v. Heist*, 5 Watts. & S. 171 [40 Am. Dec. 493], and *Bolton v. Johns*, 5 Pa. St. 145 [47 Am. Dec. 404], to invalidate certain acts of legislation, or rather to reverse certain legislative decrees. Conceding the right of legislative interpretation in the first instance, because it has prevailed too long to be disputed, we can pronounce the act of 1848 to be exclusively prospective without disturbing titles.

It is destitute of retroactive force, not only because it was an act of judicial power, but because it contravenes the declaration in the ninth section of the ninth article of the constitution, that no person shall be deprived of life, liberty, or property, except by the judgment of his peers or the law of the land. Taking the proof of execution, at this stage of the argument, to be defective under the act of 1833, it would follow that the plaintiff had become the owner of a third of the property in contest, by the only assurance that any man can have for his property—the law. Yet the legislature attempted to divest it, by a general law it is true, but one impinging on particular rights. Still it is argued that the act may be sustained as a confirmation of conveyances by will, as a confirmation of conveyances by deed was sustained in *Underwood v. Lilly*, 10 Serg. & R. 97; *Mercer v. Watson*, 1 Watts, 330, and other cases of the class. It was remarked in *Menges v. Wertman*, 1 Pa. St. 223, that a party, who has received a benefit from a transaction, is under a moral obligation to convey, and that the legislature may add a legal one to it; and I still think that a distinction between a purchaser and a volunteer, is the only ground left us to found a practical limitation of special legislation. In this case, the devisee is a volunteer, and the heirs are bound by no obligation which did not bind the legitimate heirs in *Norman v. Heist*, 5 Watts & S. 171 [40 Am. Dec. 493]. But the great obstacle in *Menges v. Wertman*, *supra*, was the number of titles that depended on legislation of the same stamp. I have doubted whether we ought not to have swept them all away; but we had a choice of evils set before us, and want of steady-

ness in the judiciary was thought to be the greater one. Decision, however, has not established a rule of property to control us in the present case; for judicial interpretation of the act of 1833 had preceded the act of 1848. The statutes in *Hess v. Wertz*, 4 Serg. & R. 356; and *Satterlee v. Mathewson*, 13 Id. 133; S. C., 2 Pet. 380, were enacted, not to create a contract or to confirm one, but to remove a disability; and the protection not of a party, but the public, was certainly within the constitutional range of legislative action.

The defendant's next position is, that the testatrix's name, written by another, without her express direction, but acknowledged by her mark, was within the true intent and meaning of the original act, which requires that "every will shall be in writing, and unless the person making the same shall be prevented by the extremity of his last sickness, shall be signed by him at the end thereof, or by some person in his presence and by his express direction." But this express direction, like signing by the testator in the presence of the attesting witnesses, and attestation by them in his presence and in the presence of each other, under the English statute of frauds, is a substantive part of the act of execution prescribed by the statute under consideration; and where it is not proved, expressly or presumptively, by the oaths or attestation of two witnesses, it is not proved at all. Why use emphatic words, if there was no design to distinguish between an express and an implied direction? Though express direction may be proved by presumptive evidence, it follows not that a subsequent act of ratification by the mark, is presumptive evidence of it. A direction precedes the act to be done in obedience to it; and in this respect a direction expressed in words differs from a direction implied from subsequent assent. There is a maxim that ratification is equivalent to command; but it was held in *Dunlop v. Dunlop*, 10 Watts, 153, not to be express direction.

The question at this stage of the inquiry is not whether the attestation may not be evidence of previous direction, but whether the mark is. It is not disputed that it is evidence of ratification; but what magic is there in ratification by the testator's pen, which is not found in ratification by his tongue, which was held not to be express direction in *Dunlop v. Dunlop*? Does the mark constitute the signature? or does the name? or do both together? Take it that the signature is only a sign; still, to import anything, it must be a sign of something. It must have an intrinsic or a conventional meaning without being inter-

puted by anything appended to it. A name without a mark to it individuates the person, and may express his assent to an act done by him: a mark without a name to it individuates or expresses nothing. A cross, or a scratch, or a scrawl, or a dot, or a dash, or a flourish, unassisted by the name, imports no more than would a blot, or a stain, or any other accidental discoloration of the paper at the foot of the instrument. When few could write, a seal was the more frequent symbol: it signified the name of the party as intelligibly as if it had been expressed by a combination of letters, which also is no more than a conventional sign of it. A naked mark is not a signature at the common law; and the statute was not designed to make it so. It requires the whole signature to be written by the hand of the testator, or by the hand of a by-stander—not a part of it by the one and a part of it by the other—and for the by-stander to write the name and the testator to make the mark is no more a fulfillment of its requisition than if their agency in the transaction was inverted, or the by-stander had, without express direction, written the one and made the other. Yet if the mark were an integrant part of the signature, it would have to be made by somebody, though the testator were too feeble to put pen to paper. If it is not an integrant part, what office does it perform? As an act of verification it is as insignificant when made by the testator as when made by a stranger. No one would pretend that a dot would be enough, and the statute consequently requires the name; and as it sanctions nothing which it does not enjoin, a mark is surplusage, and consequently ineffective. It substitutes for it the name written by the testator's express direction, as a more rational act of authentication in order to dispense with it.

Even without a statute to help it, the seal of a party, affixed by another in his presence and with his assent, was held in *Hart v. Withers*, 1 Pen. & W. 285 [21 Am. Dec. 382], on the authority of *Ball v. Dunsterville*, 4 T. R. 313, to be his immediate act. As signing by the testator's assent would have been good at the common law, the statute was enacted not to authorize it, but to regulate the evidence of it by requiring more than a wink or a nod, or a word not less ambiguous, and therefore not less liable to misconstruction or misrepresentation. The purpose of it was to have a straightforward direction expressed in terms, which would leave no pretense for the touch of an insensible or dead man's hand to give color to an artful tale told by willing witnesses. In other transactions, the mark is sometimes used as a badge of

assent; but the assent required by the statute is to be signified, not by a badge attached to the name, but by a direction to attach the name to the paper. Were we to receive the implication of a direction as an equivalent for the express direction demanded by the statute, we should overrule *Dunlop v. Dunlop*, in which the doctrine of equivalents was rejected, and *Burwell v. Corbin*, 1 Rand. 131 [10 Am. Dec. 494], which is a strong authority for the principle. The judgment in the latter was founded on the construction of a statute in Virginia, enacted in the words of our own. The will was proved, by one of the attesting witnesses, to have been signed with the testator's name, by his express direction; and the other, who had not been present, but attested it the next day, proved that the testator acknowledged it to be his will; and, though this recognition by words were more explicit than recognition by a mark, the proof was held to be deficient. After all, therefore, it is the name written by the testator's express direction which constitutes the signature; and the question comes to this: Was the positive testimony of one of the attesting witnesses, and the attestation of the other, in the absence of his recollection, proof of it?

Where the oath can not be had, it is settled that the attestation is a substitute for it, and proof of compliance with the requisitions of the statute. Such is the principle of *Hands v. James*, 2 Com. 531; *Provis v. Reed*, 5 Bing. 435; and *Carrington v. Payne*, 5 Ves. 404. In *Croft v. Pawlet*, 2 Stra. 1109, the attestation was in the usual form, except that it was not said in it that the witnesses had signed in the testator's presence; and on an objection that it stood for proof of no more than the facts to which they subscribed, was disregarded. Even where the witness is present, but his memory is not, his attestation stands for proof. In *Dayrell v. Glascock*, Skin. 413, Lord Holt held it sufficient, in the first instance, to prove the attestation of a witness who would not swear to the sealing and publication. Pretty much to the same effect is *Turnipseed v. Hawkins*, 1 McCord, 272; *Brice v. Smith*, Willis, 1; *Fetherly v. Waggoner*, 11 Wend. 599; and *Fitzherbert v. Fitzherbert*, 4 Bro. C. C. 231. These prove very satisfactorily that the attestation of a witness dead, blind, insane, subsequently incompetent, or out of the reach of process, is *prima facie* evidence of every necessary fact. But what avails it that the man is living, if his memory is dead? If it were blotted out by paralysis, or worn out by decay, his attestation would stand for proof by a witness; but it must be immaterial how, or by what means, it lost its tenacity. The law of double

proof would place wills on ticklish ground, did it leave them to depend on the incorruptibility of attesting witnesses, or on their exemption from growing infirmity. Even where they flinch from their attestation, it satisfies the demands of the statute in the first instance, and is evidence to confront them before a jury. After the testator has executed his will in conformity to the requirements of the law, it would be a mockery of his right of testamentary disposal to exclude presumptive or secondary evidence of a compliance with forms that would be received in cases of another nature. I lay out of the case the supposed effect of the probate, which, though it might entitle the paper to be read in the first instance, can not shift the burden of proof in a question like the present. As a special case seems to be made for the opinion of the court, and not the jury, I am of opinion that the attestation was *prima facie* evidence, and sufficient.

Judgment affirmed.

LEGISLATURE CAN NOT EXERCISE JUDICIAL POWER: See *Lane v. Dorman*, 36 Am. Dec. 543, and note collecting prior cases in this series, and *State v. Fleming*, 46 Id. 73. A statute attempting to validate a void judicial proceeding for the taking of private property is judicial in its nature and void: *Richards v. Rote*, 68 Pa. St. 255. So a statute directing the performance of a judicial function in a particular way is void, but not so a statute directing the time of performing such function: *Haley v. Philadelphia*, 68 Id. 47, both citing the principal case. In *Reiser v. William Tell Sav. Fund Ass.*, 39 Id. 145, it is said that the supreme court of Pennsylvania has sometimes yielded to arbitrary legislative interference, and decided cases "not according to law, but according to the direction of the legislature," but that "this has often been repented of and been followed by 'works meet for repentance,'" citing the principal case and several others.

RETROSPECTIVE STATUTES, CONSTITUTIONALITY OF: See *Sutherland v. De Leon*, 46 Am. Dec. 100; *Towle v. Eastern Railroad*, 47 Id. 153; *Chesnut v. Shane's Lessee*, Id. 387; *Bolton v. Johns*, Id. 404, and cases cited in the notes thereto. Retrospective statutes which interfere with vested rights are unquestionably void, whether they are special or general: *Marble Building Association v. Hocker*, 3 Phil. 502; *Palairer's Appeal*, 67 Pa. St. 487, citing and approving the principal case. In *Grim v. Weissenberg School District*, 57 Id. 436, the remarks of Chief Justice Gibson in the principal case, as to the extremes to which the supreme court of Pennsylvania has sometimes gone in sustaining retrospective legislation, are referred to with approval.

LAW IN FORCE AT DEATH OF TESTATOR GOVERNS AS TO THE SUFFICIENCY OF THE EXECUTION OF HIS WILL: *Houston v. Houston*, 15 Am. Dec. 647; *Elcock's Will*, 17 Id. 703. In *Jauncey v. Thorne*, 45 Id. 424, it is said that, as to the execution of a will, the law in force at the time of its execution governs, while as to the proof of it, the law in force at the time it is offered for probate governs. That the Pennsylvania statute of wills of 1848, referred to in the principal case, has no retrospective operation as to rights already vested, is a point to which the case is cited in *Shinkle v. Crock*, 17 Pa. St. 162; *McCarty v. Hoffman*, 23 Id. 509. A statute passed after the death of the

husband, where a husband and wife agreed to execute mutual wills, and by mistake each signed the other's will, authorizing the court to take evidence, and if the mistake should be proved, to reform the husband's will is unconstitutional: *Aller's Appeal*, 67 Id. 345. If a will is not executed in the presence of competent witnesses it is no will, and the estate descends to the heirs, and any subsequent act, general or special, attempting to divest such estate by curing the will is unconstitutional and void: *Camp v. Stark*, 81½ Id. 241, all citing the principal case.

STATUTES RELATING TO EXECUTION OF WILLS SHOULD BE STRICTLY CONSTRUED: *Clingan v. Mitcheltree*, 31 Pa. St. 36, citing *Greenough v. Greenough*.

STATUTES VALIDATING DEFECTIVE CONVEYANCES, CONSTITUTIONALITY OF: See *Chestnut v. Shane's Lessee*, 47 Am. Dec. 387, and note; *Parkison v. Bracken*, 39 Id. 296.

MARK AS SIGNATURE TO WILL: See *Chaffee v. Baptist Missionary Convention*, 40 Am. Dec. 225; *Asay v. Hoover*, 45 Id. 713; *Grabill v. Barr*, 47 Id. 418; *Ray v. Hill*, 49 Id. 647, and notes.

SIGNING OF TESTATOR'S NAME BY THIRD PERSON BY HIS DIRECTION: See *Chaffee v. Baptist Missionary Convention*, 40 Am. Dec. 225; *Cavett's Appeal*, 42 Id. 262; *Asay v. Hoover*, 45 Id. 713; *Grabill v. Barr*, 47 Id. 418, and notes.

ATTESTATION CLAUSE AS EVIDENCE OF DUE EXECUTION of will, where the witnesses are dead, absent, or otherwise unable to testify: See *Remsen v. Brinckerhoff*, 37 Am. Dec. 251; *Chaffee v. Baptist Missionary Convention*, 40 Id. 225; *Jauncey v. Thorne*, 45 Id. 424; *Nelson v. McGiffert*, 49 Id. 170, and cases cited in notes thereto. Proof of the handwriting of the witnesses where they are dead, beyond sea, infamous, or have forgotten the facts, or the like, is sufficient evidence *prima facie* of the due execution of the will: *Leckey v. Cunningham*, 56 Pa. St. 373, citing the principal case.

PROOF OF WILL BY ONE WITNESS, or by one witness and corroborative evidence, where the other witnesses are unable to testify: See *Jackson v. La Grange*, 10 Am. Dec. 237; *Lindsay v. McCormack*, 12 Id. 387; *Dan v. Brown*, 15 Id. 335; *Jackson v. Vickory*, 19 Id. 522; *Nelson v. McGiffert*, 49 Id. 170, and cases cited in the notes thereto. The testimony of one of the witnesses to a will, showing that all the requirements of the statute have been complied with, aided by the attestation of the other witness where the latter is dead, absent, or has forgotten the facts, or the like, is sufficient proof of its due execution: *Long v. Zook*, 13 Pa. St. 402; *Vernon v. Kirk*, 30 Id. 224. But where, under the statute of 1833, the name is written by a third person, and, by mistake, the wrong name is signed, but the testator affixes his mark, it is not a sufficient execution: *Long v. Zook*, *supra*. If the testimony of one of the witnesses is full and complete, but the other negatives an essential fact, the will is not duly proved: *Barr v. Graybill*, 13 Pa. St. 398. So where the only witness examined testifies that he did not hear the testator request any one to sign his name: *Snyder v. Bull*, 17 Pa. St. 60. In the foregoing cases the principal case is commented on and approved or distinguished.

BORLAND v. NICHOLS.

[12 PENNSYLVANIA STATE, 38.]

WIDOW'S RIGHT OF DOWER IN LANDS ALIENED BY HER HUSBAND during his life-time, without her co-operation, is not barred under section 10 of the act of 1797, by the acceptance of a devise to her; nor is the statute prevented from operating by the fact that the husband conveyed with covenant of warranty.

ACTION of dower. Plea, that a devise was made by the husband to the demandant in lieu of dower, and accepted by her. There was a special verdict, in which it was found, that in 1798 the demandant's husband, being seised of the premises in fee, aliened them by a conveyance in which the wife did not join, and under which the defendant claimed; and that the husband died in 1830, having devised and bequeathed certain property to the demandant, which she accepted. Judgment was given for the defendant on the verdict, and error was assigned.

Shaler, for the plaintiff in error.

Williams and Kuhn, contra.

By Court, BELL, J. This controversy is identical in principle with *Leinawever v. Stoeper*, 1 Watts & S. 160, the reasoning of which is unanswerable. It is true, the questions presented by the two cases arise under different statutes, but both of these have the same object in view, and are, therefore, subject to the same construction. If, indeed, there be any difference discoverable in the language of the two enactments in the particular now under consideration, it is in favor of the claim set up in this action. This is made subject to the act of 1797, the tenth section of which provides that an accepted devise of any portion of a testator's estate to his widow "shall be deemed and taken in lieu and bar of her dower out of the estate of her deceased husband, in like manner as if the same was so expressed," while the act of 1794, under which *Leinawever v. Stoeper* was adjudicated, directs that "the share of the estate of an intestate, in this act directed to be allotted to the widow, shall be in lieu and satisfaction of her dower at common law." Yet, notwithstanding the comprehensiveness of these words, which taken literally would seem to include all a widow can claim at common law, it was solemnly adjudged that accepting the statutory interest in the lands left by her deceased husband, will not bar her of dower in lands aliened by him in his life-time, without her co-operation. And why? Simply because, by the unwritten

law, a husband has no power to destroy his wife's estate in dower by alienation, and he is not helped to do it by the act of 1794, which, like its successor of 1833, has reference solely to the realty of which the baron was owner at the time of his death: *Riddleberger v. Menzer*, 7 Watts, 141.

If this be the true meaning of the older statute, and I do not understand it is denied, by what warrant can we ascribe a broader signification to the act of 1797, which merely substitutes the accepted devise for the widow's interest in "the estate of her deceased husband," a description having no application to property in which he divested himself of all estate prior to his death? The truth is, no one can read these statutes and those that have followed them of like import, without at once perceiving this operation was intended to be confined to lands an intestate had left to descend on his heirs or a testator had given to his devisees. The simple absence of every direct expression indicative of a design to bring lands aliened within the purview of the enactments, ought, in itself, to be accepted as sufficiently proving no such design was entertained; for, surely, had the law-maker intended so important a change in the existing law, he would not have left it to a doubtful inference drawn from inconclusive reasoning. This suggestion is in accordance with one of the primary canons of construction, which teaches that statutes are to be interpreted in subordination to the common law, a change of which is not to be imputed to the legislative body where the legislative act can be construed in harmony with it. "It is not to be presumed," says an approved writer on the subject, "that the legislature intended to make any innovation upon the common law further than the case absolutely required. The law rather infers that the act did not intend to make any alteration other than what is specified and besides what has been plainly pronounced; for if the parliament had had that design, it is naturally said, they would have expressed it:" Dwarria on Stat. 43. This position is abundantly supported by the highest authority, as a glance at the books will show: *Stowel v. Zouch*, Plow. 365; *Miles v. Williams*, 1 P. Wms. 252; 2 Inst. 148; Id. 301; *Thursby v. Plant*, 1 Saund. 240; 1 Kent's Com. 434.

But, as has already been intimated, direct decision has closed on this question, so far as the act of 1794 is involved, and reason and analogy equally conclude it, as it is presented under the act of 1797. The most that can be said for the defendant in error is that the object of the latter statute was to put a widow

to her election, where there was a general devise in her favor, precisely as she may be called on when a testator expressly provides that the thing devised is to be taken in lieu of the devisee's dower in his estate. Yet it will scarcely be pretended that such a direction would defeat the widow's estate in lands aliened before the execution of the will. Our books furnish us with no case countenancing such a doctrine—at least, none have been brought to our notice by counsel noted for industrious research, for ~~the~~ reason, as I take it, that this idea has never been entertained, either at law or in equity. It is said, however, that a leading object of the act of 1797, and now of the act of 1833, is to protect the heir or devisee from the unreasonable exactions of widows, claiming to take both under the will and at law. And so, indeed, it is. It was predicated upon the reasonable presumption that a testamentary gift to a man's wife is, unless otherwise expressed, always intended by the testator to be instead of dower in the lands descended from, or devised by, him. A positive rule was, therefore, introduced in aid of this presumed intention, for the benefit of *hæres natus* and *hæres factus*. But was it also intended to operate for the benefit of a stranger alienee? I have already endeavored to show it was not, and, indeed, this appears to me to be so plain as to leave no room for cavil in ordinary cases. But, as leading to a different conclusion in this litigation, we are directed to the covenant of warranty entered into by the husband of this demandant. It is argued that, as his devisees may be made to answer in damages for a breach of it, the only way in which their estates can be protected is by denying the demandant's right to recover. We must, however, recollect that we are not now weighing the consequences that may flow from a breach of the testator's covenant. We are called on simply to declare the meaning of a statute, which must be the same whether there be warranty of the lands aliened or not. If it be conceded that the husband's unassisted alienation is impotent, under the terms of the statute as they stand, to destroy the wife's dower, it must necessarily result that a new quality can not be conferred on the act by a covenant not at all within its contemplation.

If without a covenant of warranty the case would be without the purview of the enactment, how can the presence of such a covenant enlarge the circle of its operation? It may be well enough to say, it ought to work such an effect, but the answer is, the statute does not so provide. The error consists in the endeavor to wrest it from its legitimate application to a class of

cases which may be called general, to make it subserve the exigencies of a particular instance, probably not thought of at the time. In this aspect of it, the argument is reduced to this proposition. Lands aliened *inter vivos* are or are not within contemplation of the acts. If they are, it requires not the aid of a special undertaking by the husband, to make them operative; if they are not, such an undertaking can not extend the circle of their efficacy. This must have been the view taken in *Leina-weaver v. Stoever*, 1 Watts & S. 160, where the husband executed a bond to indemnify against the wife's claim of dower, a recovery on which would, of course, have decreased his remaining estate. Yet it was deemed so unimportant in the decision of that question, that it was neither urged on the argument nor noticed in the opinion of the court.

For the reasons given, the judgment rendered by the district court must be reversed, and as the special verdict finds everything necessary, the proper judgment in favor of the demandant will be awarded by this court.

Judgment reversed, and judgment for the demandant.

DOWER, WHEN BARRED BY PROVISION IN WILL.—In case of a devise to a widow in lieu of dower, the widow has an election, either to accept the devise or claim dower: *Hall's Case*, 17 Am. Dec. 275; and if the devise be accepted, dower is barred: *Jackson v. Churchill*, 17 Id. 514. In *Larrabee v. Van Alstyne*, 3 Id. 333, a bequest was held not a bar, it not appearing that the wife had accepted it in lieu of dower. In *Gray v. McCune*, 23 Pa. St. 449, the doctrine of the principal case, that the acceptance of a devise under the husband's will did not bar the widow's right of dower in lands which the husband had conveyed to a stranger, and which formed no part of his estate, was approved; but held that an instrument executed by the widow, in this case, was not limited to lands of which her husband died seised, but operated as a release of her right of dower in lands conveyed by her husband to his son by a former wife, in the conveyance of which she had not joined; and in *Bradford's v. Kents*, 43 Id. 478, in commenting upon the substitutes for dower recognized by the Pennsylvania legislation, the principal case was cited on the proposition, that although an accepted devise or bequest under the will of her husband is in lieu and is a bar of the widow's right of dower, yet her right of dower out of lands aliened by the husband in his life-time, and during coverture, is not taken away by statute; and (page 479) that, as far as lands embraced in the intestate laws are concerned, the widow is shut up to the substitute, but lands which do not descend under such laws are unaffected. The widow is not required to elect between dower and a provision under her husband's will, unless the intent that she should do so appears expressly or by necessary implication from the will: *Hamilton v. Buckwalter*, 1 Am Dec. 350; *Evans v. Webb*, Id. 308; *Fickett v. Peay*, 6 Id. 594; *Adsit v. Adsit*, 7 Id. 539; *Jackson v. Churchill*, 17 Id. 514; *Gordon v. Stevens*, 27 Id. 445; *White v. White*, 31 Id. 232; *Church v. Bull*, 43 Id. 754. In *Van Orden v. Van Orden*, 6 Id. 314, the widow was held barred by the acceptance of a legacy; while in *Wiseley v. Findlay*, 15 Id. 712, it was held she could not be barred by a devise

of an estate for years, nor by a provision in personal estate; and in *Wood v. Wood*, 28 Id. 451, that she could not be compelled to elect between her dower and a testamentary provision out of a mixed fund to arise from a sale of testator's realty and personalty, where there was nothing to show that her dower interest was intended to be sold as part of the estate, but she might claim both. A widow can not be endowed of lands given in exchange, and those received, but she may elect of which she may be endowed: *Mahoney v. Young*, Id. 114. And the relinquishment of dower, in the husband's life-time, in one of the parcels of land exchanged, does not amount to an election to take dower in that parcel, but rather indicates an election to take dower in the other parcel: Id. As to when the wife is compelled to elect between benefits conferred by will and a share in community property, see *Theall v. Theall*, 26 Id. 501, and note.

THE PRINCIPAL CASE IS ALSO CITED IN *Pettit v. Fritz's Ex'r*, 33 Pa. St. 122, in reference to the construction of a married woman's act, to the point that "an obscure statute ought to be construed according to the rules of the common law."

FERRIS v. HENDERSON.

[12 PENNSYLVANIA STATE, 49.]

STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN, IN EQUITY, against a claim, where fraud is involved, until the fraud is discovered.

IN DETERMINING WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN, IN CASE OF FRAUD, regard may be had to the condition and circumstances of the person on whom the knowledge of the facts is to operate.

BILL in equity by Thomas Ferris, born in 1774, the slave of Joseph Becket, and claiming to be free in 1780, because he had not been duly registered. The other allegations appear in the opinion. The prayer was for an account and discovery, and satisfaction for services fraudulently obtained. A plea of the statute of limitations was sustained by the court below, and the bill dismissed. Complainant appealed.

Dunlop, for the appellant.

Woods, for the appellee.

By Court, COULTER, J. In *Overseers v. Kline*, 9 Pa. St. 218, it is said by Mr. Justice Rogers: "If it appeared in evidence that the defendant knew of the non-registry of Sylph, that she was entitled to her liberty, and fraudulently concealed that fact from her, a different case would be presented. Or if he had compelled her, taking advantage of her ignorance, to serve him, it would be another matter." Now all these ingredients are distinctly charged in the bill of the complainant in this case. Thus it is contained as follows: "Nevertheless as your orator

expressly charges, that notwithstanding the aforesaid Joseph was well acquainted in the premises, that is, that the orator was free, he, the aforesaid Joseph, fraudulently concealed the same from your orator, and held him in a state of slavery until the first of January, 1810, under pretense and a threat, that if your orator did not faithfully serve him, the said Joseph, as a slave as aforesaid until the full expiration of the time last mentioned, that then he, the said Joseph, would hold your orator a slave for life." And the bill continues in substance to aver that the deed of manumission was alleged by the said Joseph to be an act of humanity in consequence of the plaintiff agreeing to serve as a slave for seven years. And the deed itself, which is appended to the bill, wears that complexion. It recites that the said Joseph, from motives of benevolence and humanity, agrees to set free from slavery his mulatto man, Thomas Ferris, on condition that he will serve seven years. The bill further alleges that the plaintiff was forced to serve one year after the expiration of the seven years, under the pretense that such was the true meaning of the act of manumission, which he was induced to believe, owing to the unhappy condition of his birth and consequent ignorance.

The bill further alleges that the said Joseph Becket died in 1816, testate, leaving a large estate, but that executors or administrators with the will annexed were never qualified, nor any account of the estate returned. That the defendants are his representatives and devisees, and further, that the plaintiff was free at the time he was manumitted, but that he was totally ignorant of that fact until the year 1846, when it was first discovered by him. The respondents do not answer the bill specially, but allege that the charges of fraud therein set forth are not true, and plead that the statute of limitations is a bar to the plaintiff's claim, if he ever had one. The issue, therefore, is upon the validity of the statute, as a bar, under the facts set forth in the bill. The court below decided that the statute is a bar. The defendant does not answer that the fraud is not sufficiently set out in the bill, nor that the plaintiff had the means of discovering the fraud, but relies altogether on the statute as a bar, in the language of the plea, even if a claim once existed, such as is set out, and prays judgment of the court thereon. In equity the statute of limitations begins to run from the discovery of the fraud, and not before: *Brooksbank v. Smith*, 2 You. & Coll. 58; *Story's Eq.*, sec. 1521. In the case from *Younge and Collyer*, Baron Alderson said: "In cases of fraud

the statute runs from the discovery, because the laches of the plaintiff commences from that date, on his acquaintance with all the circumstances." The plaintiff may reply fraud to the plea of the statute of limitations, and avoid the plea: *Harrisburg Bank v. Forster*, 8 Watts, 12. Against a right of action, dependent on a secret fraud, the statute runs only from the discovery of the fraud: *Pennock v. Freeman*, 1 Watts, 401. But the court below say that when the party might have discovered the fraud, the statute began to run, and fix the period of its commencement in 1810, when the plaintiff was discharged, and cites a case from Pickering: *Farnam v. Brooks*, 9 Pick. 212; and from 3 Massachusetts: *First Mass. Turnp. Corp. v. Field*, 3 Mass. 201 [3 Am. Dec. 124].

These cases doubtless refer to circumstances where the defendants were guilty of supine negligence, and had the means of discovery in their possession. Because all frauds are discoverable by evidence somewhere in *rerum natura*. It depends, however, on the intelligence, acuteness, and activity of the party. I have examined the case of *Farnam v. Brooks*, 9 Pick. 212, on which the court below rely. The court say that the common law allows fraud, if not discovered until within six years before action brought, to be a good answer to the statute; courts of equity do no more, except that they do not in all cases require a recent discovery to repel the statute: Page 244, and in page 246. If the aggrieved party knew of the fraud when committed, or had full possession of the means of detecting it, which is the same thing as knowledge, it will deprive him of his remedy. In that case, the party had in his possession the books and documents which established the fraud. The bill in this case charges actual fraud in the suppression of the truth, that the complainant was free, and in the assertion of a falsehood, that he was a slave, by means whereof he procured the agreement of the mulatto to serve seven years. The reckless assertion of that which is not true, by means whereof a man cheats and obtains the advantage of another, is a fraud: *Bree v. Holbeck*, Doug. 655; *Jones v. Conoway, Rees' Ex'r*, 4 Yeates, 109. The nature of the fraud is quite sufficiently indicated and pointed out in the plaintiff's bill; but that was settled by the decision on the demurrer. In *Jones v. Conoway, Rees' Ex'r*, it was held that where there is fraud, the statute does not operate unless it be discovered within the time, nor then when the party is ignorant that the facts constitute a fraud. In this case, the complainant was born a slave and held as a slave till an advanced period of his life. He

belonged to a caste in which ignorance, submission, and oppression was the badge of their tribe. He had the deed of manumission, and to that he clung as evidence of his freedom, and of the humanity and benevolence, as expressed on the face of it, of his master. Such is the habit of submission and even attachment to which long servitude reduces the mind, that those held in bondage rarely think of questioning the veracity of those who hold them; like the noble animal, the horse, they are obedient to their master's voice, even after they are turned on the common to browse and die.

Although ignorance of the law shelters no man, yet we must have regard to the circumstances and condition of people on whom a knowledge of facts is to operate. Although in equity, a contract made with a man of sound mind will not be set aside, merely because it is a bad bargain, rash and improvident, yet, if it be made with a person of weak understanding, there does arise a natural inference that it was obtained by fraud, or circumvention, or undue influence: 1 Fonbl. Eq., b. 1, c. 2, sec. 3. If, then, such regard is had to the condition of a man, as to obliterate and annul his contract, why shall the condition of the plaintiff not account for a want of knowledge as to the facts which made him free? I will not say, but it would seem from the facts stated in complainant's bill, that the knowledge was acquired after he was put on the township for support, when the defendants refused to remunerate the overseers. As to the ultimate liability of the defendants, I intimate no opinion, because the only question raised on the record is, whether, on the facts stated in the plaintiff's bill, and the decision of the court below on the demurrer, the statute of limitations is a bar. We are of opinion that it is not. The decree of the court below is therefore reversed, and the record remitted, with instructions that the defendants answer over to the plaintiff's bill.

Decree reversed.

STATUTE OF LIMITATION IN CASE OF FRAUD.—At law, when the statute is pleaded, fraud may be replied: *First Mass. Turnp. Corp. v. Field*, 3 Am. Dec. 124; *Homer v. Fish*, 11 Id. 218; *Conyers v. Kenan*, 48 Id. 226. But in *Fee v. Fee*, 36 Id. 103, which was an action of *assumpsit*, it was held, that fraudulent concealment will not stop the running of the statute, though the plaintiff is thereby prevented from knowing that his cause of action accrued; the relief in such a case would be in equity. On the other hand, in *Arnold v. Scott*, 22 Id. 433, it was held, that the statute did not begin to run against the plaintiff, in an action of trover, until he has obtained knowledge of the conversion, if his want of knowledge was due to concealment by or other improper conduct of the defendant. And at law, mere ignorance of one's rights, when not

owing to the fraud or default of the debtor, does not prevent the operation of the statute: *Jordan v. Jordan*, 16 Id. 249; *Smith v. Bishop*, 31 Id. 607.

In equity, in general, the statute is a good plea where good at law: *Reeves v. Dougherty*, 27 Am. Dec. 496, and note; *Frame v. Kenny*, 12 Id. 367, and note. *Perkins v. Cartmell*, 42 Id. 753; *Lexington etc. R. R. Co. v. Bridges*, 46 Id. 528; *Thomas v. White*, 14 Id. 56; but in cases of fraud or inequitable conduct, the statute begins to run only from the discovery of the fraud: *Shelby v. Shelby*, 5 Id. 686; *App v. Drisbach*, 21 Id. 447; *Reeves v. Dougherty*, 27 Id. 496, and note; *Richardson v. Jones*, 22 Id. 293; *Haynie v. Hall's Ex'r*, 42 Id. 427; *Kuhns' Appeal*, 87 Pa. St. 104, where the language of the principal case in regard to the running of the statute is quoted, and applied to a case where a guardian had perpetrated a fraud in the settlement of his accounts; and it was held that the limitation in the act of October 13, 1840, began to run from the discovery by the injured party, and not from the confirmation of the account.

THE PRINCIPAL CASE IS ALSO CITED IN *Gump's Appeal*, 65 Pa. St. 479, to the point, "that a mistake or accidental omission, its equivalent, in drawing up the terms of a written instrument, falls within the jurisdiction of chancery under the head of mistake."

MCGOWIN v. REMINGTON.

[12 PENNSYLVANIA STATE, 56.]

SPECIFIC DELIVERY OF CHATTELS DETAINED WILL BE DECREED where the law does not afford adequate redress by compensation in damages, or where such chattels have been deposited upon a trust.

JURISDICTION OF EQUITY ATTACHING FROM NATURE OF ONE OF THE SUBJECTS OF CONTEST EMBRACES ALL OF THEM.

BILL in equity. The complainant, Z. W. Remington, set forth in his bill that he had been a surveyor and regulator of the streets of Pittsburgh, and other places around that city, and as such, had made many maps, plans, plats, and drafts of surveys of the ground in and near the city, of the grades of streets and roads, and of plantations in the adjoining counties, and possessed certain furniture and surveying instruments; that he removed from Pittsburgh, intending to engage in other occupations, and left his plans, plats, and other property with the defendant, who had been under the complainant's tuition and service as a surveyor, for the purpose of the defendant's use and assistance, until they should be again required by the complainant, in case he returned and resumed his old business of surveying; that all of the complainant's property in the defendant's hands was of real value to the complainant, such that no damages at law could compensate, and which would be difficult or impossible to replace or procure; and that the complainant demanded his property of the defendant, but the latter refused to

deliver it up. The answer affirmed, among other things, that the plans and other property belonged in part to the respondent and in part to other persons. At the hearing, the plats, plans, drafts, and any copies of the same that might have been made by the defendant before the demand, and the furniture and instruments, were decreed to be delivered up to the complainant, and an injunction which had been granted, restraining the copying, destroying, secreting, etc., of the plats, plans, and drafts, was made perpetual. Defendant appealed.

Craft and McCandless, for the appellant.

Dunlop, contra.

By Court, BELL, J. The defendant having failed to sustain, by proof, his allegation of sale or gift of the articles sought to be recovered by this bill, the contest in this court is reduced to two questions: 1. Whether the bill presents sufficient grounds to warrant the interference of a court of equity, in this state, under the statute conferring equitable jurisdiction? 2. Whether that portion of the decree which covers the surveying instruments and furniture described in the exhibits annexed to the bill can be sustained?

As to the first point: the defendant insists that the only remedy is at law. Though the action of replevin is, with us, a broader remedy than in England, lying in all cases where one man improperly detains the goods of another, it is in no instance effective to enforce a specific return of chattels, since a claim of property and bond given is always sufficient to defeat reclamation, no matter what may be the eventual issue of the contest. As, therefore, our common-law tribunals are as powerless for such a purpose as the similar English courts, the propriety of exerting the equitable jurisdiction now invoked must depend with us on the same reasons that are deemed sufficient to call it into action there. Here, as there, the inquiry must be whether the law affords adequate redress by a compensation in damages, where the complaint is of the detention of personal chattels. If not, the aid of a court of chancery will always be extended to remedy the injury, by decreeing a return of the thing itself.

The precise ground of this jurisdiction is said to be the same as that upon which the specific performance of an agreement is enforced, namely, that fruition of the thing, the subject of the agreement, is the object, the failure of which would be but ill supplied by an award of damages: *Lowther v. Lowther*, 13 Ves.

95. In the application of this rule some difficulty has been experienced. The examples afforded by the English books are usually those cases, where, from the nature of the thing sought after, its antiquity, or because of some peculiarity connected with it, it can not easily, or at all, be replaced. Of these may be instanced, the title-deeds of an estate and other muniments of property; valuable paintings: *Lowther v. Lowther*, *supra*; an antique silver altar-piece: *Duke of Somerset v. Cookson*, 3 P. Wms. 389; an ancient horn, the symbol of tenure, by which an estate is held: *Pusey v. Pusey*, 1 Vern. 273; heir-looms: *Macclesfield v. Davis*, 3 Ves. & Bea. 18; and even a finely carved cherry-stone: *Pearne v. Lisle*, Amb. 77. Such articles as these are commonly esteemed not altogether, or perhaps at all, for their intrinsic value, but as being objects of attachment or curiosity, and, therefore, not to be measured in damages by a jury who can not enter into the feelings of the owner; so too the impossibility, or even great difficulty of supplying their loss, may put damages out of the question as a medium of redress. But these are not the exclusive reasons why chancery interferes, for there may be cases in which the thing sought to be recovered is susceptible of reproduction or substitution, and yet where damages could not be so estimated as to cover present loss or compensate its future consequent inconvenience. And I take it this is always so, where, from the nature of the subject or the immediate object of the parties, no convenient measure of damages can be ascertained; or, where nothing could answer the justice of the case but the performance of a contract in specie. Of this *Buxton v. Lister*, 3 Atk. 384, furnishes an example in the analogous instance of a contract for the sale of personalty: contracts, which are most commonly left to be dealt with at law. It was a bill to enforce the performance of an agreement for the purchase of several large parcels of growing wood, to be severed by the defendants, who were to have eight years to dispose of it, and to pay for it in six yearly installments. Lord Hardwicke was, at first, extremely reluctant to entertain the bill, but after discussion came to the conclusion, that, though relating to a personal chattel, it was such an agreement that the plaintiff might come into chancery for a specific performance. He instanced the case of *Taylor v. Neville*, which was a bill for the performance of articles for the sale of eight hundred tons of iron, to be paid for in a certain number of years, by installments, where the decree prayed for was made; and proceeded to observe—"such sort of contracts as these,

differ from those that are immediately to be executed. There are several circumstances which may concur. A man may contract for the purchase of a great quantity of timber, as a ship-carpenter, by reason of the vicinity of the timber; and this is on the part of the buyer. On the part of the seller, suppose a man wants to clear his land in order to turn it to a particular sort of husbandry; there nothing can answer the justice of the case but the performance of the contract in specie." Similar in principle is the case of *Fells v. Read*, 3 Ves. 70, where the plaintiffs prayed the restoration of an engraved silver snuff-box, used for many years by a society, as the symbol of their association; and *Nutbrown v. Thornton*, 10 Id. 159, where a tenant brought a bill against his lessor, who, under pretense of the tenant's covenant, had repossessed himself of the land, and seized upon the stock of cattle, which by the lease the tenant was to enjoy for seven years. The objection was that the tenant's remedy, if he was entitled to one at all, was at law, in damages.

But how, asked Lord Eldon, are damages to be estimated in such a case? The direction to the jury must be to give, not the value of the chattels, but their value to the tenant! A similar question may well be propounded in our case. By what standard would you measure the injury the plaintiff may sustain in futuro from being deprived, even for a brief period, of the use of papers essential to the prosecution of his business? Their intrinsic value might, perhaps, be ascertained by an estimate of the labor necessary to their reproduction, admitting the means to be at hand, and within the power of the plaintiff. But how could a tribunal ascertain the probable loss which in the mean time might be sustained? The present pecuniary injury might be little or nothing, and so possibly of the future; or it might be very great, depending upon the unascertainable events of coming time, as these may be influenced by the misconduct of the defendant. These considerations show, I think, the case is not one for damages. Besides, as many of the maps, plans, surveys, and calculations are said to be copies of private papers, we are by no means satisfied they could be replaced at all. Certainly not without permission of the owners; a risk to which the plaintiff ought not unnecessarily to be exposed. If to these reflections we add the fact that some of these documents are the original work of the plaintiff, of value as being predicated upon data possibly no longer accessible, a wrong is perpetrated which a chancellor ought not to hesitate in relieving. It is enough for this purpose that a perfect relief at law

is not apparent. The thing to be guarded against is not the invasion of the defendant's rights, for he stands here absolutely without any, except the common interest every citizen has in preserving the proper line of distinction that divides the jurisdiction and limits the powers of the several courts. What is to be avoided is an unnecessary trespass upon the province of the common-law tribunals, and this is to be tested by the simple query whether they offer a full remedy for the wrong complained of.

But there is another ground upon which this proceeding may be sustained. In *Fells v. Read*, 3 Ves. 70, the snuff-box was deposited with the defendant as a member of the society, upon certain terms, to be redelivered upon the happening of certain events. Lord Rosslyn held that under these facts the defendant was a depositary on an express trust which, upon a common ground of equity, gave the plaintiff title to sue in that court; and in this he was supported by Lord Eldon, in the subsequent case of *Nulbourn v. Thornton*. According to the proof in our case, the papers and documents claimed were left with the defendant under the express understanding that they were to be redelivered whenever the plaintiff should see fit to resume the business of his then profession in this city. It is then the case of direct confidence violated—a spell sufficiently potent to call into vigorous activity the authority invoked.

As to the second question, it is perhaps enough to say, that when once a court of equity takes cognizance of a litigation, it will dispose of every subject embraced within the circle of contest, whether the question be of remedy or of distinct yet connected topics of dispute. If the jurisdiction once attaches from the nature of one of the subjects of contest, it may embrace all of them, for equity abhors multiplicity of suits. Thus in the case last cited, the chancellor ruled that where a person is found wrongfully in possession of a farm, over which the court had undoubted power, and also in possession of the stock upon it, at the same time and under the effect of the same wrong, the court will undoubtedly make him account for and deliver back the whole. In the case at bar the surveying instruments and office furniture stand in the same category with the maps, drafts, etc.; were delivered to the defendant at the same time, and are withheld by an exertion of the same wrong. In short, they enter into and make part of the same transaction, and may, therefore, be the objects of the same measure of redress.

Decree affirmed.

EQUITY JURISDICTION TO RECOVER CHATTELS.—As a general rule, equity will not take jurisdiction to recover specific chattels: See *Lining v. Geddes*, 16 Am. Dec. 606; but if the chattels have some special value to the owner, over and above any pecuniary estimate, equity will entertain a suit for their recovery, or specific performance of a contract concerning them: *Id.*; 3 Pomeroy's Eq. Jur., sec. 1402, where the principal case is cited. In *Foll's Appeal*, 91 Pa. St. 437, the court, in stating that it knew of no instance in Pennsylvania in which a court of equity had decreed a specific performance of a contract for the sale of stock, cited and distinguished the principal case, on the ground that the latter came within the well-recognized exception to the rule that equity will not entertain a suit to recover specific chattels; besides, in that case, the property was deposited on trust. The exception to the general rule of equity in regard to the recovery of chattels is kept within narrow grounds. This fact probably gave rise to the citation of the principal case in *Smaltz's Appeal*, 99 Id. 312, where it was said that the courts of Pennsylvania will not entertain equity jurisdiction for specific performance where there is an adequate remedy at law in damages, and the occasion for the remark, that "care should be taken that there be no unnecessary encroachment on the province of the courts of common law." The decision of the principal case is perhaps a little remarkable as coming from the courts of a state with such narrow equity powers as those of Pennsylvania. But in *Finley v. Aiken*, 1 Grant's Cas. 92, which was an action for specific performance of a contract for the sale of land at the suit of the vendor, the principal case was cited on the point, that the action in question ought to be maintainable in Pennsylvania, since the equitable remedy should be encouraged, because better than the action of covenant, which was bungling and inadequate.

TRUSTS IN PERSONALTY will be enforced: *Kimball v. Morton*, 43 Am. Dec. 621; 3 Pomeroy's Eq. Jur., sec. 1402, citing the principal case. The principal case is also cited in *Simes v. Everson*, 46 Pa. St. 309, in which it was held that the district court had jurisdiction of a bill in equity to compel the redelivery of a note given to the payees and holders by the maker, on condition and under agreement that it should be specifically surrendered in case of the failure of a contemplated arrangement, the arrangement having failed, and the complainant having retransferred the consideration received from the respondents, according to the agreement. As to establishing the trusts by parol, see *Kimball v. Morton*, *supra*, where the cases in this series are collected. Express trusts in personalty are not abolished by the revised statutes of New York, abolishing all but certain kinds of express trusts: *Kane v. Gott*, 35 Am. Dec. 641.

JURISDICTION OF EQUITY ONCE ATTACHING, EXTENDING TO ENTIRE CONTROVERSY: *Chichester v. Vass*, 4 Am. Dec. 531; *Middletown Bank v. Russ*, 8 Id. 164; *King v. Baldwin*, Id. 415; *Hughlett v. Harris*, 12 Id. 104; *Candler v. Pettit*, 19 Id. 399; *Dugan v. Cureton*, 31 Id. 727; *Irvine's Heirs v. McRee*, 42 Id. 468. In the last case it was held that equity had jurisdiction to decree the possession of land, when a controversy about the title had been properly brought in that court. The principal case is a leading one in Pennsylvania, on the proposition that if a court of equity obtains jurisdiction for any purpose it will retain it for all, and is cited to that effect in *Shollenberger's Appeal*, 21 Pa. St. 340, to show that if the orphans' court—essentially a court of chancery—had decreed a balance in the guardian's favor on settlement of account, he might have a writ of *fiery facias* to collect the balance out of the ward's estate; in *Gloninger v. Hazard*, 42 Id. 401, on the general proposition that since discovery was peculiarly a chancery jurisdiction, equity, to prevent a

multiplicity of suits, will, when it has acquired jurisdiction for this purpose, entertain the suit and dispose of every connected topic—i. e., decree an accounting, when discovery is sought; in *Souder's Appeal*, 57 Id. 502, on the point that when money is paid into court on a judgment, and is claimed by different persons as owners of the judgment, the question of ownership may be determined by the court itself or submitted to a jury; but if the ownership of an incumbrance arises legitimately in a proceeding to make distribution, it may be determined in the proceeding itself, as one of the incidents of distribution, thus avoiding prolongation and circuity of action; in *Marvine v. Drexel*, 68 Id. 368, to the effect that when a sale of land by executors, in a manner which would be ruinous to the complainant, who was jointly interested with the testator, by virtue of an agreement, in the proceeds of the land to be sold by the testator, was restrained, a sale in such manner as would serve the joint interests of the parties would be decreed; in *Allison & Evans' Appeal*, 77 Id. 227, where damages were sought to be obtained, on an injunction granted to restrain boring for oil; in *Winton's Appeal*, 97 Id. 395, to the point that equity has power to enforce its own decree in reference to a subject over which it has obtained jurisdiction, without being obliged to have recourse to the assistance of a court of law; and in *Morse's Appeal*, 97 Id. 396, to the effect that if an absolute deed has been decreed by equity a mortgage, a sale of the mortgage will be ordered, not by virtue of the power of equity to decree a sale at the instance of the mortgagee, but because where jurisdiction has once attached, it embraces within its grasp all powers and remedies necessary to give effect to the equity which is invoked.

BROWNFIELD v. BROWNFIELD.

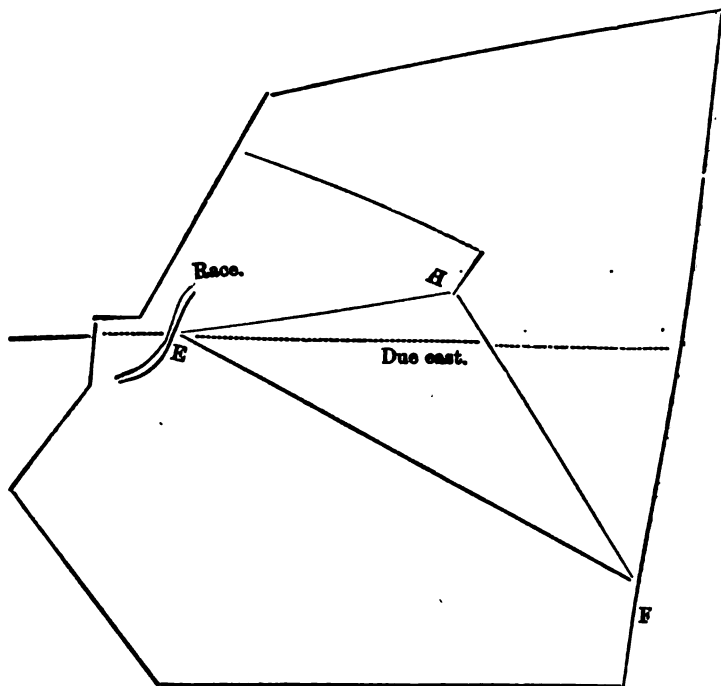
[12 PENNSYLVANIA STATE, 186.]

WHERE NAME AND DESCRIPTION IN DEVISE ANSWER IN SAME DEGREE TO EACH OF TWO OBJECTS, the intention is a pure question of fact, and does not depend in any degree on legal direction.

TO REMOVE LATENT AMBIGUITY IN WILL, acts and declarations of a testator in respect to the thing given are admissible; also, the relative amount of advancements, and the differences in value of portions of land devised to children, are proper subjects for consideration.

EJECTMENT. The action was brought by John Brownfield against Isaac Brownfield to recover a piece of land in the shape of a triangle, containing about thirty acres, inclosed between two lines, laid down in the accompanying draft as E H and E F, and meeting at E, near the west side, and a third line, drawn from H to F. The question was as to which of the two lines, E H and E F, constituted the boundary between the parties. The line E H ran a few degrees north of, while the line E F ran a greater number of degrees south of, due east. The entire tract of land, embracing the portion in controversy, had been patented to Thomas Brownfield, who afterwards, in

consideration of love and affection, conveyed the north-eastern part of it to his son John. The remainder of the tract is termed the "home place," and includes the premises in question. A further conveyance of a small part of this "home place," with a saw-mill and water right, had been made to John by his father, on a money consideration. Thomas Brownfield, by his will, devised to his son Isaac, the southern portion of the "home



place," "beginning at the saw-mill race [E], four perches south of the dwelling-house, near said saw-mill, and thence supposed nearly an east course to a post, a corner of John Brownfield's and my home place, and the other part of my home place I give and devise to my eldest son John and his male heirs." Evidence was offered by the defendant, showing that there was a post corner at each of the two places, H and F, thereby raising a latent ambiguity in the will; whereupon the plaintiff offered to show by the executor and scrivener of the will, that the testator intended the line to run to the post corner at F, to the admissibility of which the court sustained an objection. The plaintiff then proposed to prove by the deposition of Anne Brownfield, a daughter of the testator, that her father had

told her how he meant to make his will, and that the division line between John and Isaac was to run to the post corner at F; that she saw him stake off that line, and after he had done so, told her he had staked it up to John's corner at F; and that she subsequently went and saw the stakes up to that corner. This evidence was rejected by the court. Evidence was then offered by the plaintiff to show the relative values of his and Isaac's portions of the land, and the circumstances which induced the father to make the gift referred to to John. The court also refused to admit this evidence. There was a verdict and judgment for the plaintiff. The direction to the jury, for which error was assigned by the defendant, is stated in the opinion.

Miller, Deford, and Veech, for the plaintiff in error.

J. K. Ewing, N. Ewing, and Fuller, *contra*.

By Court, GIBSON, C. J. The key to the difficulty in this case is, that it arises from a latent, not a patent, ambiguity, produced not by the words of the will, but by circumstances collateral to it. Had the contemplated monument of the division between the brothers been described as *the* "post, a corner of John Brownfield's and my home place," the definite article would have indicated the existence of an apprehension that there was no other post corner which answered the description; and the ambiguity caused by the testator's ignorance of the fact, and not by any uncertainty in his words, would clearly have been a latent one. Is it less so, when, using the indefinite article, he describes the monument as *a* post corner? It is plain he supposed that there was only one such; for had he known there were two, he surely would have specified the intended one by reference to peculiar circumstances connected with it. Nothing could be more indefinite than a bequest simply to John Smith; yet it would be unambiguous, standing on the words of the will, though it might be otherwise standing on extrinsic circumstances; and a contest about the identity of the legatee would be determinable as an unmixed question of fact, the court having no more to do with it than to inspect the evidence pertinent to it, and pass it to the jury. As regards the corner, the contest in the court below was such; and the question to be solved was one of fact, which did not depend in any degree on legal direction. "Yet," said the judge, referring to the diagram, "the location of the line on the ground is for you. Was F a post corner? If it was, I think the will directs to that

point. But if it was not, and the corner H was a post corner, and the only one in an easterly direction from the place of beginning, then that is the true corner, and your verdict should be for the defendant; if not, or if both H and F were post corners, then your verdict should be for the plaintiff." But the will did not point to either of the corners in exclusion of the other, though external circumstances might do so. It gave no directions, but to run by an easterly course to a post corner of John Brownfield's land and the testator's home place: and if there were two such, the will did not point to either of them in particular. That the verdict ought to be for the plaintiff, if both H and F were found to be post corners, was not a necessary conclusion of either fact or law. It is true, the course of the contemplated line was supposed by the testator to be nearly east; but that was a matter of guess which leads to no result. I can at present recall but one case in which a legal conclusion has been drawn from modes of designation. Where, as in *Vernor v. Henry*, 3 Watts, 393, a concurrent designation by name and by description disagree, the rule is that the former shall be taken to be the more worthy in certainty. But here there was no disagreement, the name and the description answering in the same degree to each of the corner posts; so that nothing was to be determined but a pure question of fact. True, the judge told the jury that the location of the line on the ground was for them; but if he did not mean to instruct them that legal conclusions would diversely spring from the two facts put before them, as the one or the other of them should be found, they might readily suppose him to mean it.

The impression that the question of intention stood on the words of the will, seems to have led also to the exclusion of evidence which, we think, ought to have been received. To remove a latent ambiguity, circumstances indicative of the state of the testator's affections towards the object of his bounty, or the relative circumstance of his connections, or his acts and declarations in respect to the thing given, or the person of the donee, are constantly admitted. The competency of such matters was considered in *Vernor v. Henry*, already quoted; but it is unnecessary to recur to authority for the principle. In applying it to the evidence in this case, it is difficult to say whether the testimony of the scrivener, that the testator intended the line to be run to the post corner at F, was proper or not. If it was offered as proof that the testator had said so, it ought to have been ad-

mitted; but if it was offered as the opinion of the witness, it was not admissible, though the facts on which it was formed might be so. Clearly, however, the deposition of Anne Brownfield was competent. If the testator told her he meant to direct by his will that the line of division should be run to the particular corner; that she saw him begin to stake it off in that direction; that he afterwards told her he had staked it to that corner; and that she subsequently saw the stakes leading to it; these facts would be not only competent but powerful evidence that the particular corner was the one called for in the will. As the presumption is, in the first instance, that a testator aims at equality, the relative amount of the advancements and the differences in value of the portions of the land would be proper for consideration.

The questions of evidence, having been ruled for the defendant in error, are considered on this writ of error by consent of the parties.

Judgment reversed, and a *venire de novo* awarded.

LATENT AMBIGUITY IN WILL.—Parol evidence is admissible to show legatee where description applies to several: *Clarke v. Cotton*, 24 Am. Dec. 279; and, in general, to explain a latent ambiguity: *Mann v. Mann*, 7 Id. 416; *Breck-enridge v. Duncan*, 12 Id. 359. The circumstances of the testator may be shown: See note to *Kenyon v. McRoberts*, 1 Id. 446. The language of Gibson, C. J., in the principal case, that to remove a latent ambiguity the circumstances indicating the testator's affections towards the objects of his bounty, or the relative circumstances of his connections, or his acts and declarations in respect to the thing given or the person of the donee, may be considered, is quoted and approved in 1 Jarm. on Wills (by Rand. & Talc.), p. 734, n. 9.

DECLARATIONS OF TESTATOR, WHEN ADMISSIBLE.—Declarations are admissible to remove a latent ambiguity: Note to *Jackson v. Kniffen*, 3 Am. Dec. 398. Declarations of testator as to his understanding of the will are inadmissible for the purpose of showing his intention: *Comfort v. Mather*, 37 Id. 523. When made regarding the cancellation of a will, they are inadmissible, if not connected with any act done or attempted by testator, to effect a revocation: *Dan v. Brown*, 15 Id. 395. When made at the time of execution and delivery of an instrument alleged to be a codicil, they are a part of the *res gestæ*: *Marston v. Marston*, 43 Id. 611. As to the admissibility of declarations to show fraud, duress, undue influence, etc., see *Hoge v. Hoge*, 26 Id. 52, where the prior cases in this series are collected: *Nelson v. McGiffert*, 49 Id. 170.

SUBSEQUENT TRIAL OF PRINCIPAL CASE: See *Brownfield v. Brownfield*, 20 Pa. St. 55, where it was held that the duty of the jury was to fit the description, "thence supposed nearly an east course to a post, a corner of John Brownfield and my home place," to the land, and parol evidence was always admissible to fit a description to its subject. And further, two post corners having existed, it was competent to show by deeds for adjoining lands, and other evidence, which corner was the one the testator meant to designate.

WATSON v. BAGALEY.

[12 PENNSYLVANIA STATE, 164.]

ASSIGNMENT OF MONEY MAY BE EFFECTED BY POWER OF ATTORNEY to collect and distribute the same to creditors.

POWER OF ATTORNEY TO COLLECT AND DISTRIBUTE MONEY IS NOT REVOCABLE after its execution by collection of the money.

STATUTES REGULATING TRANSFERS FOR BENEFIT OF CREDITORS EMBRACE WITHIN THEIR PURVIEW an assignment, created by power of attorney, to collect money and pay it to creditors.

SCIRE FACIAS. The plaintiffs, Bagaley & Smith, had obtained judgment in foreign attachment against Seatown. The defendants were Watson and McCahan, as garnishees of Seatown. The plaintiffs, who were creditors of Seatown, had issued a foreign attachment, which was executed by attachment of moneys and effects of Seatown in the hands of Watson and McCahan, collected by the latter by virtue of a power of attorney given them by Seatown, authorizing them to collect and receive all money, debts, goods, etc., due and belonging to Seatown, and to pay certain amounts in a prescribed order to certain persons, and, finally, to pay the rest of the creditors *pro rata* out of the balance of the assets in their hands. The money attached was claimed by the plaintiffs and by the creditors named in the power of attorney. The court below held that the power of attorney was virtually an assignment, but that it should have been recorded according to the requisites of the act of March 24, 1818, and not having been recorded, the fund was liable to attachment. Judgment was therefore entered for the plaintiffs, and this entry was assigned for error.

Acheson and McKennan, for the plaintiffs in error.

Gow, for the defendants in error.

By Court, GIBSON, C. J. An assignment of a chose in action or of a fund need not be by any particular form of words, or particular form of instrument. It leaves the legal ownership and consequent right of action in the assignor; and it has therefore been treated as a declaration of trust for the assignee, or an agreement that he shall receive the money to his own use; or, as the case may be, to the use of the persons beneficially concerned. Any binding appropriation of it to a particular use, by any writing whatever, is consequently an assignment, or what is the same, a transfer of the ownership; and that it may be effected by a letter of attorney to collect and distribute so as to be good against an attachment by particular creditors, was ruled

by this court in *The United States v. Vaughan*, 3 Binn. 400 [5 Am. Dec. 375], and *Sharpless v. Welsh*, 4 Dall. 280, so that the case before us is with the defendants on authority. The difficulty, on principle, arises from the revocable nature of the instrument; whence an argument that if the principal can control the money, it is potentially his property, and subject to attachment, in whatever hands it may be. The solution of it is that a letter of attorney is not revocable after it has been executed; and here the money was collected and ready for distribution according to the terms of the trust. The services of the trustees, in the execution of it, was a consideration for an agreement which would have prevented the donor of the power from retracting it had he been disposed to do so. The consideration of trouble was certainly as potential as the trifling pecuniary one inserted in formal assignments. If, then, the letter of attorney, and the acts done pursuant to it, virtually constituted an assignment, it was decisively within the purview of the statutes to regulate transfers for the benefit of creditors; else those statutes might be evaded, and the pernicious power to prefer be retained by changing the form of the instrument. True, it was held in *Blakey's Appeal*, 7 Pa. St. 449, that judgments given to prefer particular creditors, are not assignments in substance or in form; but they could not be made so by any construction, however forced. An assignment passes the property immediately: a judgment enables the creditor to seize it: but their operation is diverse. Here the garnishees had the property for the creditors, by force of an irrevocable power, and it was consequently subject to attachment.

Judgment affirmed.

ASSIGNMENT FOR BENEFIT OF CREDITORS, HOW EFFECTED.—A direction to an attorney, in whose hands notes have been placed for collection, authorizing him to apply the collections to the payment of the note of a third person, a client of the same attorney, is an actual appropriation of the fund, or an irrevocable verbal assignment, which places it beyond control of the assignor: *Alexander v. Adams*, 47 Am. Dec. 547. The principal case is cited in *Valance v. Miners' Life Ins. Co.*, 42 Pa. St. 444, to the point that the form of the instrument by which an assignment is created for the benefit of creditors is not inflexible. An instrument in the shape of a lease of a railroad, the proceeds of which were to be applied to certain objects, and the earnings remaining to be paid to certain creditors, is an assignment for the benefit of creditors, and the road being property in possession, and the earnings potential, both interests passed to and vested in the assignee for the purposes of the agreement: *Bittenbender v. Sunbury etc. R. R.*, 40 Id. 276, citing the principal case. But an arrangement does not amount to an assignment in trust for creditors, where a bank, in accordance with an agreement made

with other banks, delivered to garnishees, acting on behalf of the latter, certain notes and bills as collateral security for an advance made by such banks of a certain sum of money for the redemption of the assignor bank's notes: *Griffin v. Rogers*, 4 Phila. 77, distinguishing the principal case. In *Johnson v. Ogilbee*, 2 Id. 80, the principal case was criticised, the court saying, that while there could be no doubt of the principles laid down, that when the power has been once executed it becomes irrevocable and operates as an assignment, or that the facts justified the application, they would perhaps have been more properly applied by a jury under the direction of a judge, or by a chancellor, than by a court of common law acting on a special verdict. The principal case was also distinguished, in that where A. gives B. a power of attorney to collect a debt due him from C., and directs part of the proceeds to be paid to D., no part of the debt being collected, there is no assignment, so as to defeat an attachment execution issued upon a judgment against A. And in *Beans v. Bullitt*, 57 Pa. St. 231, the principal case was also criticised and explained, the court holding that it went very far, when it was argued that because an attorney under a power was directed to apply the proceeds of the assets of a partnership to the payment of all debts of the firm, the creditors acquired an interest under the power, and that it must be regarded as an assignment in trust for them, notwithstanding the power passed no legal title. The principal case went upon the ground that the power was not revocable after it had been executed, and after the attachment had been laid; the money had been collected, and there was a devotion of it to certain creditors; it might, therefore, be held an appropriation to those creditors.

REVOCATION OF ASSIGNMENTS FOR BENEFIT OF CREDITORS, by assignor, not possible after it has once taken effect: *Scull v. Reeves*, 29 Am. Dec. 703. See the subject discussed in *Oakley v. Hibbard*, 44 Id. 425, and note.

RECORDING OF ASSIGNMENTS FOR BENEFIT OF CREDITORS required in Pennsylvania within thirty days, or assignments may be avoided by each creditor proceeding to judgment and execution: *Seal v. Duffy*, 45 Am. Dec. 691. In *McIlree v. Guy*, 1 Phila. 489, the decision of the principal case was said to show that the object of the legislature was to compel every transfer of a debtor's property in trust for his creditors to be placed on record, whether the assignment be legal or equitable, and without regard to the means by which it is effected. If a debtor places property beyond the reach of execution, in trust for the benefit of creditors, it is within the spirit of the acts regulating assignments for the benefit of creditors, and the provisions of those acts must be complied with: *Corn Exch. Nat. Bank v. Phila. Trust etc. Ins. Co.*, 11 Id. 510; *Lucas v. Railroad*, 3 Id. 216; *Blabon v. Lewis*, 3 Id. 455; and where A. executed to certain attorneys for some of his creditors an assignment of numerous claims and judgments, "in payment" of their demands, it was an assignment for the benefit of creditors, and not having been recorded within thirty days, was void as against a subsequent attaching creditor: *Wallace v. Wainwright*, 87 Pa. St. 267. If a debtor makes an assignment for the benefit of creditors, and the deed becomes void as to creditors generally, by reason of its not being recorded, a foreign or an execution attachment may be supported: *Heath v. Page*, 63 Id. 123; *Driesbach v. Becker*, 34 Id. 154. In all the foregoing the principal case was cited.

OVERHOLT'S APPEAL.

[12 PENNSYLVANIA STATE, 223.]

IT IS COMPETENT TO PROVE, ON DISTRIBUTION OF PROCEEDS OF AN EXECUTION SALE, that the property sold was partnership property, and that a mere joint judgment was given for a partnership debt.

APPLICATION by appellant, asking that an auditor's report be referred back, or that the court direct an issue to enable appellant to prove that the estate of Blocher, Shoemaker & Taylor, in certain factory property sold on execution, was purchased by them as partners for partnership purposes, and that his judgment was given for a partnership debt. The appellant's judgment had been confessed by the three defendants on an instrument for the payment of money, while the judgments of the appellees were separate judgments against Shoemaker. The appellant claimed that his judgment was entitled to preference over the separate judgments of the appellees, and made an affidavit, the substance of which appears in the opinion. An auditor had been appointed to distribute the proceeds of the execution sale, and his report, referred to above, proposed two plans of distribution, one on the assumption that the land had been held by the defendants as partners; the other on the assumption that it had been held by them as tenants in common. The application was refused; and the court confirmed the latter plan of distribution, in language appearing in the opinion.

Patterson and Howell, for the appellant.

Veech, contra.

By Court, ROGERS, J. Under the act of 1806 respecting executions, if any fact connected with the distribution of the estate shall be in dispute, the court shall, at the request in writing of any person interested, direct an issue to try the same. This act is ruled to be imperative on the court, and a refusal error, in *Bichal v. Rank*, 5 Watts, 140; *Reigart's Appeal*, 7 Watts & S. 267; *Trimble's Appeal*, 6 Watts, 133; and in *Huling v. Drexell*, 7 Id. 126. But it is said that it is not the duty of the court in all cases to grant an issue: that the act was not intended to enable a litigious party to demand an issue under all circumstances, and thus take his chance before a jury when there is nothing in the case to call for its intervention. And this is ruled in *Dougherty's Estate*, 9 Watts & S. 192, 193 [42 Am. Dec. 326]; and in *Dickerson and Haven's Appeal*, 7 Pa. St. 255. If this be a case of that description that there were no facts to submit, or that the determination of

the facts would not alter the result, the refusal to direct one issue worked no injury; and consequently, as has been repeatedly ruled, we would not reverse the proceedings. The controversy in this case is between separate and partnerships creditors, as to the distribution of proceeds arising out of the sale of property alleged to be held in partnership. In the distribution of the money two facts are material. Was the judgment of the appellant a judgment against the persons named in their individual or partnership characters, and was the property sold partnership property? In view of these facts, which are undoubtedly material in their distribution, the appellant filed an affidavit, setting forth that the factory property at New Haven, sold by the sheriff as the property of Blocher, Shoemaker & Taylor, the proceeds of which are now the subject of distribution, was purchased by Blocher, Shoemaker & Taylor, as partnership property, and for the purpose of carrying on business by them as partners for the manufacture of woolen goods, and that after the purchase aforesaid the defendant knows that they held it as partnership property. The appellees contend that the affidavit does not allege that his debt was a partnership debt, and consequently the only issue which the jury would have to try would be whether or not the property sold was partnership property, and that this would have left the question whether Overholt should be preferred over other separate creditors as undetermined as before, and consequently would have no effect in changing the manner of distribution. That the affidavit in this particular is defective must be conceded; and if the case rested here, there would be no cause for reversal, as no injury was done the appellant. But that the request was not confined to an issue to try whether the property sold was partnership property, would seem to be pretty plain. On the thirty-first of December, 1847, we found this entry signed by the learned judge who heard the case. The counsel for H. D. Overholt ask the court to refer this report back to the auditor, or to direct an issue to enable him to prove that the property sold was purchased by the defendants as partners for partnership purposes, as is stated in the affidavit of H. D. Overholt and in his application for an issue this day filed, and that the judgment number 90, September term, 1844, was given for a partnership debt.

And what renders it certain that the application for an issue was intended for a double purpose, is that the court declined to grant the application because it was believed "that the distribution must be made to the judgments as they appear on the

record; that their character can not be altered by parol proof, and the distribution will be the same in the opinion of the court, whether the defendants held the property as tenants in common or as partners: the judgments all appear upon the record as of the same character as ordinary judgments against the defendants." It is perfectly plain the court understood the application as a demand of an issue to try whether the judgment number 90, September term, 1844 (the Overholt judgment), was given for a partnership debt. Without this it is impossible to understand the reason assigned for refusing to grant the issue and confirming the distribution made. With that explanation the remark of the judge is perfectly intelligible, and if right in his idea that the distribution must be made to the judgments as they appear on the record, and that their character can not be altered by parol proof, there would be nothing wrong in refusing to direct an issue. The issue could produce no possible beneficial effect to the appellant, and of course there would be nothing of which he could complain. But that the court was mistaken in that view of the case would seem to be plain on the authorities cited. Thus, where one of two partners gives bond for the payment of borrowed money; the other witnesses it; the money is entered in the cash-book of the partnership; a joint commission taken out; the obligee is entitled to be admitted as a creditor: *Ex parte Gilbert Brown*, cited 1 Atk. 225. So when money is raised for partnership purposes by bills drawn by one of the firm, the person discounting them can sustain his claim against the joint estate for the money received by the firm: *Bradley v. Millar*, 1 Rose, 273; *Ex parte Langston*, Id. 27; Cary on Partnership, 90. The object of the application is for liberty to show that the bond was given by defendants as partners and for a partnership debt. We see nothing in the proposal contradicting the judgment, but a mere explanation. A firm may exist, as is correctly said, and often does, without being designated by any name, and in bringing suit against a firm of that kind it is sufficient to designate the names of the parties, as in this case, and it is unnecessary to allege the existence of a partnership firm. In *Davis v. Abbott*, 2 McLean, 29, it was decided that in an action against the maker of a note signed A. and B., it is unnecessary to allege a partnership between the makers. It is only, as is ruled in *Palmer v. Stephens*, 1 Denio, 471, and *Bank of Rochester v. Monteath*, Id. 402 [43 Am. Dec. 681], when partners have a partnership name, that they will be

bound only by that name. For the reasons given, we are of opinion that there was error in refusing to direct an issue.

Proceedings reversed and remitted, with directions to award an issue.

REAL ESTATE PURCHASED BY FIRM AS PARTNERSHIP PROPERTY is liable to the payment of partnership debts: *Divine v. Mitchum*, 41 Am. Dec. 241; but see *Wheatley's Heirs v. Calhoun*, 37 Id. 654, and cases in note; and judgments against the firm for partnership debts are payable out of the proceeds of a sheriff's sale, in preference to judgments against the partners individually: *Erwin's Appeal*, 39 Pa. St. 538; *Abbott's Appeal*, 50 Id. 238; both citing the principal case. Partnership property must first be applied to payment of partnership debts: *Dob v. Halsey*, 8 Am. Dec. 293; *Morgan v. His Creditors*, 20 Id. 262; *Doner v. Stauffer*, 21 Id. 370; *Bowden v. Schatzell*, 23 Id. 170; *Wilder v. Keeler*, 23 Id. 781; *Egberts v. Wood*, 24 Id. 236; *Grosvenor v. Austin's Adm'rs*, 25 Id. 743, and note; *Morrison v. Blodgett*, 29 Id. 653; *Payne v. Matthews*, Id. 739; *Dyer v. Clark*, 39 Id. 697; *Ladd v. Griswold*, 46 Id. 443; *Buchan v. Sumner*, 47 Id. 305, and note; but see *Reed v. Shepardson*, 19 Id. 697.

THE PRINCIPAL CASE IS FURTHER CITED in *Rice's Appeal*, 79 Pa. St. 182, on the question of distribution of a fund in court; and in *Souder's Appeal*, 57 Id. 503, on the point that an issue under the act of 1836 is demandable of right, at any time before the decree, to try certain facts arising on the distribution of money from a sheriff's sale.

McMAHON v. SLOAN.

[12 PENNSYLVANIA STATE, 229.]

PURCHASER OF PERSONAL PROPERTY ACQUIRES NO BETTER TITLE, in general, than that of his vendor.

ACTS OF OWNERSHIP BY POSSESSOR OF CHATTEL, INCONSISTENT WITH ANOTHER'S OWNERSHIP, must be brought to the knowledge of the true owner to divest him of title.

DECLARATIONS MADE BY OWNER OF CHATTEL, INCONSISTENT WITH HIS OWNERSHIP, WILL NOT DIVEST HIM OF TITLE, unless acted upon by the purchaser.

TROVER for a horse. The evidence showed that the horse belonged to the plaintiff, by whom it had been loaned to his son, to be used on a neighboring farm. The son used the horse, and spoke of it as his own, and it was generally so considered by the neighbors. He had also once offered to sell or barter it. The plaintiff had several times casually spoken of it as belonging to his son, and had once denied his own ownership of it. The son sold the horse to the defendant, and this action was brought by the father, claiming ownership. The question of original ownership was left to the jury, under instruction that

unless the declarations of the father induced the defendant to purchase, the plaintiff, if in fact the owner, might recover.

Purviance and Sullivan, for the plaintiff in error.

Smith, contra.

By Court, BELL, J. It is said to be a fundamental principle of our law of personal property, that no man can be divested of it without his own consent; and consequently, even an honest purchaser, under a defective title, can not resist the claim of the true proprietor. The maxim that "no one can transfer to another a better title than he has himself" obtains, in the civil as well as the common law: Pothier, *Traité du Contrat du Vente*, 1, n. 7; Ersk. Inst. 418; and hence it is now recognized everywhere in civilized Europe, for "a sale *ex vi termini* imports nothing more than that a *bona fide* purchaser succeeds only to the rights of the vendor:" 2 Kent's Com. 324; *Saltus v. Everett*, 20 Wend. 275 [32 Am. Dec. 541]. In England, an exception is acknowledged in favor of sales effected in market overt; but, as in this country we have not adopted their notion of markets overt, every transfer of chattels is with us to be considered in reference to the general law I have stated. This doctrine was anxiously discussed and considered in the leading case of *Lickbarrow v. Mason*, by the various courts through which it passed: 2 T. R. 683; S. C., 1 H. Black. 357; S. C., 5 T. R. 367; and though it was finally established as an exception, under the qualified negotiability of bills of lading, the concession was everywhere made that, in the words of Lord Loughborough, "mere possession, without a just title, gives no property, and the person to whom such possession is transferred by delivery must take the hazard of the title of its author." In accordance with this principle, it was held in *Wilkinson v. King*, 2 Camp. 335, and *Loeschman v. Machin*, 2 Stark. 311, that if a bailee for a special purpose, pass the goods to another in contravention of that purpose, the true owner may assert his property by action, though the transfer be a *bona fide* purchase, without notice. Going perhaps a step further, it was held in *Hoare v. Parker*, 2 T. R. 376, that a pledge of plate, by one having a life interest therein, did not, after the death of the pledgor, bind the remainderman, who was permitted to recover the goods pawned without repayment of the money advanced upon them by the pawnee, though the latter had no notice of the settlement. The case was thought to be a hard one, but the court observed: "This point is clearly settled, and the law must remain as it is, until

the legislature think fit to provide that the possession of such chattels is proof of ownership." This protection of the true owner was, perhaps, carried still further in *Prescott v. De Forest*, 16 Johns. 159, where it was ruled that a sale under a distress for rent, where no rent was due, passed no property to the purchaser.

The adjudications of the same court furnish other signal instances of the application of this doctrine. Among them may be noticed *Williams v. Merle*, 11 Wend. 80 [25 Am. Dec. 604]. In that case the captain of a tow-boat, through mistake, carried from the warehouse of his principal four barrels of pot and pearl ashes, belonging to another. On arriving at his place of destination, he informed the clerk of his principal of the error, and delivered the property to him. The latter, deeming it best for the interest of the owners, caused the ashes to be appraised and sold to the defendant, who purchased as the agent of another. In an action brought about a year after, by the owner, it was held, that, as neither the captain nor the clerk had any property in the ashes, they could convey none to the plaintiff; and as the gist of the action was the disposing of another man's property without his consent, it was of no account to say that they acted under the instructions of another, who himself had no authority. Another instance is found in *Ripley v. Gelston*, 9 Johns. 201 [6 Am. Dec. 271]. The plaintiff had purchased a livery stable, and put it into the hands of A. to carry on the business, as his agent. He afterwards purchased a coach which was added to the establishment, and subsequently run as a public carriage in the name of A. The sign of the livery stable bore A.'s name as proprietor, and was advertised as his. The coach was taken in execution by A.'s creditors, and sold to the defendant, and in an action brought by the owner, it was determined that, as A. was the mere agent of the plaintiff, no property in the coach passed by delivery to him, and unless the possession was fraudulent and intended for colorable purposes, it was not liable to the execution of A.'s creditors. The same law obtains in Massachusetts, as is evidenced by *Vincent v. Cornell*, 13 Pick. 294 [23 Am. Dec. 683]; and our own case of *Vandyke v. Christ*, 7 Watts & S. 374, very properly confines the doctrine of constructive fraud to sales of chattels where the vendor retains the possession; and shows that delivery at the time of sale is required, not by the common law, but by a free interpretation of the statutes of 13 and 27 Elizabeth, the first of these having been made to avoid collusive transfers of the legal ownership,

in protection of the vendor's creditors, and the latter, performing the same office in favor of *bona fide* purchasers. But the statutes and the law deduced from them have no application to bailments of chattels, whether for carriage, for work to be performed upon them, for temporary use under a contract of hiring or by way of loan, or for any other specific purpose, where the object of the parties was not to pass the property in the thing, to the bailee: *Lecky v. McDermott*, 8 Serg. & R. 500.

In *Saltus v. Everett*, 20 Wend. 366 [32 Am. Dec. 541], a leading case on the subject in New York, which commenced in the superior court of the city of New York, passed through the supreme court, and was finally determined by the high court of errors and appeals, Chief Justice Jones, of the city court, propounded as a general rule, the proposition that "a purchaser (from the possessor of chattels), for a fair and valuable consideration, in the usual course of trade, without notice of any conflicting claim, or any suspicious circumstances to awaken inquiry or to put him on his guard, will be protected in his purchase, and unaffected by any latent claim." The supposed general rule was the foundation of his decision against the plaintiff, and he enforced it by observing, that if the purchaser "has notice of any circumstance tending to show that others are interested in the property, he buys at his peril, and his title will be invalid against the true owner." But both the appellate tribunals derived the effect thus attributed to the absence of notice and the possession of the bailee, and put the case upon the general inviolability of actual ownership. The judgment of the court of the last resort was pronounced by Chancellor Walworth, and it was ably seconded by Mr. Senator Verplanck, who, in an opinion marked by much learning and research, vindicated the principle which generally recognizes the right of the true owner, at the peril of a purchaser from one without title, though apparently clothed with the *jus disponendi*. He shows the general conclusion from the authorities to be that "the title of property in things movable, can pass from the owner only by his own consent and voluntary act, or by operation of law." There are, it is true, exceptions to this rule, strongly intrinched in equitable grounds, and as firmly established as the rule itself. In the opinion to which I have just referred, the authorities that establish these exceptions are reviewed and grouped into two distinct classes. The first of these relates to money, cash, bank bills, checks, and notes, and whatever else comes under the notion of currency. This is "by reason of the course of trade,

which creates a property in the holder." From the very nature of the thing, "they pass by delivery only, and are considered as cash, and the possession always carries with it the property:" *Anonymous*, 1 Salk. 126; *Miller v. Race*, 1 Burr. 452; *Peacock v. Rhodes*, 2 Doug. 636, where Lord Mansfield observed that to apply the general doctrine that an assignee takes the things assigned, subject to all the equity to which the original party was subject, to bills and notes, would stop their currency. And in *Miller v. Race*, in reply to an attempted analogy in this particular between chattels and notes, he observed: "The whole fallacy of the argument rests upon comparing bank notes to what they do not resemble, and what they ought not to be compared to, viz., goods or securities or documents for debts," etc.

The second class of exceptions is said to consist of those cases only, where the true owner, by his own direct voluntary act, confers upon the person from whom the *bona fide* vendee derives title, the apparent right of property, as owner, or of disposal, as agent. This class has heretofore been confined to well-ascertained instances. The first is where the owner, with the intention of sale, parts with the property, though under such circumstances of fraud as would authorize him to recall the possession of the thing from the hands of his vendee. Of this, *Parker v. Patrick*, 5 T. R. 175; *Mowrey v. Walsh*, 8 Cow. 243; and *Root v. French*, 13 Wend. 572, may be cited as examples.

Another instance is, where by his own act or consent he has given to another such evidence of the right of disposition, as according to the custom of trade, or the common understanding of the world, usually accompanies such authority. This is the case with a consignee in a general bill of lading, furnished by the owner, which, according to the law of trade, authorizes the consignee to transfer the goods consigned to a *bona fide* purchaser; so that a fair holder of the bill indorsed by the consignee, is invested with all the rights of property which were of the consignor. But if the bill of lading be not given or authorized by the true owner, the consignee can not transfer the goods, no matter how fair the transaction may appear on its face, and though the owner intrusted the goods to the party who caused the bill to be made, for the purpose of transportation: *Saltus v. Everett*, 20 Wend. 360 [32 Am. Dec. 541].

Again: it is said an owner may lose the right of pursuit as against purchasers, by exhibiting to the world a third person as having power to dispose of his goods, either by giving him

direct authority or conferring an implied one. An implied authority may be inferred from recognition and ratification of prior similar dealings, thus holding out the person as authorized to sell; by permitting another person with full knowledge of the facts, to deal with the chattels as his own in his transactions with third persons, thus creating an inference that they actually belong to the party in possession; and by putting them into another's custody whose common business it is to sell: *Pickering v. Busk*, 15 East, 44; though merely sending them to a wharf where such goods are usually sold, will not validate an unauthorized sale made by the wharfinger: *Wilkinson v. King*, 2 Camp. 335.

So far as I am at present advised, the enumeration I have repeated includes every recognized exception. When these are out of question, the general law that "whoever deals with an agent or other bailee constituted for a special purpose, deals at his peril when the bailee passes the precise limits of his power," has again place. In the case in hand, the jury has found the horse in litigation belongs to the plaintiff below. The question then is, do the facts in proof bring the case within the circle of any of the exceptions to the rule, which protects the true owner? The only one of them having any apparent affinity to it is that predicated upon a voluntary permission to the bailee to deal with the thing as his own. But we think the defendant below failed to place his defense within its protecting influence. There is no proof that the son dealt with the horse as his own, further than to use him in his business of farming, with the permission of the father. This was the very object of the loan; an object, the legality of which can not be disputed. These loans of personal property by a father to his sons commencing the world, are of very usual occurrence, and there is happily nothing in the policy of the law forbidding them. Their validity does not depend on the period of enjoyment. They may be of longer or shorter continuance, as the necessities of the borrower may require, and the good will of the lender permit. Mere lapse of time, without more, will not change the relative rights of the parties, though doubtless it may enter into the estimate when weighing their intention. In this instance the possession of the animal was alternate or mixed, the father using him whenever his convenience required. But had it been otherwise, we have seen that mere possession in a third person, however exclusive, is in itself insufficient to work a change of property. It was therefore incumbent on the defendant to show

that the son was invested by the father with some other *indicia* of right, on the faith of which the defendant acted. Had the son been in the habit of offering the horse as his own, for sale or exchange, with the knowledge of the father, the rights of the former, as owner, would probably be postponed in favor of the purchaser. We have, however, no evidence of such habit and knowledge. The only proof is, that the son once proposed to sell or barter the animal, and frequently spoke of him as his own. But we do not know that the father was aware of these facts. So, too, the father sometimes referred to the horse as Leslie's; yet we have no evidence that this was communicated to the defendant, or in the slightest degree contributed to mislead him. Without some such evidence, it appears to us it would be going too far in a direction opposite to the tide of authority, to attribute to casual expressions of very common use in the country, under similar circumstances, the power of working a deprivation of property. The owner ought certainly not to be affected by the unknown and unauthorized declarations of the agent, nor ought the purchaser to found a right in himself, upon the loose saying of the owner, of which the former never heard. Had he shown that he acted on the faith of these, attributing property to the son, or even that they were communicated to him, thus furnishing a ground of fair inference, there might have been sufficient warrant for the application of the equitable rule that, where one of two innocent persons must suffer a loss, he shall bear it who, by his indiscretions, occasioned it.

This is the light in which the question presented itself below; and when we recur to the stringency of the rule protective of the true owner, and the clearness with which an exception must be made out, we can not say the learned judge who tried the cause committed an error in that particular of his charge, to which exception is taken here.

In determining who shall bear the wrong inflicted by the fraud of a third person, the line of distinction must be drawn somewhat arbitrarily; and it is certainly safest to adhere to the general rule of property, leaving him who would escape it, to establish a clear exception in the particular case. In this the defendant has failed.

Judgment affirmed.

COULTER, J., dissented.

PURCHASER OF GOODS FROM ONE HAVING NEITHER TITLE NOR AUTHORITY TO SELL acquires no title: *Saltus v. Everett*, 32 Am. Dec. 541; *Wheelwright v.*

Depeyster, 3 Id. 345; *Williams v. Merle*, 25 Id. 604, and note, where the rule and exceptions are fully considered. The principal case is cited and followed in *Quinn v. Davis*, 78 Pa. St. 18, where D. deposited a piano for storage with K., who bought and sold second-hand furniture at auction and received goods on storage; K. had the piano sold at auction, and Q. bought it *bona fide*, at a fair sale, without knowing who was the owner; *held*, D. could recover the piano from Q.

ALLEN v. MACLELLAN.

[12 PENNSYLVANIA STATE, 328.]

DECREE OF DIVORCE OBTAINED BY FRAUD MAY BE VACATED AT SUBSEQUENT TERM by court of common pleas, although a marriage was contracted on its faith, and issue born.

ORDER VACATING DECREE OF DIVORCE FOR FRAUD IS CONCLUSIVE AFTER EXPIRATION OF TIME FOR APPEAL, although the record does not show that proof of fraud was made.

CERTIFICATE from *nisi prius*. *Assumpsit* against maker of promissory note. The note had been made December 5, 1845, in favor of Lucretia Bleecker, and was indorsed by her second husband, Wheatley, to the plaintiff, on January 16, 1846. The right of the plaintiff depended upon Wheatley's authority to indorse the note as the husband of the payee. A libel for divorce had been filed in 1845 in the court of common pleas of Philadelphia, by Lucretia Bleecker, alleging desertion and cruel treatment, and a decree of divorce was entered November 22, 1845. Wheatley, on the faith of this decree, married Mrs. Bleecker, on the twelfth of January, 1846, and an issue was born on November 4th of the same year. On February 13, 1846, Bleecker applied to the court to vacate the decree, the application denying the allegations of the libel, and averring that the libelant had been previously guilty of adultery. Notice of the application was served at the reputed residence of the libelant, the libelant being at the time absent from the state. On the seventh of March, 1846, the court ordered the decree annulled, on the ground that it was obtained by fraud and imposition on the court, but the record did not show that any proof had been made, or that the libelant appeared. The court gave judgment for the plaintiff.

W. L. Hirst and Lambert, for the appellant.

Randal, *contra*.

By Court, GIBSON, C. J. The case which most distinctly recognizes the power of a spiritual court to vacate its sentence

when obtained by imposition is *Prudham v. Phillips*, stated in *Meadows v. The Duchess of Kingston*, 2 Amb. 763, and rather more fully in 1 Harg. Tracts, 456, note. It was tried before Chief Justice Willes in 1737; and, though a *nisi prius* decision, it was quoted with approbation by Lord Apsley. To show by analogy that the sentence in a suit of jactitation of marriage is conclusive in a common-law action, the chief justice took a distinction founded on the common-law principle, that a party to a fraudulent judgment can reverse it only directly, but that a stranger may reverse it collaterally, by pleading and evidence. "Who ever knew," he said, "a defendant plead that a judgment against him was fraudulent? He must apply to the court; and if both parties colluded, it was never known that either of them could vacate the judgment. Here the defendant was party to the sentence; and whether she was imposed upon, or she joined in deceiving the court, this is not the time and place for her to redress herself. She may, if she has occasion, appeal, or apply to the proper judge." So was it with the legitimate husband in the case under consideration. The time for appeal had gone by, and he applied to the only tribunal that was open to him. Chief Justice Willes does not intimate how it ought to proceed on the application; but it must necessarily be by summary examination and order. In Bac. Abr.; Error, I. 6, the remedy for a surreptitious judgment at common law, is said to be a writ of error *coram nobis*; but *Ronney v. Robinson*, 2 Roll. Abr. 724, which is cited for it, leans the other way. If a clerk of the king's bench, it was there said, enter judgment against an order by a judge of the court, it may be vacated at a subsequent term. If by writ of error, it would have been unnecessary to say anything about the time; and the meaning undoubtedly is, that such a judgment may be vacated after the term, just as if the record were still in the breast of the court. That case shows that the principle of *Prudham v. Phillips*, 2 Amb. 763, is a general one, and applicable alike to ecclesiastical sentences and common-law judgments. It has no relation to the doctrine of amendments, which make the record speak a language it did not speak before: the vacation is a new and independent judgment, of which the recorded entry is its appropriate evidence. If it can be entered only on a writ of error, what is to be done with a surreptitious sentence of an ecclesiastical court, to which no such writ lies? As imposition on it would else be without the means of correction, it must necessarily have a power of summary revision. Facts put in

issue as they may be, by the pleadings in error, are triable by jury; but as there is no jury in such a court, there is the less objection to summary proceeding by it. There is certainly more reason for it than there was in *Ronney v. Robinson*, 2 Roll. Abr. 724. True, a statute has given the common pleas jurisdiction in libel for divorce; but it has not made it a court of record in any other aspect than the one in which it had before been considered. Its proceedings in divorce are not according to the course of the common law—at least where a feigned issue is not directed—and no writ of error lies to remove its sentence, whatever may be its power to remove the record of such an issue. In every other respect, the remedy is by appeal, as it is in the ecclesiastical courts.

It may seem an arbitrary act to expunge a sentence of divorce, with a stroke of the pen, bastardize after-begotten children, involve an innocent third person in legal guilt, and destroy rights acquired in reliance on a judicial act, which was operative at the time: and under this first impression, I would have decided as did the judge at *nisi prius*. But the legitimate husband also has rights; and if any one must suffer from the invalid marriage, it is he who procured it. By the terms of the contract he took the lady for better for worse; and having assumed at least her moral responsibilities, he stands as to hardship in her place. He therefore has no right to complain. The children, who are the fruit of the connection, are the only persons who have it, if indeed to have been brought into the world in any circumstances, can give such a right; but their condition is not worse than that of the dishonored husband. There is no injustice, therefore, in a proper exercise of the power assumed in this instance; and the apparent danger of excess in the use of it vanishes when it is viewed in connection with a principle, which requires the record to exhibit the ground of every judgment. Possibly there may have been no sufficient ground exhibited in this case; but even if there were not, the order to vacate would be only erroneous, and unimpeachable after the expiration of the period for reversing it by appeal. In stating, however, the charge of imposition, without the facts and circumstances to sustain it, the court has perhaps stated enough to justify their action upon it. Confidence must be reposed in the wisdom and justice of the tribunals; and hence the maxim, that all things are presumed to have been rightfully done in courts of record. The indorser of the note in suit before us had no property in it; and the plaintiff has no title.

Judgment for plaintiff reversed, and judgment rendered for defendant.

DECREE OF DIVORCE OBTAINED BY FRAUD, VACATED: *Harding v. Alden*, 23 Am. Dec. 549; *Boyd's Appeal*, 38 Pa. St. 243, citing and following the principal case. But in *Greene v. Greene*, 2 Gray, 366, the principal case was distinguished; and held a decree of divorce from the bond of matrimony, although obtained by fraud and false testimony, can not be set aside on an original libel filed at a subsequent term.

JONES v. JONES.

[12 PENNSYLVANIA STATE, 350.]

EVIDENCE TO SHOW THAT LEGISLATIVE DIVORCE WAS GRANTED FOR CAUSES OVER WHICH COURTS HAVE JURISDICTION, and that therefore the legislature had no power to grant it, under the constitution, is inadmissible. EVIDENCE AS TO MANNER OF PROCEEDING OR AGENCIES EMPLOYED by any member of the legislature, in procuring an act of divorce, is admissible.

EJECTMENT. The lands in controversy had descended to the wife, the plaintiff in the action, after she and the defendant had been married, in 1821. The plaintiff, to sustain her title, introduced an act of the assembly, passed in 1845, which read as follows: "Be it enacted, etc., that the marriage contract entered into between Joseph P. Jones and Charlotte S., his wife, late Charlotte S. Styer, of the county of Montgomery, be and the same is hereby annulled and made void, and the parties released and discharged from the said contract, and from all duties and obligations arising therefrom, as fully and effectually and absolutely as if they had never been joined in marriage; provided, the children of the said Joseph P. Jones and Charlotte S., his wife, shall enjoy all the rights and privileges of children born in lawful wedlock." The record of an action of divorce, in 1842, by the wife against the husband, in which a verdict had been rendered for the latter, was then offered in evidence by the defendant. The defendant also offered to prove that the petition of Mrs. Jones, with certain affidavits and documents, praying an act divorcing her from her husband, was presented to the legislature by one of her counsel, who was at the time a member; and that the act of the assembly was procured by fraud, falsehood, undue means, and without notice, and by the misrepresentations of the member referred to. All this evidence of the defendant was rejected, and error was assigned. The record, above referred to, is given in the opinion.

H. Freedley and G. R. Fox, for the plaintiff in error.

McMurtrie and Mulvany, contra.

By Court, COULTER, J. The case presents for the judgment of the court a question of property between two individuals. In reaching that question, however, it is absolutely necessary to consider the social relation of the parties, and to estimate its effect on the question of property. One party invokes the protection of a clear and explicit provision of the constitution. And to reach that, we must, if necessary, go over an interposing act of assembly. In England, parliament has frequently annulled the contract of marriage for adultery. There is, perhaps, more reason for the practice there than existed in this state for the exercise of a similar power by the legislature; because parliament is a court. Lord Coke says it is the highest and most honorable court in the kingdom. But that high court proceeds with the utmost circumspection, examines witnesses to prove the adultery, and in cases where the guilty parties have not left the realm, requires that there shall also have been a trial in the common-law courts for criminal conversation, and damages recovered, and also that a sentence of divorce in the spiritual court should have been decreed, which can only divorce *a mensa et thoro*; hence the necessity of the intervention of parliament to divorce *a vinculo*, whose power, only, is adequate to that end. But in this state the legislature seems to have acted on the ground that it was an exercise of legislative power, and therefore not requiring a judicial examination. We think, however, that this doctrine may be well questioned.

A divorce annuls a civil contract between two individuals, of a higher and more imposing nature, and of more emphatic emphasis on the whole structure of society, than the voluntary contracts by deed or by parol. And there flows from the severance of the contract, a divestiture of property from one and a reinvestment of it in the other. It is in fact a judgment in a dispute between two individuals, the justice of which must depend upon facts in relation to which both parties ought to have an opportunity to be heard. But however questionable the power might have been under the constitution of 1790, the amended constitution of 1838, did expressly prohibit its exercise by the legislature, wherever the courts then had or should thereafter be vested with power; from which an implication results of a power to annul the marriage contract in the non-enumerated cases. The legislature has therefore a limited power, with an express

prohibition outside of the limitation. Section 14, article 1, is as follows: "The legislature shall not have power to enact laws annulling the contract of marriage in any case where by law the courts of this commonwealth are or may hereafter be empowered to decree a divorce." The courts have now power to decree a divorce in almost every case where a divorce is justifiable. The act of assembly does not express on its face, or in a preamble, the cause of the divorce in the present case. It is in these words. [His honor here stated it.]

It does not appear from the act whether the case was within legislative power or not. And the position taken by the defendant in error is, that courts can not go, as they call it, behind the act itself to ascertain whether it was within the pale of the constitution or not. But I apprehend that we can, in all cases, go to the constitution itself. The majestic impersonation of the sovereign people speaking through the constitution is always present in this court, and must always be heard and obeyed.

The power confided to the legislature is a limited power, and it can not be allowed that they should convert it into an unlimited power. If they can convert a special jurisdiction into a general jurisdiction, the provision of the constitution becomes dead. If courts can not or will not go behind the act, where the cause is not expressed on its face, the clause in the constitution might as well have been that the legislature shall annul, etc., as that they shall not. It requires but a trick of the pen to leave out the cause, and then the power becomes general. A great number of authorities have been cited by the defendant in error to show that in judicial proceedings the judgment of a court of competent and general jurisdiction over the subject-matter can not be overhauled in a collateral proceeding. All this is admitted, but then it is to be understood that the party was affected with notice in the mode pointed out and prescribed by the law. But no court ever held that a judgment against an individual who had no notice whatever was valid. We know that the legislature never summon the party, and that they proceed, in nine cases out of ten, upon *ex parte* testimony. The cases therefore are not applicable. But the counsel assume the fact in contest, and then lean on those authorities. The legislature have not a general jurisdiction over the subject of divorce. Their jurisdiction is limited, and these authorities, even assimilating the proceeding to analogous cases in court, do not touch the question.

It was, however, ruled in *Kemp v. Kennedy*, 1 Pet. C. Ct. 36, that courts of limited jurisdiction must not only act within the scope of their authority, but that it must appear on the face of their proceedings that they did so, and if it does not so appear, all their proceedings are *coram non judice*. This is the general principle as to courts of limited jurisdiction, as that every just analogy drawn from proceedings of courts is against the defendant. But I place the decision on the broad ground that the constitution must be preserved, and that if courts should refuse to permit evidence to show the grounds of the divorce, the legislature could obliterate the clause in the constitution. This is a question of property resulting from the divorce. The party has a right to the protection of the constitutional provision, and if necessary, the court can touch the act with the judicial wand, and open it to inspection, so as to see whether or not it is within the pale of the constitution. The evil of this example would not terminate with this class of cases, but reach with fatal effect to others.

The legislature can *aliene* and grant the public domain not already appropriated. They have therefore a limited jurisdiction in granting lands. Suppose they were to pass a law granting three hundred acres of land on the Delaware, by well-defined boundaries, to John Doe, could not the real owner of the land be permitted to show that the land had been granted more than a hundred years ago, to those under whom he claimed, and that therefore the legislature had no power or jurisdiction over it? Not so, if full effect is given to the argument of the counsel for defendant in error. Courts can not go behind the law, but must presume against fact that the legislature acted within the scope of their power. In the one case as well as the other, the legislature have a limited jurisdiction; in case of the land, to grant that which had not previously been granted, and in cases of divorce, to grant them where the power had not been previously granted to the courts. And the only mode of preserving the constitution and protecting the rights of individuals in either case is to admit the best evidence, *aliunde* as from behind the law. Evidence of this kind has been admitted by the court when the peril to individuals was not so pregnant as here: *Austin v. Trustees*, 1 Yeates, 260; *Stoddart v. Smith*, 5 Binn. 355; *Bolton v. Johns*, 5 Pa. St. 145 [47 Am. Dec. 404].

In the case of *Gaines v. Gaines*, Pa. Law Jour. Rep., June, 1849; S. C., 9 B. Mon. 295 [48 Am. Dec. 425], the court of appeals of Kentucky decided that a special law granting a divorce

was a judicial act, and as such belonged to the court; and admitted evidence to show that when an act was passed, judicial proceedings were pending to procure a divorce; and that, therefore, the law was void as it respected the property of the parties; and decreed dower out of the estate of the husband, notwithstanding the legislative divorce. We are of opinion that the following evidence, offered by the defendant below, ought to have been admitted, to wit:

"Defendant offers in evidence the record of an action of divorce, instituted in the court of common pleas of Montgomery county, to August term, 1842, No. 29, by the said Charlotte S. Jones, by her next friend, David Styer, against the said Joseph P. Jones, the defendant. That the causes set out in the libel of the said plaintiff were cruel treatment and the offering of such indignities to her person as to render her condition intolerable, and life burdensome, and thereby forced her to withdraw from his habitation. That all of said causes were denied by the said defendant, and that the issue was subsequently tried, and a verdict rendered for the said defendant. That on or about the sixth day of April, 1845, Mr. Styer, who was one of the counsel for the said Charlotte S. Jones, and at that time a senator of Pennsylvania, presented to the said senate the petition of the said Charlotte S. Jones, with certain affidavits or documents, praying the said legislature to pass a law divorcing her from the bonds of matrimony with her husband. That the grounds upon which the said application was made were the same as those stated in her said libel presented to this court, viz., cruel and barbarous treatment, and the offering of such indignities to her person as to render her condition intolerable."

But that what follows, in relation to the manner of proceeding, or agencies used by any member of the body, ought to be rejected.

It would be unbecoming and discourteous to the legislative body to admit such evidence, which is excluded by the case of *Fletcher v. Peck*, 6 Cranch, 87. We are of opinion that the court erred in excluding the evidence in the first bill of exceptions, the second, the third, and the fourth. The object in these offers was to bring before the court the very best evidence the nature of the case admitted of the grounds on which the divorce was procured; that is, the petition of Mrs. Jones to the legislature, and the affidavits by which it was sustained, all of which, it appears, were in court. The act of the legislature was constitutional, if it was passed for any of the non-enumerated causes in

the constitution; in other words, if not for any of the causes over which the court had jurisdiction. The defendant takes ground too broad, therefore, when he asks the court below to say that the act is unconstitutional on its face. The point of this decision is, that the defendant below has a right to establish by such evidence as he offered that the act was passed for a cause over which the courts had jurisdiction, and that the court of Montgomery county, on a fair trial between the parties in relation to the alleged causes, had given judgment against the plaintiff, and that, therefore, the legislature had no jurisdiction or power to grant the divorce.

A great deal was said in the argument of the duty of this court to presume that a co-ordinate branch had confined itself within the scope of its power. I will admit that, if the legislature had specified in the act, or by a preamble, that the divorce was granted for a cause where the court had no power, a very different case would be presented. But they have not said it. At most, however, this is nothing but the old argument, not pushed to quite its full extent, that the courts must always presume that a co-ordinate branch acted within the scope of its authority, and can not, therefore, declare its acts unconstitutional.

The old rule is a good one, that, where a fact can not be made to appear, the reason is the same as if it did not exist. As the legislature have not expressed the cause, we throw it open to evidence by either party, so that this question of property may be justly decided according to the constitution.

Judgment reversed, and *venire de novo* awarded.

POWER OF COURTS TO RECEIVE EVIDENCE TO DETERMINE WHETHER A STATUTE WAS SO PASSED AS TO BE INVALID.—It does not necessarily follow, from the power of courts to declare statutes unconstitutional, that they can go behind authenticated and approved statutes for the purpose of inquiring whether those statutes were passed in the manner prescribed by the various constitutions. Whether our courts have this power to look to legislative journals, and receive other evidence, in order to ascertain whether legislatures in passing statutes have conformed to constitutional requirements, has excited no little judicial controversy and difference of opinion. It has been held on the one side, that a duly authenticated, approved, and enrolled statute imports absolute verity—is conclusive that such an act was passed in every respect as designated by the constitution; and, on the other, that while such authentication, approval, and enrollment are strong *prima facie* evidence that it was so passed, still this presumption may be overcome by proper evidence.

JOURNALS, WHEN EVIDENCE.—The leading case in support of the view that courts may inquire into the passage of a legislative act, is *Spangler v. Jacoby*,

14 Ill. 297. The constitution of Illinois required that "each house shall keep a journal of its proceedings," and that "on the final passage of all bills, the vote shall be by ayes and noes, and shall be entered on the journal, and no bill shall become a law without the concurrence of a majority of all the members elect in each house." It was held that it was competent to show from the journals of either branch of the legislature, that a particular act was not passed in the mode prescribed by the constitution; and if a contest arises as to the passage of an act, the journals may be appealed to to settle it. This ruling has been repeatedly followed by the courts of the same state, in *Prescott v. Board of Trustees*, 19 Id. 324; *Turley v. Logan Co.*, 17 Id. 151; *People v. Sturte*, 35 Id. 121; and by the supreme court of the United States, in following these decisions in cases from Illinois, in *South Ottawa v. Perkins*, 94 U. S. 260, and *Post v. Supervisors*, 105 Id. 667. But in the two latter Illinois cases, the court, although deciding the question in conformity with the rule as laid down in *Spangler v. Jacoby*, seem to think it would have been better had that case been otherwise decided, and intimate that the decision would be different, did the court not feel bound by the precedent there established. The case of *Spangler v. Jacoby* has been distinguished by subsequent cases in other states, holding the opposite rule, in that it was decided under the peculiar constitutional provisions in reference to journals, above referred to. Thus in *Sherman v. Story*, 30 Cal. 253, where it was offered to show by the journals, and other evidence, documentary and parol, that certain rejected amendments were incorporated in an enrolled bill, and thereby, although not in fact adopted by either house, became a part of the act as it then appeared, the following language is used by Sawyer, J.: "If the enrollment of the statute is in existence, the enrollment itself is the record, which is conclusive as to what the statute is, and can not be impeached, destroyed, or weakened by the journals of parliament, or any other less authentic or satisfactory memorials; and that there has been no departure from the principles of common law in this respect in the United States, except in instances where a departure has been grounded on or taken in pursuance of some express constitutional or statutory provision requiring some relaxation, of the rule, in order that full effect might be given to such provisions; and in such instances the rule has been relaxed by judges with great caution and hesitation, and the departure has never been extended beyond an inspection of the journals of both branches of the legislature."

The court then goes on to say, that there was nothing in the constitution or laws requiring or authorizing a departure from the common-law rule, and that the provisions of the California constitution, requiring the ayes and noes to be entered on the journal at the request of three members present, and that when a bill was returned without the approval of the governor the ayes and noes should be taken, and it could be passed by two thirds of the members—the constitution not mentioning that the ayes and noes should be entered on the journal—were different from the provisions found in the Illinois constitution. A similar ruling, and a like distinction, was made by the supreme court of Missouri in *Pacific R. R. v. Governor*, 23 Mo. 353, where it was held that the validity of an enrolled statute, authenticated in the manner pointed out by law, by the certificate of the presiding officers of the two houses of the legislature that it passed over the governor's veto by the constitutional majority, can not be impeached by the journals showing a departure from the forms prescribed, in the reconsideration of the bill. It was attempted also to distinguish the earlier case of *State v. McBride*, 4 Id. 303, where the same court held it had power to look into the proceedings of the

general assembly to see that all prerequisites had been complied with, and that certain amendments to the constitution were adopted by the proper constitutional majority; but as to how far it could look does not definitely appear; it would seem, however, that the right was claimed of going behind the enrollment to the journals, and even further. The case of *Sherman v. Story* was followed in *People v. Burt*, 43 Cal. 560, where the court refused to look into the journals to see when a bill was introduced and how it passed through the houses, and overrules *Fowler v. Peirce*, 2 Cal. 165, in which it was held that parol evidence was admissible to show that the act in question was not signed by the governor within the time required by the constitution, although it purported so to be, and that therefore it never became a law. In the Railroad Tax Case, *San Mateo Co. v. Southern Pacific R. R.*, 8 Saw. 238, 292, 293, a question was raised as to whether a certain bill had ever passed the legislature of California. The new constitution of that state requires the yeas and noes to be taken and entered on the journals, and provides that no bill shall become a law unless passed by a majority of the members elected. Sawyer, circuit judge, who delivered the opinion in *Sherman v. Story*, said: "Under the decisions of the courts upon constitutional provisions, in all respects similar to that of the present constitution of California, it is settled that the court, to inform itself, will look to the journals of the legislature. * * * Unless this mode is adopted of resorting to the journals to ascertain whether a statute has been legally passed or not, experience and the number of cases that have already arisen under similar constitutional provisions demonstrate that the requirements of the constitution that the vote shall be taken by yeas and nays, and a majority of the members required to vote in the affirmative on the final passage of an act, would be of little avail. While we think the case of *Sherman v. Story* correctly decided under the constitution as it then was, we are of the opinion that the change in the constitution requires a change in the rule."

The Indiana cases present a similar difference of judicial opinion to those of California. In *Skinner v. Deming*, 2 Ind. 558, there are *dicta* to the effect that legislative journals may be resorted to, to show whether an act was passed by the requisite constitutional vote; and in *Coleman v. Dobbins*, 8 Id. 156, that if the facts in relation to the passage of an act were properly presented, they would be subject to judicial inquiry and determination; while in the more recent case of *Evans v. Browne*, 30 Id. 514, it was decided that if a statute is authenticated by the signatures of the presiding officers of the two houses of the legislature, the court will not search further to ascertain whether such facts existed as to give constitutional warrant to those officers to thus authenticate the act. The decisions of the New York courts are in like manner somewhat unsatisfactory. The doubt raised by the cases of *Thomas v. Dakin*, 22 Wend. 9; *Warner v. Beers*, 23 Id. 103; and *People v. Purdy*, 2 Hill, 31, whether the court could look beyond the printed statute book to the original engrossed bills on file in the office of the secretary of state, was settled by *Purdy v. People*, 4 Id. 384, in holding that the court had this power to see whether an act was passed as a majority bill or by a two-thirds vote; and to the same effect are *De Bow v. People*, 1 Donio, 9, and *Commercial Bank v. Sparrow*, 2 Id. 97. These cases are distinguished in *Sherman v. Story*, *supra*, and *Green v. Weller*, 32 Miss. 650, in that the most the court decided was that it could look to the original record, although there are *dicta* to be found in them that the journals may be resorted to. See the similar comments in Sedgwick's Stat. and Const. L., 2d ed., p. 54. In *People v. Supervisors*, 8 N. Y. 317, 327, it being contended

that the ayes and noes on an act under consideration were not duly entered upon the journal, and three fifths of the members were not present at its final passage, in conformity with the constitution, the court held, that while the particular act did not require the presence of three fifths to form a quorum, it required, like other laws, that the question on its final passage should be taken by ayes and noes, and that they should be duly entered on the journals; the presumption was that they were so entered, and it was not admissible in any case to prove the contrary—certainly not, when the pleadings did not tender an issue on that fact. The court then said, that assuming it could look to the journals, there was no foundation to be found there that the legislature had failed to comply with the directions of the constitution. This case has been frequently cited as an authority to show that courts may look to the journals, but it obviously bears no such construction, although it must be admitted that some passages in the opinion are inconsistent with others, and seem to admit the power.

Finally, in *People v. Devlin*, 33 N. Y. 269, the court was of the opinion that legislative journals were not legitimate evidence to impeach a statute duly certified; and in *People v. Commissioners of Highways*, 54 Id. 276; S. C., 13 Am. Rep. 581, it was held that a law, required by the constitution to be passed by a two-thirds vote of the legislature, not appearing on the statute book or upon the original act to have been passed by such a vote, was void, and that the objection to the act need not be pleaded, since it was not a matter of fact, but of law. The validity of an act erecting a new county was sought to be impeached in *De Camp v. Eveland*, 19 Barb. 81; and *Rumsey v. People*, 19 N. Y. 41, because such county had not the population which the constitution required. The clause of the constitution was that "no new county shall be hereafter erected, unless its population shall entitle it to a member." The court held that it was bound to be presumed that the legislature acted upon good and sufficient evidence of the fact in reference to the population, and this presumption, from the nature of the case, must be conclusive. The doctrine of these two latter cases is approved in *Lusher v. Scies*, 4 W. Va. 11, on a similar state of facts. Their conclusion, under any view, would seem to be sound. It was so considered in *Osburn v. Staley*, 5 Id. 640; S. C., 13 Am. Rep. 640, in which *Spangler v. Jacoby*, *supra*, was followed, and held that, "as the constitution requires each branch of the legislature to keep a journal, and provides that on the passage of every bill the vote shall be taken by yeas and nays, and be entered on the journal, and that no bill shall be passed by either branch without an affirmative vote of a majority of the members elected thereto, this court should look beyond the authentication of the act to the journal of the senate to see if the bill was passed by the required number of votes."

Perhaps the most able, learned, and exhaustive opinions against the proposition that legislative journals may be resorted to in order to ascertain whether a statute was so passed as to be invalid, are to be found in *Sherman v. Story*, *supra*; *State ex rel. Pangborn v. Young*, 32 N. J. L. 29; S. C., 5 Am. Law Reg. (N. S.) 679; and *State v. Swift*, 10 Nev. 176. The following cases, in addition to those above cited, also hold that a signed, approved, and enrolled bill is ultimate and conclusive: *Clare v. State*, 5 Iowa, 509; *Duncombe v. Prindle*, 12 Id. 1; *Eld v. Gorham*, 20 Conn. 12; *Green v. Weller*, 32 Miss. 650; *Swann v. Buck*, 40 Id. 268; *Fouke v. Fleming*, 13 Md. 392; *Mayor v. Harwood*, 32 Id. 471; S. C., 3 Am. Rep. 161; and, on the other hand, the following additional cases hold, or assume, that an enrolled bill is but *prima facie* evidence, which may be overcome by a resort to the journals: *Opinions*

of the Justices, 35 N. H. 579; *Id.*, 52 *Id.* 62; *Supervisors v. Heenan*, 2 Minn. 330; *Grven v. Graves*, 1 Dougl. (Mich.) 351; *People v. Mahaney*, 13 Mich. 481; *Fordyce v. Godman*, 20 Ohio St. 1; *Southwark Bank v. Commonwealth*, 26 Pa. St. 446; *State v. Francis*, 26 Kan. 724; *Burr v. Ross*, 19 Ark. 250; *Vinsant v. Knox*, 27 *Id.* 226; *State v. Little Rock etc. Railway*, 31 *Id.* 701; *Jones v. Hutchinson*, 43 Ala. 721; *Moody v. State*, 48 *Id.* 115; S. C., 17 Am. Rep. 28; *State v. Platt*, 2 S. C. 150; S. C., 16 Am. Rep. 647; *Berry v. Baltimore etc. R. R.*, 41 Md. 446; S. C., 20 Am. Rep. 69; *Gardner v. Collector*, 6 Wall. 499; *Blessing v. Galveston*, 42 Tex. 641; *Houston etc. R. R. v. Odum*, 53 *Id.* 343. The ruling of the Texas court of appeals, in *Usener v. State*, 8 Tex. App. 177, is inconsistent with that of the supreme court of the same state in the two cases above cited, and also with the general weight of authority in other states on similar constitutional provisions. The holding was that when a law had come to the court fully accredited as valid and subsisting upon the statute book, it would not go behind the enrolled bill as deposited in the office of the secretary of state, and consult the journals of the legislature to see if it was passed in conformity with the constitution, providing "that in cases of imperative public necessity, four fifths of the house in which the bill may be pending may suspend the rule [requiring the bill to be read on three several days], the yeas and nays being taken on the question of suspension, and entered upon the journals." The case of *State v. Platt*, *supra*, presents a novel state of facts. An enrolled act, to which the great seal had been affixed, and which was signed by the presiding officers of both houses of the legislature, and approved by the governor, provided that the courts for the county of Barnwell should be held at *Barnwell*; but it appeared from the journals of the two houses that the bill as finally passed provided that the courts should be held at *Blackville*, which was the county seat before the passage of the act. Held, the enrolled, authenticated, and approved act was not conclusive evidence of the terms of the bill as it passed the houses, but the journals may be received to show what those terms were; and whenever it appears that the enrolled act differs from the bill as passed, in a substantial manner, the judiciary may declare the act in whole or in part void. If a private act be certified by the presiding officers of the legislature, it is a matter of record which can not be impeached before the courts in a collateral way, by going behind the record and inquiring whether or not it was passed in conformity with the constitution, by giving the prescribed notice of application: *Brodnax v. Groom*, 64 N. C. 244.

NATURE OF THE EVIDENCE TO BE FURNISHED BY THE JOURNALS.—The proof as furnished by the journals must be clear and convincing to overcome the *prima facie* presumption furnished by the due authentication, approval, and enrollment: *State v. Francis*, 26 Kan. 724; *Larrison v. Peoria etc. R. R.*, 77 Ill. 11; *Blessing v. Galveston*, 42 Tex. 641; *English v. Oliver*, 28 Ark. 317; *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743; S. C., 8 Am. Rep. 602. The journals must likewise affirmatively show that the constitutional requirements in regard to matters of legislative procedure were not observed, or otherwise the presumption of due observance will prevail: *State v. McConnell*, 3 Lea, 332; *Williams v. State*, 6 *Id.* 549; *Miller v. State*, 3 Ohio St. 475; *Supervisors v. People*, 25 Ill. 181; *Worthen v. Badgett*, 32 Ark. 496. Thus, in the last case, it was held that where the journals show that a substitute for a bill, which had been read the first and second times, was reported and adopted, and read a third time and passed, not showing the first and second readings of the substitute, the court will presume that the substitute was read three times, as the constitution required. But in *Comm'rs of Leavenworth Co. v.*

Higginbotham, 17 Kan. 62, the court refused, under the circumstances, to declare an act invalid, because the ayes and noes were not entered upon the senate journal, on the concurrence by the senate in certain slight amendments made by the house—the act having been generally considered valid, and many rights having accrued under it during the eleven years before it was sought to question it; and held further, that the signatures of the presiding officers of the houses of the legislature to an enrolled bill were only portions of the many evidences of its due passage and validity, and the courts must decide as to its passage and validity upon the whole of the legal evidence applicable in such cases. Therefore, where the enrolled bill and legislative journals taken together clearly show that the bill was duly passed by the legislature and approved by the governor, the bill should be held valid, although it may not have the signature of the presiding officer affixed to it. The courts will not take judicial notice of the contents of journals; when they are relied upon, they must be brought before the court as evidence; but when offered, they prove their own authenticity: *Grob v. Cushman*, 45 Ill. 119; *Illinois Cent. R. R. v. Wren*, 43 Id. 77; *Bedard v. Hall*, 44 Id. 91; *Hensoldt v. Petersburg*, 63 Id. 157. Nor will the court act upon the admission of the parties that a statute has not been passed in the manner required by the constitution; such fact must be shown: *Happel v. Brethauer*, 70 Id. 166. Whether a seeming act of the legislature is or is not a law, is a judicial question to be determined by the court, and not a question of fact to be tried by the jury: *Post v. Supervisors*, 105 U. S. 667; *South Ottawa v. Perkins*, 94 Id. 260; *Railroad Tax Case*, 8 Saw. 238, 293.

CONCLUSIONS AS TO JOURNALS AS EVIDENCE. — The conclusion from the foregoing would seem to be correctly formulated, in accordance with the weight of authority, as follows: When the intent of a constitution appears to be that the journals should be kept as records, then those records may be examined to see if the constitutional requirements have been kept, and if they have not, the act will be declared invalid; but at the same time constitutional directions in regard to mere procedure: *State v. McConnell*, 3 Lea, 332; *Williams v. State*, 6 Id. 549; *Miller v. State*, 3 Ohio St. 475; *Supervisors v. People*, 25 Ill. 181; *Worthen v. Badgett*, 32 Ark. 496; as, for example, reading bills in a certain manner, and for a certain number of times; and the finding of certain facts upon which the legislature bases its action, *Lusher v. Scites*, 4 W. Va. 11, will be presumed to have been observed, and will not be inquired into unless perhaps the contrary affirmatively appears: See the rule as stated in *Cooley on Const. Lim.* *135.

EVIDENCE OTHER THAN JOURNALS. — While the courts of many states will look to journals to determine whether a statute was so passed as to be invalid, the same courts are extremely cautious about looking further. In *Fowler v. Peirce*, 2 Cal. 165, it was held that courts of law could go behind the record evidence of a statute, and that it might be shown by parol that an act had not been approved by the governor within the time fixed by the constitution, although it purported so to be; but this doctrine was overruled by *Sherman v. Story*, 30 Id. 253; see *supra*. In *Gardner v. Collector*, 6 Wall. 499, the president had approved a bill, passed by congress, December 24th, but had omitted the year "1861." If any sources of information could be looked at, they would show that the record in the office of the secretary of state was filed there, with the president's approval to it, December 26, 1861, and the journal of the house of representatives showed that a message was received from the president January 6, 1862, stating that he had approved the bill on the twenty-fourth of the preceding month. Miller, J., used the following broad

language: "Whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; always seeking first for that which in its nature is most appropriate, unless the positive law has enacted a different rule." In *McCulloch v. State*, 11 Ind. 424, where it was alleged that an act incorporating a bank was not passed by a constitutional majority; that certain members whose names appeared on the journal of the house as present and voting for the bill were absent, and a certain member whose name appeared in the journal as voting in favor of the passage did not in fact vote for it, but against it; and that these entries were made by mistake, fraud, and corruption—held that the journals could not be impeached or contradicted, but were conclusive evidence of the facts appearing therein; and see *People v. Mahaney*, 13 Mich. 481. The judges of the court of common pleas were required by the constitution of Ohio to be elected by joint ballot of both houses of the legislature. At a certain election, the journal of the house certified the election of *Samuel* Moffitt, while that of the senate, the election of *Lemuel* Moffitt. It was sought to prove by depositions of officers and members of the legislature, that *Lemuel* and not *Samuel* Moffitt was the one voted for and elected. The court thought that this evidence could not be introduced, but the case really went off on another point: *State v. Moffitt*, 5 Ohio, 358. In *Division of Howard County*, 15 Kan. 104, the court refused to look beyond the journals to an engrossed bill not contained therein. And see *Louisiana State Lottery Co. v. Richoux*, 23 La. Ann. 743; S. C., 8 Am. Rep. 602, Justice Howe's concurring opinion; *Berry v. Baltimore etc. R. R.*, 41 Md. 446; S. C., 20 Am. Rep. 69.

DOCTRINE OF THE PRINCIPAL CASE EXAMINED.—It is plain that the foregoing examination in no way casts any doubt upon the correctness of the ruling in the principal case. If it is admitted that courts may go behind an act of the legislature—and this may be done in Pennsylvania in an ordinary case: See *Southwark Bank v. Commonwealth*, 26 Pa. St. 446—it will follow, from the weight of authority, that no presumption in a case of this kind will be entertained in favor of the observance of the constitutional requirements; and under any view, and if it be denied that courts may examine into legislative records, the principle should be distinguished in that the legislature of Pennsylvania, in granting such a decree of divorce, is really acting as a court of limited jurisdiction, and if it acts without jurisdiction its decree should be void. The principal case was followed and approved in *Cronise v. Cronise*, 54 Id. 255, on a somewhat similar state of facts. Agnew, J., says: "It is supposed that the absolute character of a law forbids inquiry into the grounds of legislation. But the answer is, that the grant of this power being limited in the constitution to certain grounds, an inquiry into them is a necessary duty under the bill of rights to prevent injustice. * * * If the boundary of a limited power be overstepped by the legislature, its act is void, and not only can be but must be inquired into. The rightful presumption is, that every legislative act of divorce is founded in just cause, but it is not a conclusive presumption that this cause is outside the jurisdiction of the courts. If because no ground is recited we refuse to inquire into the ground, we fail in an enjoined duty, the legislative will would become unfounded, and breaches of the constitution be beyond reach."

MOTIVES OF LEGISLATURES OR MEMBERS THEREOF WILL NOT BE INQUIRED INTO.—Courts have been often urged to inquire into the motives of legislatures or members, but this has as often been refused, even where fraud, bribery, and corruption have been alleged. Impeachment and the ballot are the proper remedies: *Fletcher v. Peck*, 6 Cranch, 87; *Ex parte McCardle*, 7 Wall. 506; *Flint etc. Co. v. Woodhull*, 25 Mich. 99; *State v. Hays*, 49 Mo. 604; *Kountze v. Omaha*, 5 Dill. 443; *People v. Bigler*, 5 Cal. 23; *Ex parte Newman*, 9 Id. 502; *Harpending v. Haight*, 39 Id. 189; *Stack v. Wood*, 8 W. Va. 612; *McCulloch v. State*, 11 Ind. 424; *Baltimore v. State*, 15 Md. 376; *Johnson v. Higgins*, 3 Metc. (Ky.) 566; *People v. Draper*, 15 N. Y. 532; *State v. Fagan*, 22 La. Ann. 545; *State v. Cardoza*, 5 S. C. 297; *Humboldt Co. v. Churchill Co. Commissioners*, 6 Nev. 30; *Doyle v. Continental Ins. Co.*, 94 U. S. 535; *Wright v. Defrees*, 8 Ind. 298; *Sunbury etc. R. R. v. Cooper*, 33 Pa. St. 278.

THE PRINCIPAL CASE IS CITED in *Election Cases*, 65 Pa. St. 41, to the point that "where a new and extraordinary remedy, out of the course of the common law, is given by statute, the party, if he adopts it at all, must pursue it to the letter."

CASES
IN THE
SUPREME COURT
OF
RHODE ISLAND.

LADD v. KING.

[1 RHODE ISLAND, 224.]

WRITTEN AGREEMENT IS ENTIRE when for the sale of certain land and a cottage thereon, and to finish the cottage by a certain time.

PAROL EVIDENCE IS INADMISSIBLE, WHERE PART OF AN ENTIRE CONTRACT IS WITHIN THE STATUTE OF FRAUDS, to vary the part not otherwise within the statute, by enlarging time of performance.

ACTION on an agreement. Plaintiff and defendant entered into an agreement in writing, whereby the former agreed to sell to the latter certain land, together with a cottage then being built thereon, and also agreed to finish the cottage on or before the first day of July next after the date of the agreement. Plaintiff claimed that the defendant subsequently extended the time for the completion of the cottage to the fourteenth of July. The cottage having been completed on the fourteenth of July, the plaintiff tendered a proper conveyance of the premises to the defendant, but the latter refused to receive it and pay the purchase price. The court held that it was incompetent to show by parol evidence that the time of performance as designated in the agreement was extended. The plaintiff moved for a new trial.

Pearce and Turner, for the plaintiff.

A. C. Greene and Potter, for the defendant.

By Court, **GREENE, C. J.** The plaintiff offered parol evidence to prove that defendant agreed to extend the time of finishing the cottage until July 14, 1847. This evidence was objected to

by defendant, upon the ground that such evidence was inadmissible under the statute of frauds. The defendant contended that the contract was entire, and, being for a sale of land, the term of performance could not be extended by parol. The agreement is for the sale of the land with the cottage thereon for the sum of three thousand dollars; and the seller agrees to complete the cottage on or before the first of July then next, the purchase money to be paid when possession is given. The plaintiff contends that the agreement is divisible into two parts, to wit, the sale of the land and the finishing of the cottage; the first is within the statute of frauds, and the second not. That the time named in the agreement applies to the completion of the cottage, but not to the conveyance of the land. That with regard to this last, no time being fixed, the law implies a reasonable time.

It is undoubtedly true that parol evidence is competent to prove an enlarged time for the performance of a written contract not within the statute of frauds, and if the plaintiff is right in his construction of the contract, parol evidence is admissible to prove an enlargement of the time for the finishing of the cottage. But is the contract divisible? We think not. The agreement is for the sale of a house and lot; the purchaser did not want one without the other, nor one before the other. It was no object to him to have the cottage without the lot, or the lot without the cottage. The purchase was of the entire estate, house and lot, and was to be perfected at the same time; that time was the first of July, at the furthest. We think, therefore, that the true interpretation of the contract is, that the sale was to be completed on the first of July; in other words, that the plaintiff agreed to convey to the defendant the house and lot complete on or before the first day of July.

And the question is, whether parol evidence is admissible to prove that the parties extended the time to the fourteenth of July. Upon this question the authorities are conflicting. The leading English case in support of the admissibility of such evidence is *Cuff et al. v. Penn*, 1 Mau. & Sel. 21, decided by Lord Ellenborough in 1813.

In that case, the "defendant agreed, by a written contract, to purchase of the plaintiffs three hundred hogs of bacon, to be delivered at fixed times and in specified quantities, and, after a part of the bacon had been delivered, requested the plaintiffs, as the sale was dull, not to press the delivery of the residue." This was to be understood only as parol dispensation of the per-

formance of the original contract in respect to the time of the delivery, and, therefore, was not affected by the statute of frauds; the defendant was held liable for not accepting the residue within a reasonable time afterwards. In giving the opinion of the court in that case, Lord Ellenborough said: "It is admitted there was an agreed substitution of other days, than those originally specified, for the performance of the contract; still the contract remained. Suppose a delivery of live hogs, instead of the bacon, had been substituted and accepted, might not that have been given in evidence, as accord and satisfaction? So here the parties have chosen to take a substituted performance."

But it appears to us that there is a wide difference between a substituted performance, accepted by the purchaser, as of live hogs delivered and accepted instead of bacon, and a substituted executory agreement to sell and deliver live hogs. Could such an agreement have been enforced? If originally by parol, it clearly could not. Does it derive any force from the fact that the parties had made a written contract for the sale of bacon, any more than if they had made a contract for the sale of wheat? If the agreement for a substituted performance is different from the written contract, then the party charged therewith is charged with a parol contract, which, the statute says, shall not be done.

The essence of an executory contract is the thing agreed to be done, and an agreement for a substituted performance is an agreement to do a different thing, and if this is required by the statute to be in writing, we do not perceive how the party can be charged by parol, if the agreement be substituted for a written contract, any more than if originally by parol. *Cuff et al. v. Penn* was under the seventeenth section, which requires either delivery of part, or part payment, or a written contract.

In *Goss v. Lord Nugent*, 5 Barn. & Adol. 58; S. C., 27 Eng. Com. L. 33, Lord Denman refers to the case of *Cuff et al. v. Penn*, and cautiously avoids giving his sanction to its authority. Park, J., doubted the correctness of the decision. In *Stowell v. Robinson*, 3 Bing. N. C. 928; and S. C., 5 Scott, 196, it was held, that the time for the performance of a written contract for the sale of lands could not be enlarged by a subsequent oral agreement, although that agreement was pleaded by the defendant as a bar to the action. The plea was, that, at the time stipulated for the performance of the written contract, neither party was ready to complete the sale; and the time for the performance was agreed by the parties to be postponed.

In *Stead v. Dawber*, 2 Per. & Dav. 447; S. C., 10 Ad. & El. 57, *Cuff et al. v. Penn* was directly overruled.

In *Marshall v. Lynn*, 6 Mee. & W. 109, decided in the exchequer in 1840, there was a written contract for the sale of goods, within the statute of frauds, fixing the time of delivery; a subsequent parol agreement was made substituting another day. Held, such subsequent agreement to be valid must be in writing. Parke, baron, says: "Everything for which the parties stipulate, as forming part of the contract, must be deemed to be material. Now, in this case, by the original contract, the defendant was to accept the goods, provided they were sent by the first ship; the parties afterwards agreed by parol, that the defendant would accept the goods, if they were sent by the second ship, on a subsequent voyage; that appears to me to be a different contract from what is stated before. Such was my strong impression, independently of any decision on the point; but the case of *Stead v. Dawber*, 2 Per. & Dav. 447, is precisely in point with the present, and on looking at the judgment, it does not appear to proceed altogether upon the time being an essential of the contract, but on the ground that the contract itself, whatever be its terms, if it be such as the law recognizes as a contract, can not be varied by parol."

In the argument of this case, the counsel for the plaintiff endeavored to distinguish it from the case of *Goss v. Lord Nugent*, 5 Barn. & Adol. 58, which was under the fourth section of the statute, upon the ground of a difference in the construction of the fourth and seventeenth sections of the statute; and, although the court repudiate any such distinction, yet no case has been cited, either in England or this country, where parol evidence has been admitted to enlarge the time of performance of a contract for the sale of lands.

The weight of English authority is decidedly against the admission of the parol evidence.

In *Blood v. Goodrich*, 9 Wend. 68 [24 Am. Dec. 121], the supreme court of New York decided that a parol agreement to extend the time of performance of a contract for the conveyance of land was invalid.

In *Cummings et al. v. Arnold et al.*, 3 Met. 486 [37 Am. Dec. 155], the defendants agreed in writing to furnish and deliver printing cloths to the plaintiffs at a certain price per yard, on eight months' credit, and the suit was brought by the plaintiffs for the non-delivery of the cloths according to this contract. *IL.* defense, the defendants offered to prove, that the plaintiffs

agreed by parol, after the writing was signed, to pay cash on the delivery of the cloths, deducting eight per cent., and the question was, whether evidence of these facts was admissible. The court decided that the parol evidence was admissible. Wilde, J., after adopting the reasoning of Lord Ellenborough in *Cuff v. Penn*, 1 Mau. & Sel. 21, goes on to say: "If the defendants, on their part, had refused to perform the verbal agreement, then indeed it could not be set up in defense of the present action; for the party who sets up an oral agreement for a substituted performance of a written contract, is bound to prove that he has performed or been ready to perform the oral agreement. This distinction avoids the difficulty in some of the cases cited, where it is said, that to allow a party to sue, partly on a written and partly on a verbal agreement, would be in direct opposition to the requisitions of the statute; and it undoubtedly would be; but no party, having a right of action, can be compelled to sue in this form. He may always declare on the written contract, and unless the defendant can prove performance, according to the terms of the contract or according to the agreement for a substituted performance, the plaintiff would be entitled to judgment."

This reasoning does not appear to us to be satisfactory. If the agreement for substituted performance has been performed by the one party and received by the other, then undoubtedly, it is an accord and satisfaction of the written contract. But a tender of performance of the substituted agreement, not accepted by the other party, is no accord and satisfaction; and, if not received, it is then executory and performance can only be enforced by suit. In such a state of things, which is in force, the original written or the substituted verbal contract? If A. and B. contract in writing for the sale to B. of Black-acre, and, afterwards, by parol, they agree that the sale should be of White-acre instead of Black-acre, and A. offers to convey to B. White-acre according to verbal agreement, and B. refuses to receive it and sues A. on the written contract for the sale of Black-acre, can B. set up the verbal contract and his tender of performance of it, as a bar to the action? Is the verbal agreement of any more force because performance has been tendered? Is the verbal agreement, with a tender of performance, of any more force in the case supposed, than if none but the verbal agreement had been made? Upon the principle adopted by the supreme court of Massachusetts, the purchaser, under a written contract, may be deprived of the land he agreed for, and com-

pelled, upon the strength of a subsequent verbal agreement of which performance has been tendered, to accept other land. We think if the performance is changed the contract is changed: that when there is a substituted performance agreed upon, whether as to time or subject-matter, there is a substituted contract, and, if it relates to land, it must be in writing.

New trial denied.

ENTIRE CONTRACTS.—For examples of particular contracts held to be or not to be divisible, see *McMillan v. Vanderlip*, 7 Am. Dec. 299; *Badger v. Titcomb*, 26 Id. 611. Sums due on current or book accounts are entire and indivisible demands: *Guernsey v. Carver*, 24 Id. 60, and note; *Bendernagle v. Cocks*, 32 Id. 448, and note. As to splitting up of entire demands, see *Guernsey v. Carver* and *Bendernagle v. Cocks*, *supra*; and in regard to apportionment of contracts, see note to *Cuthbert v. Kuhn*, 31 Id. 518; *Van Rensselaer v. Bradley*, 45 Id. 451, and cases collected in note. Performance in full, when essential to recovery: *Hayward v. Leonard*, 19 Id. 268, and note; *Morford v. Mastin*, 17 Id. 168; *Marshall v. Jones*, 25 Id. 260; *Greene v. Linton*, 31 Id. 707; *Helm v. Wilson*, 28 Id. 336, and note; *Eldridge v. Rowe*, 43 Id. 41, and note. An entire contract is void when founded upon an indivisible consideration, part of which is illegal: *Wilson v. Himes*, 47 Id. 422, and cases collected in note.

PAROL ENLARGEMENT OF TIME OF PERFORMANCE, WHEN VALID: *Blood v. Goodrich*, 24 Am. Dec. 121, and cases in this series collected in note. In action for breach of written contract, alteration may be proved, although the oral agreement be within the operation of the statute of frauds: *Cummings v. Arnold*, 37 Id. 155.

THE PRINCIPAL CASE IS CITED IN *Martin v. Clarke*, 8 R. I. 395, to the point that a contract for the sale of an interest in real estate can not be varied, under the statute of frauds, by parol evidence; and in an equity case, that of *Hicks v. Aylsworth*, 13 Id. 566, the principal case was referred to as an illustration of a case at law, in holding that the time for accepting an option in regard to land could not be extended by parol.

CASES
IN THE
COURT OF ERRORS AND APPEALS
OF
SOUTH CAROLINA.

SAHLMAN v. MILLS & Co.

[3 STROBANT'S LAW, 384.]

CONSTRUCTIVE DELIVERY OF CHATTELS.—Where the owner of corn gave an order on the agent at the depot where the corn was to arrive, to deliver six hundred and twenty-five bags to a person designated, and the agent recognized the person's right to the property, it was held that there was a constructive delivery.

IN DETERMINING WHETHER CHATTELS HAVE BEEN DELIVERED CONSTRUCTIVELY, the intention of the parties, if it can be collected from what they have said and done, will largely govern.

IDENTIFICATION OF CORN MIXED WITH LARGER LOT.—Where the owner of corn, to arrive at a depot, gives an order for a portion of it, that is a sufficient identification of it, and the first to arrive will be the corn meant.

CONTRACT MAY BE PROVED BY PAROL, where the chattels have been delivered and no writing is necessary.

TROVER for six hundred and twenty-five bags of corn, containing two and a half bushels each. Mills & Co. purchased three thousand bushels of corn from Adger & Co. at Hampton's plantation, to be delivered at the Charleston railroad depot. The following order was sent to plaintiff:

"MR. JOHN KING, JUN., AGENT RAILROAD COMPANY—Sir: Please deliver to C. Sahlman six hundred and twenty-five bags of corn consigned to us, and oblige,
O. MILLS & Co.

"P. S. We are not certain that all the corn has arrived at the depot, but when it comes let Mr. S. have it.

"January 25, 1847."

Plaintiff presented the order to the agent, who recognized it, and when the corn came informed him of its arrival. Mills was

present when plaintiff went for the corn, and refused to let him have it. Plaintiff tendered the price he had agreed to pay for it—seventy-eight cents per bushel—but Mills refused to take the money, and hauled the corn away. Corn had advanced in price since the original contract of purchase. The jury found a verdict for the plaintiff for three hundred and twelve dollars and forty cents, the difference between the contract price and the advanced price, and defendants appealed.

Bailey, Brewster, and Petigru, for the appellants.

Simons, contra.

By Court, WITHERS, J. If there was no delivery of the corn in question, to the plaintiff, the case was within the statute of frauds; and we might not be able to find enough in the plaintiff's proof to fulfill the demands of that statute. If the contract was executory, the plaintiff must fail, for he has brought trover, and such a contract is not the basis of such an action.

The true inquiry, therefore, is whether the order received by the plaintiff, from defendants, and by him presented to the railroad agent, was an execution of the contract—that is to say, did it operate to vest in Sahlman the right of property in the corn, and a constructive possession of it?

It was contended at the bar, that O. Mills & Co. had not possession themselves, and consequently they could not transfer it to another. But the testimony (by Mr. Pringle) is that the sale of three thousand bushels of corn, was made by Adger & Co., the defendants, "at Hampton's plantation." Mills sent his bags to that plantation, and the corn was put into them. There is no room to question that defendants were complete and absolute owners of the corn, at Hampton's plantation, and could deal, concerning it, as effectually as if the commodity had been in their warehouse in Charleston. Though Adger & Co. were to pay the freight (yet, as the testimony is), Mills & Co. were to receive the corn at the railroad, and have it from that place.

Conceding that the agent of the vendor, holding the goods, should recognize the order, which has not been discussed in this cause, it is conceived that he did so in fact; for the proof on that subject, shows that though it was not left with the agent of the railroad when presented to him, that was omitted only because the corn had not then arrived; and we are informed that when it did arrive, information was given of the fact to the plaintiff, by one connected with the railroad depot; and it may, therefore, be well concluded that the warehouseman

fully recognized whatever right the paper presented conveyed to the plaintiff, and regarded the custody of the goods, when they should arrive, to be for and on account of the plaintiff in this case.

The real point of objection to the force and effect of the paper presented by the plaintiff to the railroad agent, as a delivery order, within the understanding of merchants, must be reduced to this—that the merchandise, intended to pass under it, was not identified; or that something remained still to be done, in relation to the corn, necessary to designate precisely that which should be the plaintiff's.

Assuredly the intention of the parties, if it can be collected from what they have said or done, as to this matter, ought to have much to do in determining our conclusion. It is not said in the order, nor otherwise proved, that any single act was to be done, tending to designate or identify the corn. It is suggested, however, that Mills & Co. by their contract with Adger & Co. reserved the right to measure the corn at the railroad depot. But it is well enough to answer that this may not, on that account, have entered into the contract or intentions of the parties to this action. It appears in the case, as reported to us, that Mills & Co. were to receive a specific quantity of corn (three thousand bushels) at Hampton's plantation, and Mills sent his own bags to receive it. It would seem that the capacity of each bag, purchased by plaintiff, was known, for in a conversation between plaintiff and Mills, the former alleged that he had bought "six hundred and twenty-five bags of corn, containing two and one half bushels each, at seventy-eight cents per bushel," and this was not denied. Then if the number of bushels was a matter to be known at the railroad depot, that would seem to be no matter of doubt. However, the subject of sale was a specific number of bags of corn (so specified in the order), bags consigned to Mills & Co. at the railroad depot, arrived or to arrive—if not there, then when they did come, or such of them as would complete the number, were to be delivered to the plaintiff. It is admitted that to make the order operative to sustain this action of trover, the plaintiff should be able, by virtue of its terms, to lay his hand on the specific bags purchased. What obstacle would he have found to doing this, if the defendants had not interfered? He would find bags of corn consigned to them; and we hear of none other consigned to them, but those brought from Hampton's plantation—the number was settled. But the defendants had other bags of corn, not dis-

tinguishable among themselves, at the same place, and from the same place. Still, there is no difficulty in this, for, by the terms of the order, upon a plain interpretation, if none were there at its date, the first six hundred and twenty-five that came were to be delivered—if some were there, but a less number, they, with the requisite additional number to arrive and when received, were to be the identical six hundred and twenty-five bags, that were the subject of the contract. The element of the case, therefore, which includes the identity, and separate identity, of the thing sold, seems well enough developed by the plaintiff's testimony.

It is not proposed to collect authorities to sustain the observations hereinbefore made; for as to the main question of inquiry here (whether the order was such as to transfer the right of property in the corn, and the constructive possession to the plaintiff), has recently undergone the consideration of this court, and has been elaborately discussed in the case of *Frazer & Co. v. Hilliard et al.*, 2 Strobl. 309. Very good illustrations of what we hold in this case may be found in *Searle v. Keeves*, 2 Esp. 598, and in *Riddle v. Varnum*, 20 Pick. 280, citing the case of *Macomber v. Parker*, 13 Id. 175. The two latter cases are a commentary upon the doctrine, that although a contract for the sale of goods be complete and binding in other respects, the property in them remains in the vendor, and at his risk, if any material acts remain to be done before the delivery—unless the evidence constrain the belief that the parties did not contemplate anything else to be done before delivery: and we are admonished by those cases to look, as in all other actions on contract, to the intention of the parties, as indicated by the proof. In the one case, though the plank and timber were in the hands of a bailee, when the contract was made, and had to be measured to ascertain the means of fixing the amount to be paid; and in the other, though the bricks were to be counted for the same purpose, yet the delivery was affirmed to have been made in each case. While the general principle is sensible, and ought to be maintained as wholesome law, it would be expedient, for the very purpose of maintaining it, that we should not push its application to a fanciful extent; and in so doing lose sight of the reasonable *indicia* of the intention of the parties to regard the delivery complete or not.

If, then, the delivery of the corn shall be considered as having followed the order, the question is ended; for there is no room to debate whether the defendants had the right of stoppage

in transitu. The delivery excludes that inquiry. Nor is there anything in the suggestion, that we ascertain some fact or other as to the particulars of that contract, by parol testimony. If actual delivery had been made (and constructive is equivalent), the whole contract might be proved by parol. So, under the statute of frauds, if a single bag had been delivered as a part of the article purchased, the same would have followed.

Inasmuch as the defendants received a more favorable charge on the law than they had a right to require, and the plaintiff, notwithstanding, has obtained a verdict, he is of course entitled to retain it; and the motion in behalf of defendants is, therefore, dismissed.

O'NEALL, EVANS, WARDLAW, and FROST, JJ.. concurred.

Motion refused.

RICHARDSON, J., did not hear the argument in this case.

IN A CONTRACT OF SALE, DELIVERY MAY BE SYMBOLICAL or by implication when the article is not in the possession of the seller: *Cocke v. Chapman*, 44 Am. Dec. 536, and note, where other cases are collected. It is a good constructive delivery of bulky articles in care of an agent of the vendor at a distant place for both the vendor and the vendee to notify him of the sale, and for the vendee to instruct him to ship the goods to his agent at another place, he agreeing to comply with such instructions: *Van Brunt v. Pike*, 45 Id. 126, and note.

STOVER & BARNES, SURVIVORS, v. DUREN.

[3 STROBHART'S LAW, 448.]

PRESUMPTION OF PAYMENT AFTER LAPSE OF TWENTY YEARS is one of fact and not of law, though equally as important as if it were; but it shifts the burden of proof, and though the court can not make such a presumption, yet a new trial will usually be granted if the jury disregards it.

MERE ACKNOWLEDGMENTS MADE AFTER TWENTY YEARS that the debt had not been paid will not rebut the presumption of payment arising from the lapse of time; to do so there should be a distinct admission of the legal obligation and no expression of unwillingness to pay.

BODY HELD UNDER CA. SA. CONSTITUTES SATISFACTION AT COMMON LAW, and this not less where the body has been discharged without payment than where payment has been received.

ARREST IS PRIMA FACIE EVIDENCE OF SATISFACTION.—To rebut it the release from prison must appear to be an exception to the general inference.

THE plaintiffs, survivors of the firm of Stover, Barnes, Dickson & Perry, in 1847 brought suit on a judgment recovered by the

firm against defendant in 1821. In 1822, defendant had been arrested, and under the prison bounds act asked to be discharged. The jury found in his favor; but the case was appealed, a new trial ordered, and on the second trial the verdict was against him. This left him in custody. How he was discharged, does not appear. His property was all sold, and applied on the judgment. It was proved that a nephew of plaintiff Stover called upon defendant, and told him he understood that he (defendant) had promised to pay the judgment when able to do so. Defendant replied that they had treated him so meanly he did not know whether he ought to or not; that plaintiffs had put him in jail. He said he supposed the debt had not been paid. On another occasion, seventeen or eighteen years before the bringing of this suit, he had said he would not pay those who put him in jail. The instructions of the judge sufficiently appear in the opinion. The jury found for the defendant, and plaintiffs appealed.

Smart, for the appellants.

John Desaussure, *contra*.

By Court, WARDLAW, J. The subject of presumptions is a good deal confused by the various terms which have been used to distinguish the different kinds. The presumption of payment, which, in reference to debts not embraced by the statutes of limitations, arises after the lapse of twenty years, is not a presumption of law—that is, a rule which the court itself may apply; but is a presumption of fact, recognized by law, from which a conclusion ought to be deduced by a jury. It is, however, one of those strong presumptions which shift the burden of proof; which, from frequent occurrence, have become familiar to the courts, and which being constantly recommended to juries, from motives of policy have acquired an artificial force, and become as important as presumptions of law. Although the court itself can not make such a presumption, a new trial will usually be granted if a jury disregards it.

It is not understood that, in this case, the circuit judge did more than urge upon the jury the well-recognized presumption of payment, from lapse of time, and express his unfavorable opinion of the circumstances that had been adduced to rebut it. Just as in *Willaume v. Gorges*, 1 Camp. 217, Lord Ellenborough thought that after the lapse of twenty years, the presumption that a judgment had been paid, was not rebutted by the circum-

stances of defendant's absence and insolvency, and, therefore, directed the jury to find for the defendant.

The matter which, on this head, is most objected to, is that the judge held that mere acknowledgments, that the debt had not been paid, made after the expiration of the twenty years, were insufficient—that if there had been no payment of interest, no promise to pay, no other sufficient rebutting circumstance, an acknowledgment, to suffice for rebutting the presumption, should be a distinct admission of the subsisting legal obligation of the debt, unaccompanied by any conduct or expressions indicative of an unwillingness to pay. This court perceives no objection to the rule thus stated to the jury. The presumption is no legal bar, but it originally was admitted in analogy to the then prevailing statute of limitations, and in considering admissions which rebut it, the same principles are applicable as in considering admissions to take a cause of action out of the statute of limitations. 'So long as the lapse of time is merely circumstantial evidence, which, by ordinary inference, creates belief (as where it is less than twenty years, and is adduced along with other circumstances), any admissions which oppugn the inference of payment drawn from it, go to the jury along with it, and all are weighed together according to their natural force. But when, by the expiration of full twenty years, the presumption of payment has acquired an artificial force, so that it stands in place of belief, an admission that the payment has not in fact been made, can not of itself destroy the effect which considerations of policy have given to a certain period of time, whether the payment has or has not been made.

This court is also satisfied with the directions which were given as to the effect of the arrest. One of the pleas averred satisfaction, and more than twenty years had intervened between the enlargement of the defendant and the commencement of the suit.

The body held under a *ca. sa.* constitutes satisfaction at common law, and this, not less where the body has been discharged without payment, than where payment has been received. An arrest gives *prima facie* evidence that this satisfaction has been enjoyed: to rebut this evidence it must appear that the imprisonment ceased in some mode which, by law, constitutes an exception to the general inference of satisfaction from the body taken. If nothing appeared but the facts that the arrest was made, and that the defendant, having failed in his application under the prison bounds act, was at large, the enlargement con-

sists as well with the supposition that the defendant was discharged by the plaintiff, of their own motion, as with the supposition that he either escaped or was discharged with his own consent, under the act of 1815.

These facts, taken in connection with the sales of defendant's property that were made, the suit on his prison bounds' bond, his long enjoyment of liberty undisturbed, yet able to pay, were strong, independent of all artificial presumptions, to show that the plaintiffs, in fact, discharged the defendant, either because they were, then, hopeless of further satisfaction, or because they received payment.

The motion is dismissed.

RICHARDSON, O'NEALL, EVANS, and FROST, JJ., concurred.

Motion refused.

PAYMENT IS PRESUMED AFTER A LAPSE OF TWENTY YEARS, but the presumption may be repelled by circumstances: *Wanmaker v. Van Buskirk*, 23 Am. Dec. 748.

PROMISE TO PAY A DEBT BARRED must be unconditional, or inferred from an unqualified admission: *Mumford v. Freeman*, 41 Am. Dec. 532; *Rainey v. Link*, 40 Id. 411. And a mere acknowledgment of the debt is not sufficient to remove the bar of the statute: *Sutton v. Burruss*, 33 Id. 246. But as to what is sufficient acknowledgment and promise to take the case out of the statute, see *Elliot v. Leake*, 32 Id. 314, and note 317; *Johnson v. Bounethea*, 30 Id. 347; *Conway v. Williams*, 29 Id. 466; *Newlin v. Duncan*, 25 Id. 66; *Austin v. Bostwick*, Id. 42; *Frey v. Kirk*, 23 Id. 581, and note.

MCCOLMAN v. WILKES.

[3 STROBART'S LAW, 465.]

POSSESSION OF TENANT OR AGENT EMPLOYED TO HOLD POSSESSION is the possession of the person under whom he holds.

TO SUSTAIN TRESPASS QUARE CLAUSUM FREGIT, plaintiff must have had, at the time of the trespass, the possession of the place trespassed upon.

IN TRESPASS QUARE CLAUSUM FREGIT, DEFENDANT MAY JUSTIFY by showing title in himself, but not by showing title in a third person with whom he is not connected.

POSSESSION OF PART, WITH EVIDENCE OF EXTENT OF CLAIM, is possession of the whole.

CONSTRUCTIVE POSSESSION IS SUCH AS THE LAW ANNEXES TO THE TITLE, and will without entry maintain trespass *quare clausum fregit* against a casual trespasser, but it is always displaced by actual possession.

ACTUAL POSSESSION MEANS an actual and continuous occupancy or exercise of full dominion, either by occupancy of the whole or by occupancy of part in the name of the whole, with evidence of the bounds where the law would extend the possession to such bounds.

EXTENT OF POSSESSION BY OCCUPANCY OF PART depends not merely on the evidence of the bounds, but on the character of a conflicting claim, and the possession which attends it.

EXTENT OF POSSESSION AS AGAINST THIRD PARTY not connected with the owner will be to the whole claim.

WHERE JUNIOR GRANT COVERS AND INCLUDES OLDER GRANT, whether the holder claims the whole of the land within the outer bounds or excludes the older grant from his claim, is a question of fact, and if he claims all within the outer bounds, possession of part is possession of all of it, where there is no adverse claimant.

OCCUPANT UNDER A JUNIOR GRANT which covers an older grant will be protected against violation of his claim of right by any one not claiming under such older grant.

PARTY IN POSSESSION, THOUGH WITHOUT TITLE, MAY MAINTAIN TRESPASS against a wrong-doer; and defendant's showing the title to be in a third person will not avail him—he must show that the right is in himself.

OWNER OF LAND CAN NOT MAINTAIN TRESPASS QUARE CLAUSUM FREGIT against one who was in possession at the time he acquired title.

OCCUPANT OF PART, CLAIMING WHOLE, takes the place of an adverse occupant upon his leaving, and is in possession of the land, the occupant's continued possession of part and claiming the whole being equivalent to a re-entry.

TRESPASS quare clausum fregit. The opinion sufficiently states the facts. Verdict for plaintiff, and defendant appealed.

McIver, for the appellant.

Dudley, contra.

By Court, **WARDLAW, J.** To justify the instructions which were given, it must be conceded that the jury found that the defendant occupied the parcel of land, west of a certain line, which Turnage had held, and no more; and that that parcel is not within the Lyons grant, but is within the grant to the plaintiff, and within the older grant to Wade.

As to the question of location, no misdirection is complained of; and the finding of the jury conformable to the opinion of the circuit judge, appears to be sufficiently sustained by the opinion of Mr. Lowry, the surveyor, the inferences which may be drawn from various plats and other papers, the marks which were found, and the long acquiescence in the line that has been established, of all persons whose interest it was to fix it correctly, or to move it farther towards the west.

It was not on the circuit objected that the action should have been by the tenant and not the landlord, and therefore nothing on that head was ruled below. The persons who held the land for the plaintiff were rather agents than tenants, or if tenants, they were not lessees of a particular parcel, but tenants em-

ployed to hold possession of the whole—tenants of that peculiar species which is mentioned in *Davis v. Clancy and Johnson*, 3 McCord, 422; *Cannon v. Hatcher*, 1 Hill (S. C.), 260 [26 Am. Dec. 177]; and *Alston v. Collins*, 2 Spears, 451. The possession of such a tenant or agent is the possession of the person under whom he holds, as much as would be an occupation by that person's overseer and slaves or cropper and hirelings.

The plaintiff had a large grant which covered the land previously granted to Wade, and much more; within the Wade grant the plaintiff had actual occupancy of part, with a claim to the whole within his own grant, but not long enough to give title by possession; he knew of the Wade grant, and had possession of the paper, but no right to it; Turnage, after the plaintiff's occupancy commenced, acquired an adverse *pedis possessio* of three years' duration on the Wade grant, quit, and was succeeded by the defendant. Can the plaintiff, showing no other title or possession, maintain trespass *quare clausum fregit* against the defendant?

It is not disputed that to sustain trespass *quare clausum fregit*, the plaintiff must have had at the time of the trespass possession of the place trespassed upon; nor that in such an action the defendant may justify his entry upon a plaintiff in actual possession by showing title in himself, but not by showing title in a third person with whom he is unconnected. The dispute is in the application of these acknowledged principles, and in my opinion it proceeds from a diversity of significations given to the terms "actual" and "constructive" applied to possession. Ever since the cases of *Eifert* ads. *Read*, 1 Nott & M. 374, and *Williams v. McGee*, 1 Mills, 85 (which firmly established the maxim, that possession of part, with sufficient evidence of the extent of the claim, is possession of the whole), this diversity may be traced in our reports. It was pointed out by Judge Cheves in the case of *Brandon* ads. *Grimke*, 1 Nott & M. 356, but often since has been productive of confusion.

Properly speaking, constructive possession is that possession which the law annexes to the title. This, according to *McGraw v. Bookman*, 3 Hill (S. C.), 265, will without entry maintain trespass *quare clausum fregit*, against a casual trespasser—but it is always displaced by any actual possession. It is sometimes called legal possession, or possession in law, to distinguish it from possession in deed or in fact, which actual occupancy gives, as by the common law seisin in law is distinguished from seisin in deed. But the learning as to seisin seems not exactly ap-

plicable to possession in this state. Our ordinary modes of conveyance are, for the purpose of maintaining an action against a trespasser or of casting descent upon an heir, here held, even without entry, to confer seisin in deed just as effectually as the delivery of turf and twig would do. I know of no advantage in the law which would here accrue to the owner of land from his going upon the land and then departing, so as to leave it unoccupied, or occupied by an adverse claimant.

Actual possession is contradistinguished from the constructive possession above defined. It means an actual and continuous occupancy or exercise of full dominion; and this may be either, first, an occupancy in fact of the whole that is in possession (which is ordinarily called *pedis possessio*, and may be called substantial possession); or second, an occupancy of part thereof in the name of the whole, where there is sufficient evidence of the bounds of the whole that is claimed as one entirety, and the circumstances are such that the law extends the possession of the part that is occupied to those bounds.

This possession of the whole by occupancy of part is often called constructive possession, and the term "actual" is often confined to a mere *pedis possessio*. I attempted on the circuit to remedy the confusion thus produced, by calling the actual possession, which arises from applying occupancy of a part to the whole, a virtual possession, so as to distinguish it from the other kind of actual possession, which is above called substantial or *pedis possessio*. But whatever terms we may use to give precision to the subject, the attributes which pertain to an actual possession, as above defined, belong to it, whether it be of one kind or of the other. Whatever an occupant has possession of, he has actual possession of.

The difficulty in the cases where possession is claimed to extend to more than is visibly occupied, always is to ascertain how far it does extend. Beyond the limits of its extent there is no possession, constructive or actual—within them all is actual. The extent depends not merely on the evidence of bounds, under which possession with a claim is held, but often on the character of a conflicting claim and the possession which attends it; and sometimes it will be considered more or less, according to the person with whom the occupant is litigating. Thus for instances: Plaintiff lived on a tract; a trespasser cut trees in a distant woodland thereon: possession of part considered possession of the whole: *Gambling v. Prince*, 2 Nott & M. 138.

The owner and adverse claimant, both in actual occupancy of different parts of the same tract, each claiming the whole under distinct evidence of the extent of his claim: the title prevails, and the adverse claimant's possession is confined to his *pedis possessio*: *Huger v. Cox*, 1 Hill (S. C.), 135.

An adverse occupant under sufficient evidence of a claim which covers an unoccupied tract and adjoining land too, has actual occupancy of the adjoining land, with a claim to the whole: in a contest with the owner, who has only constructive possession of the unoccupied tract, the adverse occupant's possession is held not to extend to the unoccupied tract: *Turnipseed v. Busby*, 1 McCord, 279.

But, as I think cases hereafter cited will show, in trespass *quare clausum fregit*, brought by the occupant against a third person not connected with the owner, for invasion of possession within the occupant's claim, and upon the tract unoccupied by the owner, the occupant's possession of part within his claim will be considered to extend to his whole claim—certainly, if his occupancy be within that tract, although not on the *locus* of the trespass; as I think, even if his occupancy be outside of that tract.

In the case which is before us, the defendant says that the plaintiff did not claim under the Wade grant, for with that he is unconnected; and that the grant to the plaintiff, although in form it covers the Wade land, does not in fact include it, inasmuch as a junior grant of land previously granted is a nullity; therefore, that the plaintiff's evidence of claim does not extend any possession outside of the Wade grant to a part within it, nor any possession within it beyond the *pedis possessio*.

This argument is built upon the principles recognized in *Steedman v. Hilliard*, 3 Rich. L. 101; and in *Aiken v. Jones*, Harp. 69.

Steedman v. Hilliard was an action of trespass to try titles, where the defendant in possession could defend his possession by showing any title in a third person, against which the plaintiff could not recover: the third person upon whose land the defendant lived could not have brought any action for the occupancy, by which the plaintiff attempted to show that he had acquired a title under the statute of limitations, for the plaintiff's occupancy was at a place which was covered by an older grant, to which place, therefore, the third person had no title. In effect, the case decided only that possession outside of an owner's tract gives no title to land within the tract.

Aiken v. Jones, however, was an action of trespass *quare clausum fregit*; the plaintiff showed a grant which covered the place occupied by the defendant, and under it his own occupancy prior to the defendant's entry: the defendant showed a grant older than the plaintiff's, which covered the defendant's occupancy, but not the plaintiff's: although the defendant was in for only a short time, and showed no connection between himself and the older grant, it seems to have been held that the plaintiff's limits were bounded by the older grant, that the possession of his own land could not be converted into possession of another's, and therefore that the plaintiff had shown no trespass upon his possession. From that case the present one is distinguished by this circumstance, that here the plaintiff had possession within the Wade grant, when the defendant entered, and ever since. This circumstance I deemed so important on the circuit, that much testimony concerning the plaintiff's possession, outside of the Wade grant, not mentioned in the report, I held to be insufficient without proof of a possession within that grant.

But I can not now permit it to be supposed that I express my approbation of what is contained in *Aiken v. Jones*. The particular facts of that case are not now to be found either in print or manuscript, but I am persuaded that it was decided under a belief that the defendant had, in fact, the elder title. The plaintiff's junior grant contained the land which was covered by the older grant; as to that land, it would have been a nullity in opposition to the older grant, urged by the owner, or by any defendant in an action of that kind which admits title, in a third person, to be set up as a good defense: but still this junior grant was evidence of claim, as a conveyance from a person who had no title would have been. It was a question of fact, whether the plaintiff had held according to his junior grant: if he knew of the older grant, and acknowledged its rights, he may have excluded what it covered from his claim, and so have, in effect, altered the limits of his junior grant: but if his claim was conformable to the junior grant, the claim to the part covered by the older grant, was as good as the claim to the whole under a junior grant would have been, if both grants had covered the whole. It could not be endured that an occupant under a junior grant, should have his claim of right, accompanied by occupancy, violated by any one who from the public offices might get evidence of an older grant; any more than that a trespass upon land, actually occupied, should be encouraged by the

chance of impunity held out, if some other flaw in the occupant's title might be shown on the trial of an action for the trespass. Possession is *prima facie* evidence of title: a plaintiff in possession, without any title, may maintain trespass against a wrongdoer: evidence by the defendant, that plaintiff is holding without right or against right, can not avail the defendant, unless he can show that the right is in himself, or in somebody under whom he acted. If title be shown in a third person, the right under it must, until the owner or some person under him, claim advantage of it, be presumed to be in the occupant, whether the occupant be defendant in trespass to try titles, or plaintiff in trespass *quare clausum fregit*: *Graham v. Peat*, 1 East, 246; *Catteris v. Cowper*, 4 Taunt. 547; *Skinner v. McDowell*, 2 Nott & M. 68.

Accordingly we find, that in *Brandon ads. Grimke*, 1 Nott & M. 356, a plaintiff in trespass *quare clausum fregit* was held (even admitting that his title was defective) to have, by actual occupancy, on the south side of a river, such possession of another part, on the north side, within his claim, as would maintain the action for entry and all subsequent trespasses, against a defendant who had not shown title.

In *Williams v. McAliley*, Cheves, 200, there were an old grant and two junior grants, all of the same land—possession by each of the junior grantees, of different parts, claiming the whole, for the statutory period: it was held that the junior grantee who first entered had such actual possession, as at the expiration of ten years, gave him a title to all the land within his claim, except the part in the actual occupancy of the other junior grantee. On the circuit it had been held that the minority of the first occupant, under a junior grant, would prevent the second occupant from acquiring title; or that the first might recover from the second, even the part of which the second had ten years *pedis possessio*; but this was overruled.

In *Owens and Brown v. Goode*, 3 Strobb. L. 474, there were an old grant with which another party was connected; a plat which covered part of the old grant and other land; occupancy by the defendant, under that plat, of the part outside of the old grant; a junior grant to the plaintiff, of all the land within the old grant; occupancy by him, for the statutory period, on a part of it outside of the defendant's plat after abandonment by an agent of plaintiff's, of a possession which had been, for a few years, held on the part within defendant's plat; entry by defendant, upon the part within his plat, covered by the old grant; action of trespass to try titles brought against him. It was held that

as there was no *pedis possessio* of the part which was covered by both claims, and by the old grant, but there was *pedis possessio* on either side outside of that parcel, the defendant's possession, being first extended to his whole claim, where it was not interrupted by an actual occupancy; attached again, soon as the actual occupancy, within his claim, was abandoned, and prevented the extension of plaintiff's subsequent possession to the same part, which was thus already occupied by the prior virtual possession of defendant; and that, upon this virtual possession the defendant might have maintained trespass *quare clausum fregit* against the person who had entered upon his claim and abandoned possession at any time before that person had held ten years.

It seems to me, then, to be plain that in a case like this it does not affect the extent of the plaintiff's possession for the defendant to show the existence of an older grant, with which neither party is connected.

It is thought to be impolitic that a squatter who has a junior grant, which covers an old grant and some other parcel, should, by settling on the other parcel, prevent an honest owner, who can not prove a perfect title, from entering upon the old grant. But it may be answered that no one who can not prove a title can be known to be owner, and nobody in possession must be presumed to be a squatter. No length of possession, outside of a tract, will give title against the owner of the tract—but accompanied by evidence of claim to the tract, possession outside may be sufficient to maintain trespass against every one who has not the right which title gives. The condition of the supposed owner would be just the same if the squatter had settled upon his unoccupied land and driven him to an action to try titles. Owners under doubtful titles will take care to preserve possession. On the other hand, an honest owner may be living on his land, held under various titles but occupied as an entirety, and if his possession of part is, by reason of an old grant which seems to show title in a third person to some woodland parcel of his tract, to be prevented from extending to the whole, some squatter might settle upon the parcel covered by the old grant and defy the owner, who has title but can not prove it, to eject him in an action to try titles.

The defendant further objects that, although the plaintiff may have been in possession when Turnage entered, Turnage dispossessed him of the *locus in quo*, departed after several years, and was succeeded by the defendant before any re-entry of the plaintiff.

iff, who has not since re-entered: so that, although the plaintiff might have maintained this action against Turnage, he can not maintain it against the defendant.

A constructive possession, as I have said, is displaced by any actual adverse possession, substantial or virtual: because the implication of law, that he who has shown title is in under that title, yields to proof that another person is holding adversely. Against an adverse occupant who was in possession when the plaintiff acquired title, the plaintiff can not, then, maintain trespass *quare clausum fregit*, even although the plaintiff, when he brought his action, may have had possession of the other part of the land covered by his title: *Pearson v. Dansby and Nelson*, 2 Hill (S. C.), 466; *Wilson v. Douglas*, 2 Strobb. 97; *Amick v. Frazier*, Dudley (S. C.), 340; and, as it seems to me, against such adverse occupant, not a casual trespasser who entered after the plaintiff acquired title, but when the plaintiff had no actual possession of any part within his title, although he may have entered and departed before or afterwards, the plaintiff can not maintain trespass *quare clausum fregit*, even for such occupant's original entry.

But all this falls short of the case we are considering. The plaintiff here had actual possession when Turnage entered. If he had been entirely dispossessed by Turnage, he might have maintained this form of action against Turnage for the act of dispossession, if not for subsequent trespasses: but he could not have maintained the action against the defendant. But he was not dispossessed by Turnage; by his continued possession of other part of the tract, he still had a virtual possession even of the *locus in quo*. I say nothing of the re-entry upon the *locus in quo*, said to have been made by the plaintiff after the defendant took possession; for I can not perceive any effect that the law, as administered here, gives to either an entry or re-entry, which is not accompanied by occupancy. Virtual possession, however, is equivalent to the re-entry of a disseisee: if it does not co-exist with an adverse *pedis possessio* (as the recovery of damages for trespasses subsequent to the trespasser's acquisition of possession seems to show that it does), it is ever ready to supplant it: it is a sort of continual claim, or constant re-entry, and soon as the adverse occupant departs takes his place. All of Turnage's acts were continued invasions of an existing possession, and so were successive trespasses: the defendant, by following him, succeeded to no right, but became a trespasser upon a possession which, if it had not previously been concurrent with Turnage's,

extended to the *locus in quo* the instant that Turnage's foot was raised.

The motion is dismissed.

RICHARDSON, O'NEALL, EVANS, and FROST, JJ., concurred.

Motion refused.

POSSESSION OF PART IS POSSESSION OF THE WHOLE, where there are conflicting grants, and the adverse claimant is not in possession of any portion: *Overton's Heirs v. Davisson*, 42 Am. Dec. 544, and note, where prior cases in this series are collected or referred to: *Allen v. Lang*, 45 Id. 688.

POSSESSION IS INDISPENSABLE TO MAINTAIN TRESPASS QUARE CLAUSUM FREGIT: *Foster v. Fletcher*, 18 Am. Dec. 208; *Truss v. Old*, Id. 748; *Wilsons v. Bibb*, 25 Id. 118; *Putnam v. Wyley*, 5 Id. 346; *Orser v. Storms*, 18 Id. 543.

POSSESSION ALONE IS SUFFICIENT TO ENABLE ONE TO MAINTAIN TRESPASS QUARE CLAUSUM FREGIT against a wrong-doer: *Bakersfield Congregational Society v. Baker*, 40 Am. Dec. 668; *Heath v. Williams*, 43 Id. 265; *Hayward v. Sedgley*, 31 Id. 64, and cases cited in the note thereto. So, too, possession alone is sufficient evidence to maintain trespass against a mere wrong-doer taking chattel: See note to *Orser v. Storms*, 18 Id. 546, where the subject is discussed at length; and generally, see, on the subject of sufficiency of possession to maintain trespass, *Barron v. Colleigh*, 35 Id. 505; *Everton v. Sutton*, 21 Id. 217; *Burdick v. Murray*, Id. 588; *Duncan v. Potts*, 24 Id. 766; *Wilsons v. Bibb*, 25 Id. 118, note 121; *Sewell v. Harrington*, 34 Id. 675; *Potter v. Washburn*, 37 Id. 615. Constructive possession is equally as available as actual possession, if the plaintiff has the right to possession and no one is in actual possession: *Gillespie v. Dew*, 18 Id. 42; *Adams v. Cuddy*, 25 Id. 330; *McClain v. Todd's Heirs*, 22 Id. 37; *Goodrich v. Hathaway*, 18 Id. 701; *Orser v. Storms*, Id. 543, and note; *Buck v. Aiken*, 19 Id. 535; *Burdick v. Murray*, 21 Id. 588.

TITLE IN STRANGER NO DEFENSE IN TRESPASS QUARE CLAUSUM FREGIT.—It is no defense to trespass *quare clausum fregit* that the title to the premises on which the trespass is charged is in one other than the plaintiff, unless the defendant justify under authority from such other person: *Finch v. Alston*, 23 Am. Dec. 299; *Tourne v. Lee*, 20 Id. 260.

BACON & RAVEN v. SONDELEY.

[3 STROBART'S LAW, 542.]

RIGHT OF PARTY DEALING WITH AGENT WHOM HE SUPPOSES IS PRINCIPAL.

If a person sells goods, believing he is dealing with a principal, but finds the person is but an agent for a third party, he may recover the purchase money from either principal or agent.

VENDOR SUING AGENT IS ASSENT TO PRINCIPAL'S RESCISSION OF AGENT'S PURCHASE.—If a principal rescind his agent's purchase, and the seller sue the agent in trover, that act is an assent to the rescission.

UPON AGENT'S DISCLAIMER OF PURCHASE ON HIS OWN ACCOUNT, made with the consent of the seller, the principal having also disclaimed, the goods

sold will be in the possession of the agent on deposit for the seller, and trover may be maintained for them.

EXECUTOR CAN NOT ALTER ELECTION OF DECEASED.—Where a person has a right to hold goods as consignee or to purchase them, and elects the former, and dies, his executor can not elect to take them as a purchase; and if he attempt to do so, and sell them, he is guilty of conversion.

TROVER to recover a piano-forte. Plaintiffs were manufacturers of pianos. Weir, acting as agent for James, but not disclosing his agency, ordered a piano of plaintiffs. It not arriving in time, the principal rescinded the order, and the agent wrote to plaintiffs not to forward it, but it had already been shipped. Weir died. The piano came after his death. The executor, who is defendant, inventoried and sold it. Plaintiffs had demanded it, but defendant refused to give it up. The jury found for the plaintiffs. Defendant appealed.

Desaussure, for the appellant.

Goodwyn, contra.

By Court, FROST, J. If a person sells goods, supposing, at the time of the contract, he is dealing with a principal, but afterwards discovers that the person with whom he is dealing is not the principal in the transaction, but agent for a third person, though he may, in the mean time, have debited the agent with them, he may afterwards recover the amount from the real principal: *Patterson v. Gaudseque*, 15 East, 67. It is manifest that Weir ordered the piano not on his own account, but as agent for James. But he did not disclose to the plaintiffs the name of his principal. The plaintiffs, then, had an election to sue either Weir or his principal for the purchase money. As Weir, by the sale and credit given to him by the plaintiffs, became liable to them for the price, so, if he chose to affirm that contract, the property in the piano vested in him. The custom, which it was proposed to prove, that a person ordering goods for another (and not disclosing his principal, which is a necessary qualification) is regarded as the vendee, is in conformity with the law; and the evidence offered, being thus immaterial, was properly rejected. It may be admitted that the shipment of the piano, pursuant to Weir's order, was a sufficient delivery to the vendee (Weir or James) to complete the contract of sale, and change the property. But the concurrence of both parties is necessary to a contract; and a contract of sale, like any other contract, may be rescinded with the assent of both parties. The plaintiffs, after they discovered

that James was the principal, might have elected to charge him with the sale. But James rescinded the sale, and by suing the defendant in trover, they have assented to the rescission. So Weir might, with the consent of the plaintiffs, have disclaimed a purchase on his own account, and referred all he had done to his agency. If the plaintiffs assented to this, the piano would be in his possession, on deposit, for them. Their right of property (James having rescinded the contract) would be revested in them; and they might maintain trover for a conversion of the piano.

Did not Weir disclaim any purchase on his own account, and renounce any title to the piano? He was employed as an agent. As soon as it arrived, he sent the bill of lading to James, to pay the freight and expenses, as he had done when a former order was executed for him. Afterwards he declared to James that he did not consider him (James) bound, and if "the gentlemen missed the sale of their article, they had nobody to blame but themselves." In his letter to the plaintiffs, of the fifth of June, he expressly affirms his agency, and renounces any purchase on his own account, when he informs them that the gentleman for whom the piano was ordered, refused to take it; and that they must, therefore, retain the instrument. In this posture of the affair, Weir died. He had plainly declared that in ordering the piano he merely acted as an agent, and disclaimed any title to it. If he received the piano in his life-time, he received it merely as consignee. If the defendant, his executor, received it after his death, it was received on the same terms. An executor has no authority to charge the deceased by any contract he may make. If a consignee has a right to take the goods at a stipulated price, and elects to hold them as consignee, after his death his executor can not elect to take them as a purchase. The piano came into the possession of the defendant as a bailment, and by the sale of it he has been guilty of a conversion.

The motion is dismissed.

RICHARDSON, O'NEALL, EVANS, and WARDLAW, JJ., concurred.

Motion refused.

PERSON DEALING WITH AGENT OF UNDISCLOSED PRINCIPAL may upon discovering the principal recover from him although he had debited the agent; but if he make the agent his debtor, knowing him to be an agent only, he can not, upon the agent's failure, charge the principal: *Clealand v. Walker*, 46 Am. Dec. 238; and see *Tanitor v. Prendergast*, 38 Am. Dec. 618, and note 619, where other cases are collected.

WOODWARD v. JAMES, EX'R, ETC.

[3 STROBART'S LAW, 552.]

CONVINCING EVIDENCE OF UNDUE INFLUENCE, fear, or constraint in the making of a will is necessary to be shown to overthrow it.

UNDUE INFLUENCE, TO AVOID WILL, must be such as, in some degree, to destroy free agency, and the burden of proof is on the party who alleges the undue influence.

EVIDENCE OF UNDUE INFLUENCE.—The fact that the testator willed his property to his son, who had great influence with him, and gave nothing to his daughter, is not of itself sufficient evidence to establish undue influence.

VERDICT OF JURY CLEARLY AGAINST EVIDENCE, though prompted by most honorable and praiseworthy feelings, will not be permitted to stand.

THE opinion sufficiently states the facts.

McDowell, for the appellant.

Boyce, *contra*.

By Court, RICHARDSON, J. The will of John James has been set aside by the jury, on account of the supposed undue influence of his son Isaac James; or of fear and constraint of this son.

The formal and legal execution of the will has been well attested and proved by the number of three subscribing witnesses.

The mental sanity of John James is not disputed. On the contrary, his sanity and moral firmness were well proved—that he often spoke of his will, and his intention not to alter it; and that he did not intend that his daughter, Mrs. Woodward, should have any part of his estate—giving for his reason that she had married her husband, George Woodward, against his wishes, after notice that, if she married him, she should have no part of his estate.

This is a very brief summary of conclusions drawn from the evidence adduced in support of the will. I avoid greater details of the evidence, because the question of the will is again to be submitted to a jury; and I would merely give the reasons that justify the court for sending the case back for a rehearing; and lay down the established meaning of the “undue influence,” that would destroy a testator’s last will.

It will be readily conceded, that a will so authenticated as this can not be overthrown by less than convincing evidence of undue influence, fear, or constraint, in making such will. I will therefore now give a similar summary drawn from the evidence to prove the supposed undue influence, fear, or constraint of the testator’s son Isaac.

John James had but two children—that is, the aforesaid Isaac, and a daughter Sarah, who intermarried with George Woodward. The testator bequeathed his whole estate to Isaac.

It appeared from the evidence that Isaac was a very excitable and passionate man—that he was very apt to threaten vengeance—that he had great influence with his father—of which influence instances were proved—that both the father and son disliked much—if they did not hate, George Woodward. That there was much inconsistency in the expressions of John James, in speaking both of his daughter and of her husband; but after her marriage, he uniformly declared that he would leave her nothing; and this appears to have been well understood by his friends and intimates. It equally appeared that Isaac was very willing that his sister should get none of his father's property.

Thus weighing the evidence for and against the supposed undue influence of Isaac James, it appears to the court that, although such a will may have been very perverse and resentful towards Mr. and Mrs. Woodward, and that Isaac might very possibly have brought about a more liberal and natural final disposition of the testator's estate; yet the only question was, whether this was truly the testator's last will.

He had the undoubted right to make such a will of his own estate; because, unnatural as it may seem to other men, it appears from the whole evidence, as often declared by the testator, from the execution of the will on the seventeenth of January, 1848, to the day of his death, seventeenth of March following—that such was his own determination.

How are we then to disregard and set it aside?

We can perceive in the evidence nothing of an "undue influence" on the part of Isaac in the adopting and executing such a will. Isaac's wishes concurred with those of his father, in excluding his sister. But the evidence of this does no more than introduce the suspicion that he might possibly have induced his father to make such a will.

But where is the proof of any coercion, or direct and undue influence, to force his own will, in substitution of the real will of his father? We perceive none; unless a concurrence in the wishes of the testator and his son can amount to undue influence—which would be an absurdity, equal to the assumption of the argument, that his daughter's wishes and interest are to make weight in the same scale, and render the testator's own will and legal right as feathers, in the opposite scale. The case is in itself very like that adjudged last May by this court:

I mean the case of *John Floyd et al. v. Washington Floyd*, 3 Strobb. L. 44 [49 Am. Dec. 626]. In that case the testator, Charles Floyd, bequeathed his entire estate to his uncle, Washington Floyd, a rich man, and left nothing to his only brother John, or either of his three sisters, Mrs. Chandler, Mrs. Burton, and Mrs. Williams. In that case "undue influence" was charged against Washington Floyd in like manner as in this case. And the general argument of a perverse and unnatural will, and controlling influence of Washington Floyd, were urged in like manner. But it was plain that it was still the will of Charles Floyd, and could not be set aside on account of the general influence, etc., of his uncle Washington, and the claims of his brothers and sisters united. The conclusive reply was, that every testator settles such sentiments and questions for himself.

As to the meaning of "undue influence," which is the important consideration and essential point of the whole case, this court has expounded, and I trust settled it, in several adjudged cases.

In the well-considered case of *Farr v. Thompson, Ex'r*, Cheeves, 37, the court unanimously laid down the law as follows: "Every person of reasonable mind and sane memory may dispose of his property by will. The true inquiry always is, whether there exists the *animus testandi*; for without that, the instrument purporting to be a will is of no effect in law." "The party, therefore, must be free, and under no compulsion from such threat or violence as may reasonably be supposed to move a constant man." "Even in cases of such constraint or fear, if when they are over, the testator confirms the will, it is made good." "So likewise, wills procured to be made by artful misrepresentations and fraudulent contrivances are void. But it is not unlawful for a man, by honest intercessions and modest persuasions to procure a will to be made in his behalf; and according to the ecclesiastical law, importunity, in its legal acceptance, must be such as the testator is too weak to resist, and pressed upon him, even to such a degree as to take away his free agency," etc.

"A disposition of property, though ever so capricious or unreasonable, will not be avoided on that ground alone," etc. "Whatever sort of influence is alleged to avoid a will, must appear to be exerted for the purpose of procuring it" (the particular will).

These rules of law have been repeated unanimously, in the

case of *O'Neill, Ex'r, ad. Farr*. In that case, the court adds: "Perhaps no man has ever existed who was entirely so self-willed as to be wholly uninfluenced by the opinions and wishes of those with whom he was connected," etc. "And it has never been supposed to be essential to a will, that the motives which lead to it should be virtuous, or that the object of the donor's bounty should be meritorious. But it is essential that it should be the free and voluntary act of a sane mind," etc. "If it be in conformity with his wishes, it is emphatically his will, and not the will of another; and we are bound to give it effect, without reference to the motive of the testator, or the unworthiness of the legatee," etc.

As to what shall constitute undue influence: "According to the authorities, it must be so great as, in some degree, to destroy free agency, etc. And the burden of proof lies upon him who alleges undue influence, in the procurement of the will."

Precisely the same rules have been reiterated in the recent case of *Floyd v. Floyd*, 3 Strobb. L. 44 [49 Am. Dec. 626]. These unanimous decisions of our own courts, one would think, ought to put an end to applications to set aside last wills and testaments, on account of the mere general influence of legatees; without which, any legacy is seldom given at all. Or on account of a supposed perverseness, in the distribution of his property, by the testator. Or on account of his supposed unnatural dislike to his near relations, and the like. The more especially, when we find that foreign jurists and judges have very uniformly laid down the same rules, etc.

From these I will give one instance, from among many: See Williams on Ex'rs, 31, who says "that the influence to vitiate must amount to force and coercion, and destroying free agency," etc. He says: "It must not be the mere desire of gratifying the wishes of another: For that would be a strong ground, in support of the testamentary act," etc.

Under such established rules of law, I would again ask, where is the evidence of any such undue influence exercised by Isaac the son, in bringing about and executing the will of his father, John James?

The court can perceive nothing of the kind; although Isaac had much influence with his father; and the father's resentment, towards his daughter, and his preference of his son, were very manifest; and the will may have concurred with Isaac's selfish wishes.

I will conclude, therefore, in the words of Judge Earle, in the

case of *Farr v. Thompson, Ex'r*: "That to allow this verdict to stand, would be to let the jury run wild, under the influence of prejudices and feelings, which, however honorable and praiseworthy, must not be permitted to overthrow the rules of law, or divert the current of justice. The trial by jury would otherwise become an engine of capricious injustice, instead of the safeguard of property."

The motion for a new trial is therefore granted.

O'NEALL, EVANS, WARDLAW, and FROST, JJ., concurred.

Motion granted.

UNDUE INFLUENCE TO VITIATE AN ACT must amount to coercion destroying free agency, or harassing importunity producing compliance for the sake of peace: *Gardner v. Gardner*, 34 Am. Dec. 340, and note 354, where prior cases in this series on the subject of what constitutes undue influence are collected.

NEW TRIAL BECAUSE VERDICT IS AGAINST EVIDENCE, when granted: See *Gerrish v. Nason*, 39 Am. Dec. 589, and cases collected in note thereto.

JONES ET AL. v. WEATHERSBEE.

[4 STROBART'S LAW, 50.]

IN ACTION ON THE CASE ALMOST EVERYTHING MAY BE GIVEN IN EVIDENCE under the general issue, and evidence of former recovery is properly received in such action.

ESTOPPEL BY FORMER JUDGMENT.—The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties on the same matter.

IDEM—CONTINUING TRESPASS.—Where one overflows land, and upon a verdict and judgment against him for the nuisance, the title being the issue, refuses to remove the water, he will be estopped to set up title in himself in another suit for the continuing trespass.

JOINT TENANT CAN NOT SUE HIS CO-TENANT except he be ousted of the joint possession.

JOINT TENANT MAY OUST HIS CO-TENANT by overflowing land and thus appropriating it to his own exclusive use.

TO NONSUIT PLAINTIFF ON EVIDENCE OF DEFENDANT IS IRREGULAR, and the supreme court will seldom grant a nonsuit where the motion was not made on the circuit.

The opinion states the facts.

Bellinger and Hutson, for the appellants.

By Court, EVANS, J. The principal question made in this case, and that to which the argument of counsel and the attention of the court has been mainly directed, is that made in the

second ground in the notice of appeal. "Because the deed from Mims, the ancestor of the plaintiffs, to Johnson, constituted a complete defense, nor was the defendant concluded by the former recovery from relying on that deed, which should have been received, not only in mitigation of damages, but as a bar to the plaintiff's right to recover in this action." To understand this ground, and the observations which I propose to make upon it, it is necessary I should give a concise history of the pleadings.

The declaration sets out, that the plaintiffs were seised and possessed of a certain plantation or parcel of land, lying on a certain watercourse, called Tinker's creek; and that the defendant did erect and make a dam across the said creek, whereby the water was obstructed and raised so as to overflow the plaintiffs' land, so as to deprive them of the use of it. The defendant pleaded: 1. The general issue, not guilty; and, 2. A special plea, which the report (adopting the language of the counsel) calls *liberum tenementum*. By this plea the defendant justifies the supposed wrong, by the allegation that the land is his own proper freehold. To this the plaintiffs (taking issue on the first plea) replied a former recovery by way of estoppel, with the proper averments as to the identity of this with the former action. To this there was a demurrer, which was overruled, on the ground that the defendant was concluded by the former recovery.

The defendant, then, put in a special rejoinder, in which was set out the following facts; that since the recovery in the said cause or action, in the said replication mentioned, he, the defendant, had found and recovered back a certain deed from the said Thomas Mims (under whom the plaintiffs claim) to one Haley Johnson, bearing date the tenth day of January, 1838, whereby the title to the said land was conveyed in fee simple, by the said Mims, to the said Johnson, and that, at the time of the trial of the said cause, the said deed was lost and out of the control of the said defendant, so that at the time of the trial of the cause mentioned in the replication of the plaintiffs it was out of his power to produce the said deed in evidence.

To this rejoinder the plaintiffs demurred, and judgment was given for them on the demurrer.

The parties, then, went to trial on the general issue, and all the facts set out in the special pleas, were either proved or admitted, with the additional fact that at the former trial the defendant had attempted to prove the existence, loss, and contents of the deed from Mims to Johnson, but had failed. Some

diversity of opinion exists in this court as to the effect of the former recovery when pleaded as an estoppel, and when given in evidence under the general issue; and as all the special pleas in this case were irregular and inappropriate to the action, the case must be considered as having been tried on the general issue alone. From what will be said hereafter I think it will be found that the effect of a former recovery is much the same whether presented in one form or the other. But before I enter on that question, I have something to say on the special pleas in this case. The general rule seems to be that in an action on the case almost everything may be given in evidence under the general issue. Chitty says, 1 Ch. Pl. 487, the action is founded on the justice and conscience of the plaintiff's case, and is in effect a bill in equity, and therefore former recovery, release, and satisfaction need not be specially pleaded, nor anything else which defeats the plaintiff's right to recover. But there are some matters, as justification in slander, which must be pleaded. At page 499 he says that if the defense would be good as matter of law, it may be pleaded specially, or given in evidence under the general issue. And at page 498 he says that if what would be good defense under the general issue be pleaded specially, it would be cause of special demurrer. The reason assigned by Chitty why such matters can not be pleaded specially is, that they tend to unnecessary prolixity and expense, and draw to the examination of the court what is proper to be determined by a jury. The objection of expense arising out of prolixity does not apply to our courts, as pleas are not paid for by the copy sheet, and the other reason will not be entitled to much favor, when it is considered that the province of the jury is to ascertain the facts, and this is superseded when the facts are ascertained or admitted by the pleadings. Indeed I find that in England the modern practice prescribed by the court requires all matters in confession and avoidance in the action on the case, to be pleaded specially: 2 Stephens' N. P. 1025. In this case the parties have chosen their own mode of presenting the facts of the case. No special demurrer or objection in any form has been made, and I do not perceive any reason why the court may not proceed to give judgment on the facts stated in the pleadings, and which by the demurrer have been submitted to the judgment of the court. If then the plea called *liberum tenementum* be regarded, as it is, a special plea in bar, then the plaintiff did right to plead the former recovery in bar as an estoppel.

But I do not consider this view as very important to the decia-

ion of the case. The same consequence will follow if all the special pleas had been struck out, and the trial had been on the general issue. In the *Case of the Duchess of Kingston*, 2 Sm. L. C. 424, Chief Justice De Grey, delivering the unanimous opinion of all the judges, said: "From a variety of cases, relative to judgments being given in evidence in civil suits, these two deductions seem to follow as generally true: 1. That the judgment of a court of concurrent jurisdiction, directly upon the point, is, as a plea, a bar, or as evidence conclusive between the same parties on the same matter." The same doctrine is to be found in our cases of *Prather v. Roens*, Cheves, 236; *Davis v. Murphy*, 2 Rich. L. 560 [45 Am. Dec. 749]; *Caston v. Perry*, 1 Bailey, 533 [21 Am. Dec. 482]; *Henderson v. Kenner*, 1 Rich. L. 474; and in numerous other cases, both in England and the United States. There is not a law book on the subject of evidence, in which the same proposition is not to be found. In all our own cases, above referred to, the question was as to the effect of a former recovery, when given in evidence on the trial. In none of them was it pleaded as an estoppel. Greenleaf, in his *Evidence*, sec. 522, states the law and the policy of the rule, thus: "It is the interest of the community that a limit should be prescribed to litigation, and that the same cause of action should not be brought twice to determination. Justice requires that every cause should be once fairly and impartially tried, but the public tranquillity demands that having been once so tried, all litigation on that question, between those parties, should be closed forever. It is a most obvious principle of justice that no man ought to be bound by proceedings to which he was a stranger; but the converse of the rule is equally true, that by proceedings to which he was not a stranger, he may well be held bound." The former recovery in this case, has all the essentials which, according to the authorities, should unite to make it a perfect bar when pleaded, and conclusive as evidence when offered as such. It is between the same parties, it is about the same matter, and it is mutually binding on the parties. If, on the former trial, the defendant had succeeded in proving the deed from Mims to Johnson, the verdict must have been for him, and would have been an effectual bar, although the plaintiffs might be able afterwards to prove it a forgery.

The grounds of appeal, taken in connection with the evidence, show that the sole question now is, whether the defendant may not now defeat the plaintiff's action by setting up a defense, which not only existed at the former trial, but which

he then attempted but failed to establish, and which, if established, would have been fatal to the plaintiff's case. In *Long v. Long*, 5 Watts, 103, the plaintiff declared against the defendant for a nuisance in erecting a dam, and thereby backing the water on the wheels of his mill. To this the defendant pleaded a former recovery and verdict in his favor. The court considered the verdict as settling the rights of the parties, as they stood at the time of the trial, and instructed the jury that the only question open for their decision, was whether the height of the dam, and the swell of the water, were the same as at the former trial, and if such was the fact, they must necessarily find for the defendant. The rule seems to be, that it must appear that the same matter was in issue on the former trial. From the unavoidable want of certainty in the pleadings, it frequently happens that it is difficult to ascertain with clearness, what was decided by the verdict. Where, from the state of the pleadings, this does not appear, there are many cases in which parol evidence may be received to make certain that which is uncertain.

The case of *Henderson v. Kenner*, 1 Rich. L. 474, is an instance of this. I had occasion in that case, to consider the cases wherein parol evidence might be received for this purpose. It appeared to me then, as it does now, that where, from the nature of the action, the verdict might have been rendered on other grounds, it is not conclusive *per se*, but parol evidence might be received to show on what ground the jury decided. In our action of trespass to try title, where the plaintiff must show title in himself, and trespass by the defendant, a verdict for the defendant would not show whether the jury decided on the title or the trespass, and therefore parol evidence was received to explain this ambiguity.

In this case, it may be, that on the same principle, the defendant might have shown that at the former trial, the verdict had been rendered on some ground wholly independent of the title to the land, and consequently that the title was not involved. It is very certain he might have shown anything subsequent to the former trial, which would defeat the plaintiff's right to recover. But he offered no such evidence, except that since the trial, he had gone to Georgia, where Johnson lives, and had procured the deed from him. This he might just as well have done before or since the trial. Shall he, for this reason, have a second trial? Even the best-regulated minds incline to the side of a litigant, where it is clear the right of the case is with him. It is pretty

evident that Mims did convey the land overflowed by the defendant's mill-pond to Johnson, and that the defendant has acquired Johnson's title by the sheriff's sale: but we can not strain the rules of law, to meet the justice of each particular case. The wisest rules of law may sometimes work injustice; but this is most generally to the negligent: seldom to the vigilant. If the defendant should suffer in this case, it is the effect of his own negligence and inattention to his business. If he had exercised an only ordinary attention to his business, he might have defended himself successfully against the first suit. If he fails to do so now, it is but the legitimate consequence of his own conduct. In the case of *Davis v. Murphy*, 2 Rich. L. 560 [45 Am. Dec. 749], the plaintiff had made a payment on his note, which he supposed had been credited. When sued, he neglected to appear, and suffered judgment to be rendered against him for the whole debt. He sued the defendant to recover it back. Justice appeared to be clearly on his side, but the court held that having failed to make his defense at the proper time, he was without remedy: the judgment was conclusive against him. All that is intended to be decided, in this case, is, that on the facts of the case, and for the reasons before stated, the former verdict concluded the title to the land, so far as it was involved in that action, and that having failed, then, to prove Mims' deed to Johnson, he can not now be permitted to do so, to defeat the recovery of the plaintiffs, for a continuance of the same nuisance.

The third ground is, that the defendant, under the deed from Jones, was a joint tenant with the plaintiffs, and "that constituted a complete defense and bar of the plaintiffs' right to recover." I think there is no doubt that Jones, by his intermarriage with Mrs. Mims, became a tenant for life, at least, of his wife's share, and that this interest was transferred to the defendant. On the trial on the circuit, the whole case was made to depend on the title to the land, which was overflowed by the water of the defendant's mill-pond, and hence, the use of the word "ouster" in the report, which, perhaps, in its technical sense, may not convey the idea intended. The rule is clear, that one joint tenant can not sue his co-tenant, except he be ousted of the joint possession. There is no reason to distinguish that case from the present, where the defendant, by overflowing the land, has thus appropriated it to his exclusive use. The reason applies as well to the one case as the other. The real difficulty of the case arises from the fact that Jones is one of the plaintiff-

iffs, and as he has thus no interest, his being made a plaintiff is a misjoinder. But no nonsuit was moved for on the circuit, nor is any such motion made in this court. It did not appear until the defendant gave the deed in evidence. It is irregular to nonsuit a plaintiff on the evidence of the defendant, and this court will seldom grant a nonsuit where the motion was not made on the circuit. It is no ground for arresting the judgment, and I do not see in the way the question is presented here, what advantage the defendant can derive from the fact, except that which he had on the circuit, in mitigation of damages.

These are all the questions necessary to be considered, and as they have been resolved against the defendant, the verdict of the jury must stand, and the motion is dismissed.

O'NEALL, WARDLAW, and WITHERS, JJ., concurred.

RICHARDSON, J., dissented.

Motion refused.

FORMER JUDGMENT, ADMISSIBILITY AND EFFECT OF, as a plea in bar or as evidence under the general issue: See note to *King v. Chase*, 41 Am. Dec. 681, where the former cases in this series on that subject are collected. See also *Warr v. McNulty*, 43 Id. 58; *Gray v. Pingray*, 44 Id. 345; *Agnew v. McElroy*, 48 Id. 772.

TENANT IN COMMON MAY MAINTAIN ACTION ON THE CASE against his co-tenant for flowing the land owned in common, by means of a dam erected upon other land; for such act tortiously deprives the former of the use of the property, and is in the nature of a destruction of the use for which it was intended: *Odiorne v. Lyford*, 32 Am. Dec. 387, and note.

OUSTER BY ONE TENANT IN COMMON OF HIS CO-TENANT may be inferred from circumstances, and it is a matter of fact for the finding of a jury: *Harmon v. James*, 45 Am. Dec. 296; and see cases collected in *Phillips v. Gregg*, 36 Id. 166, and note.

PLAINTIFF CAN NOT BE NONSUITED WITHOUT HIS CONSENT: See note to *French v. Smith*, 24 Am. Dec. 616, where the subject of granting compulsory nonsuits is discussed. See also *Cahill v. Kalamazoo Mutual Ins. Co.*, 43 Id. 457; *Booe v. Davis*, 33 Id. 457.

BANK OF HAMBURG v. WRAY.

[4 STROBANT'S LAW, 87.]

ONE INDORSING BILL AS AGENT WHEN HE IS NOT SUCH is liable personally, although he do so *bona fide*.

INNOCENT MISTAKE OF INDORSER AS TO HIS BEING AGENT WILL NOT RELIEVE him from personal liability.

WILLFUL MISREPRESENTATION THAT ONE IS AGENT NEED NOT BE SHOWN, to bind him personally to a contract he had no authority to make.

INDORSER WHO GIVES HIS NOTE IN PAYMENT OF BILL, with full knowledge of the drawee's failure, can not resist payment of such note on the ground of want of demand and notice.

TIME OF PAYMENT OF NOTE IS NOT EXTENDED by confession of judgment with a stay of execution which expired before the time when, in the regular progress of a suit against the principal, execution might have been recovered.

ASSUMPSIT. There were two counts: one against defendant as indorser of a bill of exchange; the other against him as the maker of a promissory note. H. G. Johnson gave notice by advertisement that Wray would conduct his business, "and act as his duly authorized agent in the purchase of goods and everything appertaining to his business in the mercantile line." William Holmes drew a bill of exchange on Holmes & Sinclair in favor of Johnson, which Wray indorsed by writing Johnson's name by himself as agent. The bill was negotiated at the bank of Hamburg, forwarded to Savannah, presented to Holmes & Sinclair, and accepted. Before the bill was due Holmes & Sinclair failed. Protest was made on the eighteenth, the bill having become due the fifteenth of June; but no notice was given to the indorser. The answer returned when payment was demanded was, that the matter had been adjusted at Hamburg. The adjustment referred to was this: Holmes as principal, and Johnson by Wray, agent, gave their note for three thousand four hundred and thirty-five dollars, the amount of the bill and expenses, to Hutchinson, the cashier, who indorsed it to the bank of Hamburg. In accordance with an agreement made at the same time, Holmes confessed judgment for the debt, and got a stay of execution to December 1st. His property was sold in the January following, but did not pay the indebtedness by one thousand four hundred and forty-one dollars. The bank then brought suit against Johnson, but was nonsuited, on the ground that Wray was not authorized to indorse notes and bills. The bank then brought suit against Wray. On the trial it was shown that the bill was indorsed by Wray, upon the agreement that another bill for a like amount, drawn by Holmes and indorsed by one Britton Mims, should be substituted in its stead upon Mims' return to Hamburg. On the day the bill was drawn it was sent to Savannah. No other bill had been offered as a substitute, because, as Holmes said, the bill had been sent off. The bank knew of the agreement in regard to the substitution of bills. The jury found for the plaintiff the sum claimed, one thousand four hundred and forty-one dollars and interest, and defendant appealed.

Carroll, for the appellant.

Bauskett, *contra*.

By Court, FROST, J. The rule affirmed in *Edings v. Brown*, 1 Rich. L. 255, is stated by the circuit judge with precision in its application to this case, when he instructed the jury that "if one sign a note or indorse a bill as agent, when he is not agent, he is personally liable, although he do so *bona fide*, and does no other act to deceive or mislead the person with whom he deals, except by the assumption of agency when he is not agent." In an action by the plaintiff against Johnson as indorser of the draft, which is the subject of this action against the defendant, it was decided that Wray had no authority to indorse Johnson's name to a draft for the accommodation of Holmes: *Bank of Hamburg v. Johnson*, 3 Id. 42. It was on the security of that indorsement the plaintiff discounted the draft of Holmes.

By the first ground of appeal, the defendant would exempt himself from personal liability on account of his unauthorized indorsement, because he says he acted under an innocent mistake, and that Hutchinson was not misled by any untruth or willful misrepresentation proceeding from him.

As to the excuse of innocent mistake, it can not be credited that Wray was ignorant that the authority confided to him to use Johnson's name was given only for Johnson's benefit in the course of his business; and not for the convenience of Wray's friends, or for his own. It may be true that Hutchinson was not misled by any misrepresentation of Wray; nor is that material. But was he not misled? Holmes says that, having bought cotton from Wray, as agent of Johnson, and Wray wanting the money, he applied to Hutchinson to pay his check, on the deposit of the cotton bills and receipts, until Mims, his indorser, should return to town. Hutchinson replied: "If Wray wants the money, let him indorse your draft, as the agent of Johnson, and he shall have it." This was a legitimate transaction, and within Wray's agency. But Holmes drew a bill for the amount due to Wray and for other parcels of cotton also. Wray put Johnson's indorsement on this bill, for the accommodation of Holmes until Mims should return, when a bill with Mims' indorsement was to be substituted for it. Hutchinson discounted the bill. There is no evidence that Hutchinson was informed the bill was drawn for more than was due to Wray.

Under these circumstances, the void indorsement of Johnson was imposed on the plaintiff. The injury proceeded from the act

of the defendant. He would evade liability under the plea of innocent mistake. In a moral sense, the act of the defendant may have been innocent; for he had no design or apprehension of mischief to his principal. But in its practical effect it was not innocent. The defendant acted with culpable inadvertence and incaution in the use of the power confided to him, and thereby caused an injury to the plaintiff. The law is well stated in *Smout v. Illery*, 10 Mee. & W. 8, which was a case reserved and decided after careful consideration. When the agent has no authority, and knows it, he is plainly liable for the consequences of the act he had no authority to do. This is, in fact, Wray's case.

But even when the agent, *bona fide*, believes he has authority to contract, and has not, he is still personally liable. In such case, it is true, the agent is not actuated by any fraudulent motive, nor has he made any statement which he knows was untrue. But his liability depends on the same principle as in the first case. It is a wrong, differing only in degree, and not in its essence, to state as true, what the individual, making such statement, does not know to be true, even though he does not know it to be false; and if that wrong produces injury to a third person, who is ignorant of the grounds on which the belief of the supposed agent is founded, and who has relied on the correctness of his assertion, it is equally just that he who makes such assertion should be personally liable for the consequences. The case of *Polhill v. Waller*, 3 Barn. & Adol. 114, is also an authority to show that falsehood and deceit are not necessary to charge an agent personally with a contract he had no authority to make.

If the action were on the bill of exchange alone, the defendant could take no exception to a want of demand and notice, which he waived when, with a full knowledge of the failure of Holmes & Sinclair, and of all the circumstances which might affect his liability, he gave his note for the amount of the draft, interest, and damages: *Leffingwell v. White*, 1 Johns. Cas. 99; *Lundie v. Robinson*, 7 East, 236; *Higgins v. Morrison*, 4 Dana, 103.

But the bill was, in fact, taken up and the note substituted for it. A receipt for the note was indorsed on the draft, and Holmes confessed judgment on the note to secure the indorser. The object of notice to parties, secondarily liable on a bill, that they may take measures for their protection, was accomplished, when Hutchinson and defendant and Holmes agreed that the note should be given, and Holmes confess judgment on it for the security of the indorser.

Although the plaintiff was under no legal obligation to present the bill immediately for acceptance, the doing so was a use of diligence beneficial to the parties to it. If the bill were accepted, the security of another and the principal party would be added to the instrument; and if the drawees should refuse to accept, early notice of non-acceptance would give the other parties a better opportunity to protect themselves. By forwarding the bill for acceptance the plaintiff did not obstruct the substitution of another bill, with Britton Mims' indorsement. If it had been offered, the plaintiff might have procured the draft from the agent in Savannah, to be surrendered according to agreement. But the bill never was tendered; and that is conclusive of any defense which may be rested on the agreement for substitution.

The last ground of appeal is unfounded. The time for the payment of the note was not extended when judgment was confessed, with a stay of execution which expired before the time when, in the regular progress of a suit against Holmes, execution might have been recovered: *Price v. Edmunds*, 21 Eng. Com. L. 246; *Hallett v. Holmes*, 18 Johns. 28; *Bank v. Myers*, 1 Bailey's L. 412.

The motion is refused.

The whole court concurred.

Motion refused.

AGENT IS PERSONALLY LIABLE UNLESS HE SHOWS AUTHORITY TO BIND HIS PRINCIPAL, even though he is described in the contract as agent: *Pitman v. Kintner*, 33 Am. Dec. 469; *Rossiter v. Rossiter*, 24 Id. 62, and note, where previous cases in this series on this point are collected, and the subject discussed at length; *Pentz v. Stanton*, 25 Id. 558; *Newhall v. Dunlap*, 31 Id. 49; *Collins v. Allen*, 27 Id. 130; *Andrews v. Estes*, 26 Id. 521. And see *Bank of Rochester v. Monteath*, 43 Id. 681, and note.

GRACEY ET AL. v. DAVIS ET AL.

[3 STROBART'S EQUITY, 55.]

EFFECT OF SETTING ASIDE DEED AS INTERFERING WITH CREDITORS' RIGHTS is to place the creditors as if the deed had never existed, and to leave them to enforce their claims and obtain satisfaction according to their legal priorities.

COURT TAKING CHARGE OF FUND TO WHICH CREDITORS ARE ENTITLED will direct payment to be made them according to their legal rank.

COURT WILL NOT DISTURB LEGAL LIENS.

BILL to set aside certain deeds as interfering with creditors' rights. B. F. Davis and his wife Gracey W. Davis executed

certain deeds, and provided in them for the payment of creditors. Although at the time of the execution of the deeds it was supposed that ample provision had been made for all creditors, it was afterwards found that Davis' debts amounted to much more than the provision made. The creditors brought suit to set aside the deeds. The court did so, and appointed a commissioner to sell the property. J. R. Adams, to whom the deeds were executed, had paid some money out under the provisions of the deed. The court ordered him to account to the commissioner for the rents and profits, and ordered the commissioner to pay to him the amounts advanced by him, also the costs of suit. The property having been sold pursuant to the order, and the funds deposited in court, the court being satisfied that the funds were equitable assets, ordered them to be paid to the creditors *pro rata*. Some of the creditors appealed, and asked that judgment creditors be paid before simple contract creditors, and according to the priority of their liens. Pending the appeal, the court ordered the money to be invested in good securities.

W. F. Desaussure, for the appellants.

Treadwell and Gregg, contra.

By Court, DUNKIN, Chancellor. Where a deed is set aside as interfering with the rights of creditors, it is, as to those creditors, as if it had never existed. A party may honestly conceive himself able to make a settlement and yet reserve an abundant estate to satisfy his creditors, as in *Izard v. Izard*, Bailey Eq. 228; or, as in this case, he may, by the deed, provide a fund for the payment of debts, and settle the residue. In neither case is there any moral fraud. But, in both, the deeds were set aside, because the fund, supposed to be abundant, proved insufficient. The effect of setting aside the deeds is to leave the creditors to enforce their claims and obtain satisfaction according to their legal priorities; or, if this court takes charge of the fund, to direct them to be paid according to their legal rank. This rule has been well established from an early period: See *Austin v. Bell*, 20 Johns. 442 [11 Am. Dec. 297], and *Codwise v. Golston*, 10 Id. 508; nor is the court aware of any decision to the contrary. The principle is fully recognized by the court in *McDermult v. Strong*, 4 Johns. Ch. 687, and has been uniformly regarded by our own courts, as may be seen by reference to the cases of *McMeekin v. Edmonds*, 1 Hill Ch. 293 [26 Am. Dec. 203], and *Anderson v. Fuller*, 1 McMull. Eq. 27. The principle

is, that this court will not disturb legal liens. If, as in *Le Prince v. Guillemot*, 1 Rich. Eq. 220, the assigned estate has been sold, and only the fund was in the hands of the assignee when judgment is rendered, the judgment created no lien, and the judgment creditor was held entitled to no priority. But, in the case before the court, the property was subject to a lien until the sale by the commissioner, the voluntary deed of the debtor being regarded as a nullity.

It is ordered and decreed that the appeal of the execution creditors be sustained, and that the decretal order be reformed according to the principles herein declared.

The whole court concurred.

Decretal order reformed.

CREDITORS MUST BE PAID ACCORDING TO THE SENIORITY OF THEIR JUDGMENTS out of the fund pursued, if land, and according to the priority of delivery of their executions to the sheriff, where the property is personal, if their claims to relief rest upon their liens: *Birley v. Staley*, 25 Am. Dec. 303, and note. Creditor obtaining judgment after fraudulent grantor's death, against his personal representative, has no priority in equity in Maryland over simple contract creditors: *Id.*

HOLEMAN ET UX. ET AL. v. FORT ET AL.

[3 STROBHEART'S EQUITY, 66.]

DEED OF GIFT TO "THE JOINT HEIRS" of a son-in-law and daughter, where two children are living at its delivery and others are born afterwards, operates to vest title in the children living at the time of its delivery.

DEED OF GIFT WITHOUT GRANTEE'S NAMES IS NOT VOID for want of a proper party to take under it, if the donees can be identified by the description.

DONEES DESCRIBED AS "HEIRS" WHILE ANCESTORS ARE LIVING may take personalty under a deed of gift, the word "heirs" when relating to personal property being synonymous with "children."

THE court below construed the instrument set forth in the opinion to give a life estate to James D. Hoof, remainder to the children. The children (complainants) appealed, and so did James D. Hoof; the latter on the ground that the instrument conveyed no estate, there being no "heirs," because the parents were alive; the former, because of alleged error in decreeing a life estate in James D. Hoof. The opinion states the other facts necessary to an understanding of the case.

Bauskett and Boozer, for the complainants.

Desaussure, Carroll, and Griffin, for the defendants.

By Court, CALDWELL, Chancellor. The instrument under which the questions in this case arise, is in the words following:

"To all people to whom these present writings shall come, be seen, or made known, greeting: Know ye, that I, Thomas Jackson, of the state and district aforesaid, in consideration of the very great love and affection that I bear my son-in-law, James D. Hoof, and daughter, Ann Hoof, of the state and district aforesaid, and for other good causes and considerations me thereunto moving, have given, granted, and confirmed unto the joint heirs of said James D. Hoof, and Ann Hoof, his wife, the following negroes, viz.: Rose, Milly, and Jack, to have and to hold the said three negroes, Rose, Milly, and Jack, with all the issue of the said Rose and Milly which they may hereafter have, to the joint heirs of the said James D. Hoof, and Ann, his wife. I, the said Thomas Jackson, for myself, my heirs, executors, and administrators, do warrant and forever defend the said three negroes unto the joint heirs of the said James D. Hoof, and Ann, his wife, and to their heirs shall and will warrant and forever defend, by these presents. In witness whereof, I, the said Thomas Jackson, have hereunto set my hand and seal, this twenty-third day of October, in the year of our Lord 1817, and in the forty-second year of American independence.

(Signed)

"THOMAS JACKSON. [L. S.]

"Signed, sealed, and delivered in the presence of Laban Williams, William Paulding, J. Q."

There are three classes of persons that have claims under this instrument: 1. James D. Hoof; 2. The two children, Thomas C. Hoof and Sarah, who were *in esse* at its execution; and, 3. The other children of James D. Hoof and Ann, his wife, born since.

But the preliminary point must first be determined—is it a valid deed?

It has all the requisites of a deed, both in form and substance, except the names of the grantees who are to take under it. The gift is to "the joint heirs of said James D. Hoof and Ann Hoof, his wife."

It can not be controverted, that, according to the strict rules of the common law, a deed conveying lands to the heirs of a person living is void, and can not be set up either at law or in equity. The indefinite description of the donee, and the rules that *nemo est hæres viventis*, and that a freehold can not be created to take effect in future, combine to defeat such an instrument.

But here the subject-matter is personal property, and the word "heirs" is not necessarily used in such conveyances. The common law, as well as history, often speaks of the heir apparent and of the heir presumptive to the throne of Great Britain; and in common parlance he who stands nearest in degree of kindred to the ancestor, is called in his life-time, his heir, although no one can be an heir, strictly speaking, until the ancestor be dead. The word "heir" is, apart from its technical meaning, universally used as synonymous with "child."

In an ancient case, *Burchett v. Durdant*, 2 Vent. 311, there was a devise to the heirs male of Robert Durdant, then living, and it was adjudged in Westminster Hall, and twice affirmed in the house of lords, to be a good limitation to George, the eldest son of Robert Durdant, although Robert Durdant was then living. So in *Darbison ex dem. Long v. Beaumont*, 1 P. Wms. 229, a devise to the "heirs" male of J. S. begotten, J. S. having a son, and the testator taking notice that J. S. was then living, was considered a sufficient description of the testator's meaning, and such son was adjudged to take, though strictly speaking he was not heir. The case of *Thomas v. Bennett*, 2 Id. 342, arose out of marriage articles, to which greater latitude has been extended than to construction of the limitations of estates; there the words were, "to the heirs of the body of my niece, Mary Bennett, by her said husband, and to their heirs," and the court held that these words shall be construed "children."

In *Loveday v. Hopkins*, Amb. 274, the words of the will were, "I give to my sister Loveday's heirs, six thousand pounds." "I give to my sister Brady's children, each one thousand pounds." The sister, Mrs. Loveday, had two children at the making of the will, and she survived the testatrix; one of her children died, leaving children, in the life-time of the testatrix, and the surviving child claimed the six thousand pounds. The master of the rolls, Sir Thomas Clarke, held that the defendants, who were the children of the deceased child of Mrs. Loveday, were excluded, and that her surviving child was entitled to the six thousand pounds.

Where one gave his wife the residue of his estate, "for her life and no longer," and upon her decease he gave and bequeathed it "to the children of Mr. John Ayton and his wife, Jane, to be equally divided amongst them, the said Jane Ayton's children, and not to any child by another marriage of either party," the residue was held divisible amongst the children of Ayton and his wife, who were living at the death of testator's

wife, but children born after her death were excluded. There the time of distribution was not indefinite, but was fixed at the death of the tenant for life, and all those that were then *in esse*, came within the class that were to take the gift.

In *Lockwood v. Jesup*, 9 Conn. 272, the plaintiffs brought an action on a promissory note, payable to the heirs of J. S., and averred that, at the date of the note, they were the children, and the only presumptive heirs of J. S. then living; the word "heir" was held on demurrer to denote the presumptive heir of a person living, and that the action was sustainable.

In *Stroman and Wife v. Rottenbury and Wife*, 4 Desau. Eq. 272, the deed purported to have been made by the donor, "in consideration of the love I have and bear to my beloved grandchildren of my daughter, Catharina, I have given and granted, etc., unto the said my grandchildren of my daughter, Catharina," it was held not only to be sufficient, but to comprehend only the grandchildren then born, and not others born afterwards. In *Moon et al. v. Herndon*, Id. 459, incorrectly reported as *Moone v. Henderson*, the limitation was to a son and his heirs, but if any of the testator's children should die without an heir, then his share to go to the rest of testator's children; it was held not too remote, and that the testator used the word "heirs" as synonymous with "children." In *Kitchens v. Craig*, 1 Bailey, 119, there was a deed of gift to the heirs of a person then living, in which it was recited that the donor had delivered the slaves which were the subject of the gift to the heirs, and it was held that this recital manifested the intention of the donor to restrain the gift to the heirs or children then living, and that children born afterwards did not take.

Where the words were, "I give and bequeath unto my dear and beloved grandchildren," without any qualification or limitation of time or circumstances when distribution should be made; that period was considered indefinite, and the court, therefore, excluded the grandchildren born after testator's death, and held that the devise vested only in those born at his death: *Myers v. Myers*, 2 McCord's Ch. 214 [16 Am. Dec. 648].

The donor when he made this deed knew well the condition and relation of the persons designated in it, and may have adopted the expression, "joint heirs" of James D. Hoof and Ann, his wife, from the fact that they, at that time, had two children, Thomas C. Hoof and Sarah Hoof. From what had already occurred from James D. Hoof's improvident management of his affairs, the donor may be presumed to have had ap-

prehensions, if he conveyed the negroes to Hoof or his wife, they might be made liable for his debts, and the family lose the benefit of their services, and subsequent events have demonstrated that he acted wisely in not making the conveyance to either of them. Hoof has been insolvent from thenceforward, and has during that period twice taken the benefit of the prison bounds act, but the negroes have not been embraced in either of his schedules, nor taken by his creditors.

As far as such extrinsic evidence can corroborate the construction given to the deed by all parties, it would seem that James D. Hoof has not been considered as the owner of the property: such circumstances may not be conclusive, but are well calculated to raise presumptions against his right. The terms of the deed do not convey any interest or estate to any other persons but to the joint heirs of James D. Hoof and Ann, his wife, and the inquiry is, Do these words sufficiently designate the donees? Can such expression be applicable to any other persons than these two children? If the donee can be identified, either by name or by description, the deed will not be void for want of a proper party to take under it. There is a material difference between a will and a deed: the latter takes effect from its delivery, and vests the title of the property in the donee immediately; the former usually looks forward to the future, and contemplates the condition of things at the period of the testator's death, or the distribution of the estate; hence after-born children are rarely provided for by a deed, the object being generally to pass a present interest, but they are frequently let in under the construction of wills by which gifts are made to children, when there is an anterior interest and they come *in esse* before its determination, especially if there be no child to take at the time of vesting in possession, or where there is a fixed period for the distribution: a legal remainder in real estate would constitute an exception.

This being a gift *inter vivos*, and operating *per verba in præsentia*, it must fail if there was no one *in esse* to whom the title could vest: no one but a child of James D. Hoof, and Ann, his wife, could be their joint heir; and Thomas C. Hoof and Sarah Hoof being the only persons who came within that description, it appears to be sufficiently certain that they were the persons the donor intended should receive the benefit of the gift. Had such persons not been in existence at its execution, it would either have been considered void, or a different construction would have been given to it, from the necessity of the case; no

one could take but after-born children, and as there was no definite period for distribution, it might be presumed the donor intended that all the children should come in and participate equally: this interpretation might be given, *ut res magis valeat quam pereat*, and a clear implication might arise from the circumstances in favor of all the after-born children. But here the donor knew that James D. Hoof, and Ann, his wife, had two children living, and as nothing was expressed in or can be implied from the terms of the deed in relation to after-born children, they do not appear to have been either necessary to its completion, or contemplated by it, and it would require a clear and necessary implication from its context, before it could be held to open and let them in. That this was not the donor's intention, may be inferred from the facts that no contingency was contemplated as necessary to complete the gift, and no period was designated for the distribution of the property among the donees. The slaves given by the deed vested in the children *in esse* at its execution, and their rights ought not, upon a slight presumption, to be abridged in favor of those that have been born since; there having been no express provision for them, and there being others who came within the description and were capable of taking, repels the conclusion that they were intended to be included: *Expressio unius [est] exclusio alterius*.

It is apparent from the face of the instrument that the donor meant that no other class but the "joint heirs" should receive the benefit of the gift. An immediate interest and title passed to these two children on the delivery of the deed; they then became entitled to the absolute and unconditional enjoyment of the property, and but for the birth of the other children, there would have been no doubt that they were the only persons the donor intended: their rights stand upon the terms of an express grant; but the claim of the after-born children can, at best, rest only on an implication from circumstances which have arisen independently of the deed, and were unnecessary to its consummation; such, however, as the donor might have anticipated and provided for if he had thought fit: nothing but a clear and necessary implication ought to abridge their vested rights in favor of the after-born children, and the terms of the deed do not warrant such a construction.

It is, therefore, ordered and decreed that Thomas C. Hoof and Sarah Hoof (who has intermarried with W. W. Holeman) are entitled to the said slaves absolutely, in exclusion of James D. Hoof and Ann, his wife, and of their children born since the

delivery of the said deed; and that the said James D. Hoof do deliver them up to the said Thomas C. Hoof and Sarah, and that his bond, heretofore given, stand as a security for his fulfillment and performance of this decree, and that the circuit decree be modified in these, and that it be affirmed in all other points.

JOHNSTON and DARGAN, chancellors, concurred.

Decree modified.

CONSTRUCTION OF WORD "HEIRS."—"The rule *nemo est hæres viventis* does not apply when it is apparent from the will who were intended by the testator to be the recipients of his bounty. A devise to the heirs male of E. L. and in default of such issue to the testator's own right heirs, E. L. being alive at the time of the testator's death, technically speaking had no heirs, and yet it was decided that the son of E. L. took the estate:" *Morton v. Barrett*, 39 Am. Dec. 578, and note, where other cases on this point in this series are collected; *Heard v. Horton*, 43 Id. 659, and note; *Reed v. Buckley*, 40 Id. 531. The contrary doctrine was held in *Clark v. Mosley*, 44 Id. 229.

WOOD ET UX. ET AL. v. INGRAHAM ET UX. ET AL.

[8 STROBART'S EQUITY, 106.]

DELIVERY IS NECESSARY TO VALIDITY OF DEED, and this may be made formally or may be inferred from circumstances.

ACTIONS NOT CONSTITUTING DELIVERY OF DEED.—Mere execution of a voluntary deed, with neither the trustee nor beneficiary present, where no publication of its contents was made, and there was no declaration of intention of delivering it, and where the donor retained entire possession of it, will not be construed to be a delivery of it.

LUCY E. MINOR, on July 14, 1847, made an instrument in writing conveying certain slaves and real estate to F. F. Dunbar for her daughter, Mrs. Wood. Mrs. Minor was married next day to Mr. Ingraham. She retained possession of the instrument, partially destroyed it, and presented what was left at the trial as an exhibit. Mrs. Wood did not know of the existence of the deeds when executed, neither she nor the trustee, nor any one in their behalf, being present. The court held there had been no delivery, and complainants appealed.

Bellinger, Hutson, and J. Bauskett, for the appellants.

By Court, CALDWELL, Chancellor. To give validity to every deed, it is necessary it should be delivered, and this may be done either formally, or the delivery may be inferred from circumstances, which indicate that the grantor intended to part with the dominion of the instrument, and to put it into the possession of the grantee. The common law required a deliv-

ery in every case, whether it be a gift of a personal chattel, or a deed of real or personal estate: the civil law only required delivery of some gifts, which, as a class, were very limited, yet the rule was so stringent as to exact an actual transition to perfect the gift. It would seem that there was wisdom in the common law's relaxing the rule requiring a formal delivery, and in permitting the fact of a delivery to be inferred from the circumstances. The situation of parties often affords the means of coming to a correct conclusion in relation to their declarations or acts—here, neither the *cestui que trust*, nor trustee, nor any one acting for them, was present; they had neither paid anything nor incurred any liability in consideration of Mrs. Minor's making the deed; and it may well be doubted whether either of them knew anything of her intention; it is clear they were ignorant of the contents of the deed. She declined publishing what the instrument was, when one of the witnesses made some objections to subscribing it without knowing its contents, and she seems to have carefully kept not only the control but the actual possession of it through the whole transaction. Nothing occurred at the time that bears any resemblance to a formal delivery, and the circumstances rebut the presumption of any intention to deliver the deed, as she kept the possession of it, and made no declaration and did no act that had a tendency to complete its execution.

There is nothing in this case that is opposed to the rule that has been settled in New York since 1814, and in England since 1826, that if a deed be signed and sealed, and declared by the grantor in the presence of attesting witnesses to be delivered as his deed, it is an effectual delivery, if there be nothing to qualify it, notwithstanding the grantee was not present, nor any person on his behalf, and the deed remained under the grantor's control.

It is not now necessary to consider the doctrine laid down in *Cecil v. Butcher*, 2 Jac. & W. 573, that a court of equity will regard the instrument as imperfect, if it be voluntary and never parted with, and executed for a special purpose never acted on, and without the knowledge of the grantee, and in such case will lend no assistance to the grantee.

This case is to be distinguished from those cases where the voluntary conveyances in the grantor's possession have been held to operate in favor of the grantees, as they were in every instance complete deeds, wanting no other act or declaration to confirm them, but were legal transfers of the property or title: *Antrobus v. Smith*, 12 Ves. 39; *Souverbye v. Arden*, 1 Johns. Ch. 254; *Bunn v. Winthrop*, Id. 337.

It has been argued that this case bears an analogy to *Dawson v. Dawson*, Rice Ch. 243, but a comparison of the evidence will demonstrate the difference—there the affidavit of the witness that the deed had been signed, sealed, and delivered, the recording of the deed at the instance (as was presumed) of the donor, and his subsequent declarations that he held the property in trust for his children, when taken together, left no doubt as to his intention to deliver the deed and to make it irrevocable. There is the absence of all these circumstances in this case, which only resembles that in one point, that in both cases the grantors had possession of the instruments.

In *Carr v. Hoxie*, 5 Mason, 60, an instrument was signed and sealed by the grantor, in the absence of the grantee, but left with a third person, without any express or implied authority to deliver it to the grantee, the court held it was not the deed of the grantor.

Proof that a deed was signed and attested, and left on the table without delivery to any one, in the absence of the donee, was held in *Hughes v. Easten*, 4 J. J. Marsh. 572 [20 Am. Dec. 230], not to be sufficient evidence of delivery. If delivery could not be presumed from the facts of these cases, much less can it be in the present case, where the right of Mrs. Minor to the possession of the paper was not suspended for a moment, but her absolute control over it continued from the commencement to the conclusion of the transaction—and no declaration or act showed that she intended to part with it, or to permit any other person to have the possession of it.

In *Uniacke v. Giles*, 2 Moll. 257, the lord chancellor greatly relied on the circumstance of the grantor's not depositing the deed with a third person. But he proceeds much further and says: "I will suppose she went through the legal formalities of saying not only, I seal and sign, but I deliver this deed, still these legal ceremonies did not finally conclude her. By carrying the deed back to her depositary, she showed a plain intent not to divest herself of power over it, but to hold it just as revocable as a will, and whatever words she used, that intent must determine its character."

Chief Justice Abbot, in *Murray v. Earl of Stair*, 2 Barn. & Cress. 88, in the case of a conditional delivery, seems to corroborate the conclusion in the preceding case; he says "it is not necessary that any express words should be used at the time; the conclusion must be drawn from all the circumstances."

The reasonableness of the provision of the deed seems to

strengthen the argument that it was delivered, but suppose it had conveyed her whole estate absolutely, would not the contrary conclusion be deduced without doubt, and demonstrate the propriety of her pausing before she consummated the act?

The grantor may have had as cogent reasons before she completed the gift, to keep the control of the instrument in her own hands, as if she had conveyed her whole estate—the future conduct of her children towards her might be much more easily controlled by that means than any other within her power.

The current of decisions has already gone sufficiently far to enable the courts to carry out the intention of the donor and to protect the rights of the donee, but they have never presumed delivery without some evidence that it was the intention of the donor, and no case can be found that would warrant the conclusion, that a delivery had been made, merely because the grantor had signed and sealed the instrument without any further act or declaration.

The disastrous consequences of any such rule can not be calculated. It would greatly tend to disturb domestic quiet and enkindle inextinguishable feuds in families; and few could feel secure in keeping by them such instruments for further reflection or future action, without subjecting themselves to the painful process of having their private papers brought before the court for its judgment. The second question, as to the instrument being marriage articles, depends upon the same principle—such articles would be void if they were not delivered.

It is therefore ordered and decreed that the appeal be dismissed, and the circuit decree affirmed.

Decree affirmed.

JOHNSTON and DUNKIN, chancellors, concurred.

DARGAN, chancellor, absent at the hearing, from indisposition.

DELIVERY OF A DEED IS ESSENTIAL TO ITS VALIDITY: *Church v. Gilman*, 30 Am. Dec. 82, and cases cited in note; *Van Amringe v. Morton*, 34 Id. 517.

WHAT CONSTITUTES DELIVERY OF A DEED.—The subject is discussed at length in note to *Jones v. Jones*, 16 Am. Dec. 39; and see *Church v. Gilman*, 30 Id. 89, and note collecting other cases in this series; *Samson v. Thornton*, 37 Id. 135; *Farrar v. Bridges*, 42 Id. 439; *Shirly v. Ayres*, 45 Id. 546; *Peavey v. Tilton*, Id. 365; *Gilbert v. North Am. Fire Ins. Co.*, 35 Id. 543; *Foley v. Cowgill*, 32 Id. 49; *Hicks v. Goode*, 37 Id. 677; *Gilmore v. Whitesides*, 31 Id. 563; *Snider v. Lackenour*, 38 Id. 685; *Hannah v. Swarner*, 34 Id. 442; *Merrills v. Swift*, 46 Id. 315.

DELIVERY IS QUESTION OF FACT FOR JURY: *Hannah v. Swarner*, 34 Am. Dec. 442.

BUSH v. BUSH.

[3 STROHMAN'S EQUITY, 131.]

PROTECTION OF PURCHASER FOR VALUABLE CONSIDERATION STANDS ON

THIS: that he has *bona fide* acquired the legal title and paid the purchase money before notice of the plaintiff's equity. If he has acquired the legal title but has not paid the purchase money before notice, his plea fails. If he has paid the purchase money and receives notice of plaintiff's equity before acquiring the legal title, he can not defeat that equity by procuring the legal title.

PURCHASER OF WIFE'S PROPERTY SOLD UNDER EXECUTION FOR HUSBAND'S

DEBTS acquires no right in the property if the husband had none, though the trust deed by which she holds is unrecorded.

RECOVERY IN TROVER BY TRUSTEE without satisfaction vests the legal title

in the defendant, and he becomes the trustee, and a court of equity will aid the *cestui que trust* against either the trustee or vendee for the recovery of the property.

BENJAMIN FOREMAN, on the twelfth of August, 1835, made a deed of trust of two negro women and their future increase to David Foreman, for the sole, separate, and exclusive use of the donor's daughter, Caroline, who afterwards, on the same day, intermarried with Samuel B. Bush. In a suit against Samuel B. Bush, the sheriff levied a *fi. fa.* on one of the negro women and her son, and sold them on November 6, 1843, to the defendant Neilson, for four hundred and ninety-five dollars, which he paid. David Foreman brought an action of trover for these negroes against Neilson, and recovered judgment for eight hundred and twelve dollars and fifty cents. After the judgment was entered, the sheriff levied executions that were older than that of Foreman on the negroes, including an after-born child, as Neilson's property. David Foreman, the trustee, then filed his bill against Neilson and the sheriff for an injunction, and for the specific delivery of the negroes, which was dismissed without prejudice; and the *cestui que trust* has filed this bill for an injunction, and for the specific delivery of the negroes, and for an account of their hire. To this bill defendant Neilson pleaded: 1. The recovery at law; and, 2. The dismissal of the bill in equity. These pleas were overruled, and defendant answered, alleging payment of consideration money and delivery of the slaves, and a want of notice of the existence of the deed of trust. The court dismissed the plaintiff's bill, and she appealed.

Patterson, for the appellant.

Bellinger and Hutson, contra.

By Court, DUNKIN, Chancellor. The leading facts of this case are set forth in the decree. The protection of a purchase for valuable consideration stands on this: that he has, *bona fide*, acquired the legal title and paid the purchase money before notice of the plaintiff's equity. If he has acquired the legal title, but has not paid the purchase money before notice, his plea fails. So, if he has paid the purchase money, but has acquired no legal title, and then receives notice of the plaintiff's equity, he can not defeat that prior equity by procuring the legal title. These principles seem very well established by the authorities, to one or two of which only it is deemed necessary to advert. Chief Justice Marshall, in *Vattier v. Hinde*, 7 Pet. 271, says "the rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate and pays the purchase money without knowledge of an outstanding equity. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity." And so in *Boone v. Chiles*, 10 Id. 177, "it is a general principle in courts of equity that, where both parties claim by an equitable title, the one who is prior in time is deemed better in right;" and when the plaintiff has a prior equity this can be barred or avoided only by the union of the legal title with an equity arising from the payment of the money and the acquisition of the legal title, without notice of the plaintiff's equity. In *Saunders v. Dehew*, 2 Vern. 271, it was ruled that "a purchaser shall not protect himself by taking a conveyance from a trustee after he had notice of the trust, for, by taking a conveyance after notice of the trust, he himself becomes the trustee, and must not, to get a plank to save himself, be guilty of a breach of trust." This principle is fully recognized in *Willoughby v. Willoughby*, reported from the manuscript notes of Lord Hardwicke in 1 T. R. 762.

Under the deed from her father, Benjamin Foreman, the complainant was the equitable owner of the slaves, the legal title being in her trustee. When they were levied on and sold under an execution against her husband, in November, 1843, the defendant, Neilson, became the purchaser. He acquired the title of the husband, and all the rights which the creditors of the husband were authorized to dispose of, and no more. Whether he paid five dollars or five hundred, the rights of the purchaser were the same. But the husband had no right whatever in the slaves. Under the trust deed, any interest or right on his part was expressly excluded. Something was said in the argument

about the fraudulent possession of the husband. But the possession was in strict accordance with the provisions of the deed: and it is not an instrument which the law requires to be recorded. But all these questions were open for discussion in the suit at law instituted by the trustee, and were solved by the jury against the purchaser at sheriff's sales. It seems, then, very clear that although the defendant (the purchaser) may have paid his money to the sheriff without any knowledge of the plaintiff's right, he had no more claim to the slaves than if he had, ignorantly, purchased the property of any other third person, which had been levied on and sold under an execution against S. B. Bush.

But the plaintiff's trustee brought an action of trover against the defendant, Neilson, and obtained a verdict for eight hundred and twelve dollars and fifty cents. On this trial all the interests of the plaintiff under the trust deed were, of course, developed. No part of the judgment has ever been realized. But it has been determined that the recovery in trover, without satisfaction, vested the legal title of the trustee in the defendant Neilson. But, as was said on a former hearing of this cause, Neilson can certainly be in no better situation by this misapprehension of the trustee than if he had, at the time of the rendition of the verdict, purchased from him his legal title and paid him the money. Having then full notice of the equitable interests of the plaintiff, he can not be permitted to shelter himself under a legal title thus acquired. Obtaining the legal title with knowledge of the trust, he becomes himself the trustee. But the defendant has not paid the verdict in trover. Neither the plaintiff, nor her trustee, has ever received any value for the slaves which were taken from her possession; and under the proceedings in trover the defendant is entitled to no more favorable consideration than if he had received a bill of sale from the trustee, with full knowledge of the plaintiff's equity, and had given to the trustee a bond for the purchase money which was yet unpaid. In that case, or in any other view which the court has been able to take, the rights of the plaintiff would not be divested, but she would be entitled to the aid of this court either against the trustee, or his vendee, for the recovery of the property.

It is ordered and decreed that the decree of the circuit court be reformed—that the negroes described in the pleadings be delivered up to the complainant to be held subject to the provisions of the deed of the twelfth of August, 1835, and that the

defendant Neilson account for the hire of the negroes while they were in his possession, and that his co-defendant, N. G. W. Walker, account for the hire since that time. It is further ordered and decreed that the defendant, David Foreman (the trustee), be perpetually enjoined from enforcing the judgment in trover against the defendant Joseph Neilson.

JOHNSTON and CALDWELL, chancellors, concurred.

Decree reformed.

LIEN OF EXECUTION DOES NOT ATTACH TO PROPERTY HELD BY HUSBAND AS WIFE'S TRUSTEE: *Jackson v. McAuley*, 40 Am. Dec. 620, and note referring to other cases in this series.

CAVEAT EMPTOR IS RULE IN EXECUTION SALES: *Henderson v. Overton*, 24 Am. Dec. 492, note 498; *McGhee v. Ellis*, Id. 131, note; *Murphy v. Higginbottom*, 27 Id. 395.

WILSON ET AL. v. BAILER ET AL.

[3 STROBART'S EQUITY, 208.]

SEPARATE ESTATE IN MARRIED WOMAN IS NOT CREATED BY THESE WORDS in a bequest: "I give and bequeath to C. B. * * * all my property, * * * by her to be freely enjoyed, to every intent and purpose, as her own in every respect."

BILL filed by the children of Catharine Bailer, claiming that under the will of Isabella Curtis the said Catharine Bailer took a sole and separate estate in certain negroes. The will was as follows: "I give and bequeath to Catharine Bailer, daughter of Thomas Curtis, all my negroes and property which I am possessed of or may have, to be by her freely enjoyed, to every intent and purpose, as her own in every respect." Catharine Bailer died, and her husband retained possession of the slaves, claiming that his marital rights attached to them, and further pleaded the statute of limitations, and also claimed under the will of Thomas Curtis, dated 1794, and which contained this clause: "I give and bequeath to Isabella Curtis, my wife, whom I likewise constitute, make, and ordain the sole executrix of this my last will and testament, all my negroes and property which I am possessed of or may have, by her to be freely enjoyed, to every intent and purpose, as her own in every respect whatsoever, during her life-time, and at her decease to have the full disposal of it, as she shall think proper, to the heirs of my body, and in no other wise whatsoever; otherwise, this will to be void and of no effect." The bill was dismissed, on the ground that the claim was barred by the statute of limitations. The com-

plainants appealed to the court of appeals, which decided that the statute did not bar the claim; but being in doubt as to the other plea, the case was remitted to the court of errors, to determine the following question: "Whether, by the words of the will of Isabella Curtis, a separate estate was created in Catharine Bailer."

Hutson and Bellinger, for the complainants.

Glover, for the defendants.

By Court, DUNKIN, Chancellor. In approaching the decision of the question submitted to the court of errors, it is well to bear in mind what has been often said by English judges, and as often repeated by our own, viz.: that a separate interest in a married woman is in derogation of the husband's common-law right; that it is the creature of the court of chancery; and that unless the intention to exclude the husband is clearly expressed, or arises by necessary implication, the marital right is maintained. In this, all the authorities concur. In one of our own cases it is thus stated: "By the common law, the personal estate of the wife, reduced to possession, becomes the absolute estate of the husband." "To create a sole and separate estate in the wife, free from the control of the husband, requires that there should be a clear and distinct expression of the intention of the grantor to create such an estate, such a departure from the rule; equivocal expressions are not sufficient." And again: "The expression of such intent should be plain, explicit, and unequivocal, else there will be a continual conflict, from the desire to raise up implications of an intention to give a sole and separate estate to the wife from slight expressions, leading to unceasing litigation." Hence the absolute terms in which the property is given to the wife, or the aptitude of her enjoyment, have never been deemed sufficient to create a separate interest in derogation of the common-law right. The implication is, however, necessary when the estate is declared to be for the sole and separate use of the wife, although the words "independently of her husband," or "without the control of her husband," are not superadded. So, if the wife is authorized to give a receipt, or to do any other act which, as a *feme covert*, she would not ordinarily do. Here is a necessary implication that her separate existence was recognized, and that, in this matter, she was to act and be treated as a *feme sole*. But, beyond this, it is vain to attempt to reconcile the conflicting decisions. It is necessary to analyze the language in every case, in

order to ascertain whether it was intended to exclude the marital right. In the will before us, the terms "to be freely enjoyed to every intent and purpose," may very well indicate no more than the amplitude of the estate, and words of a similar character occur, not unfrequently, without any more definite purpose.

The other terms used, "as her own in every respect," have been repeatedly the subject of judicial consideration. The cases are collected by Mr. Justice Story, sections 1382, 1383, and the conclusion at which he arrives is that, although the words "for her own use and at her own disposal," create a separate estate, as in the case of *Prichard v. Ames*, 1 Turn. & R. 222, where the decision of the court is rested on the latter words as giving a *jus disponendi* which does not otherwise belong to a *feme covert*—yet, says he, "on the other hand, a gift or bequest to a married woman 'for her own use and benefit,' or 'to be paid into her proper hands, for her own proper use and benefit,' have been held not to amount to a sufficient expression of an intention to exclude the marital rights of the husband, for although the money is to be paid into her own hands, or to her own use, yet there is nothing in that inconsistent with its being subject to his marital rights." In a note he remarks, that this is the doctrine expressly maintained in the authorities, and that, although there are antecedent *dicta* or opinions the other way, they seem to have proceeded on a misapprehension of the case of *Johnes v. Lockhart*, which has now been correctly reported in Mr. Belt's note to 3 Bro. C. C. 383. The case of *Graham v. Graham*, 3 Hill (S. C.), 145, goes further in sustaining the marital rights than is, perhaps, warranted by any previous decision. The gift was to Rebecca Cooper, the wife of George Cooper, "to her, and at her disposal at her death." After a full examination, the court say: "We are, therefore, of opinion that the provisions of the will in question do not create a sole and separate estate in Mrs. Cooper (afterwards Mrs. Graham), disposable by her, whilst a married woman, in derogation of the marital rights." It has been sometimes said, that some of the concurring judges may have thought the words sufficient to create a separate estate during the existing coverture with Cooper, but that it did not extend to the second marriage. No such distinction is intimated in the decision; and it may be added that, so far as able argument and high authority may amount to a final adjudication, it is now settled that a gift to the sole and separate use of a woman, married or unmarried, is good against

an after-taken husband. But in the case before us, there are no such words as in *Graham v. Graham*—no words vesting in the married woman an express right of disposition; and we are of opinion, upon authority, that the marital right attached—and such is the response of the court of errors to the question submitted.

But this cause was heard in the court of chancery. The will of Thomas Curtis, from which the title of the testatrix, Isabella Curtis, was derived, constituted part of the pleadings in the cause, according to the proper construction of which will, the defendant also insisted on his right, independent of the bequest from Isabella Curtis. Thomas Curtis, in 1794, bequeaths to his widow his property, “by her to be freely enjoyed to every intent and purpose, as her own in every respect whatsoever, during her life,” etc. It can hardly be contended that this exhibits an unequivocal intention to exclude the marital right of any future husband his widow might take, or that he contemplated such an event; or that it is anything more than rather a tautologous expression of the amplitude of the gift. For many purposes a person is presumed to have knowledge of the instrument through which he derives title. But the identity of the language adopted by Mrs. Curtis in her own will, with that which her husband had used in the gift to herself, would not only add a strong presumption that she was at least familiar with the instrument, but goes very far to show that the language was used not with reference to the marital rights, or with any purpose of excluding them, but because this form of donation had received the sanction and authority of her own honored husband.

RICHARDSON, O'NEALL, EVANS, WARDLAW, and FROST, JJ., and DARGAN, chancellor, concurred.

The court of appeals in equity then made the following order:

Per JOHNSTON, Chancellor. The court of errors having responded to the question submitted by this court, that the marital right of John Bailer attached on the property bequeathed by Isabella Curtis; it is ordered and decreed that the appeal be dismissed.

Appeal dismissed.

WORDS CREATING SEPARATE ESTATE IN WIFE: See *Smith v. Wells*, 39 Am. Dec. 772, and note thereto, where the subject is discussed at length; *Beaufort, Adm'r, v. Collier*, 44 Id. 321, and note 324.

CASES
IN THE
SUPREME COURT
OF
TENNESSEE.

BOMAR v. MAXWELL.

[9 HUMPHREYS, 620.]

PROPRIETORS OF STAGE-COACHES CARRYING PASSENGERS WITH THEIR BAGGAGE are responsible in all respects as common carriers so far as regards the baggage.

BAGGAGE INCLUDES SUCH ARTICLES OF NECESSITY OR PERSONAL CONVENIENCE as are usually carried by passengers for their personal use; it does not include medicines, handcuffs, a watch, etc., nor money, except just sufficient to pay traveling expenses.

CASE. The opinion states the case.

M. Brown, for the plaintiff in error.

A. Miller, for the defendant in error.

By Court, **McKINNEY, J.** This is an action on the case, brought by the defendant in error against the plaintiff in error, as the proprietor of a stage-coach, to recover damages for the loss of a trunk and its contents, the property of the former, who was a passenger in said coach, alleged to have been lost or stolen therefrom during the passage from Bolivar to Nashville, for which distance the defendant in error, who was on a journey, had taken a seat in said coach.

It appears from the proof in the record, that said trunk, when delivered to the driver at Bolivar, contained, in addition to wearing apparel, one hundred and nineteen dollars in silver; a ten-dollar bank note; twenty-five or thirty-five dollars in gold coin; a silver watch, worth about thirty-five dollars; also, medicines, handcuffs, locks, etc., worth about twenty dollars.

The circuit judge instructed the jury in substance, that on proof by the plaintiff of the payment of his passage money, the delivery of his trunk to the defendant or his agent, the stage-driver, and the loss of the trunk, he would be entitled to recover only the value of the trunk and the usual wearing apparel of the passenger. To enable him to recover the value of the money, watch, and other articles mentioned in the proof, it must be proved by the plaintiff that he notified the defendant or his agent of the fact that the trunk contained the money, watch, etc. If the proof showed that the defendant's agent was informed that the trunk contained money, the plaintiff would be entitled to recover the amount contained in the trunk, although the agent was not notified of the amount. The defendant had a right to require the plaintiff to state the amount of money; but if he did not require the amount to be stated, on being informed of the contents, he would still be liable for the amount proved to be lost. Verdict and judgment were rendered in favor of the plaintiff for one hundred and seventy-seven dollars and thirty-seven cents, and the defendant appealed in error to this court.

We think the foregoing charge is erroneous, both in respect to the ground of the defendant's liability for the money, and the extent of the plaintiff's right of recovery. The liability of the defendant for the money, watch, and other articles alleged to have been contained in the trunk, did not depend upon the fact of notice; and whether or not such notice were given to him, or his agent, was altogether immaterial. It is now well settled, that the proprietors of stage-coaches, carrying passengers with their baggage, are responsible in all respects as common carriers, so far as regards the baggage; though it is otherwise as to the persons of passengers. "But by baggage we are to understand such articles of necessity, or personal convenience, as are usually carried by passengers for their personal use; and not merchandise or other valuables, although carried in the trunks of passengers, which are not designed for any such use, but for other purposes, such as sale or the like." Such is the rule as laid down by Story: *Story on Bail.*, sec. 499.

In the case of *Hawkins v. Hoffman*, 6 Hill (N. Y.), 586 [41 Am. Dec. 767], it is said: "A contract to carry the ordinary baggage of the passenger, is implied from the usual course of the business, and the price paid for fare is considered as including a compensation for carrying the freight. But this implied undertaking has never been extended beyond ordinary baggage, or

such things as a traveler usually carries with him for his personal convenience in the journey," and in this case it is doubted whether an amount of money, sufficient to pay traveling expenses, might be included; and this upon the ground, that money for such purpose is usually carried about the person, and not in trunks; and the general proposition is laid down, that the term "baggage" does not include merchandise or money in a trunk, nor such articles as are usually carried about the person. But in the case of *Orange County Bank v. Brown et al.*, 9 Wend. 85 [24 Am. Dec. 129], Nelson, J., in delivering the judgment of the court, says: "It may be difficult to define with technical precision what may legitimately be included in the term "baggage," as used in connection with traveling in public conveyances; but it may be safely asserted, that money, except when it may be carried for the expenses of traveling, is not thus included." This we think is the correct rule: it would often be alike unsafe and impracticable, especially upon a long journey, to carry about the person an amount of money sufficient even to defray traveling expenses. And to this extent we think the plaintiff in error, in the present case, is responsible, but for no greater amount. The watch alleged to have been in the trunk, clearly does not fall within the meaning of the term "baggage;" and much less the handcuffs, locks, etc.; these certainly do not usually constitute part of a gentleman's wardrobe, nor is it perceived how they are necessary to his personal comfort on a journey in a stage-coach.

It is obviously impracticable to prescribe any uniform or very definite rule in respect to what shall be deemed baggage. This must be left to the jury to determine in each particular case; from the habits, rank, and condition of the party; the extent and reasonable expenses of the journey, together with all the other circumstances relevant to the inquiry.

As respects the objection that the proof in the record before us is insufficient to establish the loss or non-delivery of the trunk, we decline the expression of any opinion, inasmuch as, upon other grounds, the case must be remanded for a new trial.

Let the judgment be reversed.

PROPRIETORS OF STAGE LIABLE AS COMMON CARRIERS FOR BAGGAGE: See *Cole v. Goodwin*, 32 Am. Dec. 470; *Hollister v. Nowlen*, Id. 455, and notes thereto. See also note to *Chevallier v. Straham*, 47 Am. Dec. 650, 651.

THE PRINCIPAL CASE IS CITED in *Johnson v. Stone*, 11 Humph. 420, to the point that baggage includes articles of necessity and personal convenience, and includes money to that extent which may be convenient to meet traveling expenses.

HEPBURN v. KERR ET AL.

[9 HUMPHREYS, 726.]

LANDS IN STATE LEVIED UPON AND SOLD BY VIRTUE OF FINAL PROCESS issued upon a judgment of the federal court are, since the act of congress of 1828, c. 68, sec. 3, subject to redemption in the same manner as if sold under final process of the state courts.

ASSIGNMENT FOR BENEFIT OF CREDITORS BY JUDGMENT DEBTOR, AFTER A SALE OF HIS LAND under execution, passes his equity of redemption, and the assignee is entitled to redeem.

EQUITY. The facts appear in the opinion.

Totten, for the complainant.

Bullock, for the defendants.

By Court, McKINNEY, J. This bill was brought to enforce the redemption of a tract of land lying in Hardin county, which was sold by the marshal on the twenty-first day of June, 1845, as the property of Robert G. Allison, by virtue of an execution issued upon a judgment of the federal court for the district of west Tennessee, and was purchased at said sale, by the defendant Kerr, for the sum of forty dollars, who afterwards, viz., on the twenty-sixth day of October, 1846, sold and conveyed the same to the defendant Davidson.

It appears, that after said sale, viz., on the fourteenth day of October, 1845, said Allison, who was indebted in a large amount to various merchants of the city of Baltimore, executed a deed of trust, by which he conveyed to the complainant, as trustee for the benefit of said creditors, among other things, "all his right, title, and interest," in and to the tract of land sold as aforesaid, containing about five hundred acres.

The bill alleges, that on the ninth day of October, 1846, the complainant, through his agent and attorney, applied to the defendant Kerr, to redeem said tract of land, and tendered to him the amount of the redemption money; but that although informed of said deed of trust executed to the complainant, he refused to receive the money, or to suffer a redemption thereof; and afterwards fraudulently conveyed the same to defendant Davidson. The redemption money was deposited with the clerk of the federal court for the district of west Tennessee. The defendants are non-residents, and the bill has been taken as confessed against them, and the cause regularly brought to hearing *ex parte*. The chancellor decreed for the complainant; and to reverse this decree, the defendants have prosecuted a writ of error to this court.

Two questions are presented for our determination; first, whether, since and by virtue of the process act of congress of 1828, c. 68, sec. 3, Laws of U. S., vol. 4, p. 279, lands in this state, levied upon and sold by virtue of final process issued upon a judgment of the federal court, are subject to redemption under the act of 1820, c. 11. And, second, if so, whether the complainant stands in such a relation as to be entitled to redeem the land in question.

1. The third section of the act of congress of 1828, c. 68, provides, that "writs of execution and other final process issued on judgments and decrees, rendered in any of the courts of the United States, and the proceedings thereupon, shall be the same, except their style, in each state, respectively as are now used in the courts of such state," etc.

It was held by this court, in the case of *Polk and Wife v. Douglass and Cameron*, 6 Yerg. 209, that lands sold upon final process from the federal court, prior to the passage of the act of congress of 1828, were not subject to redemption under the laws of this state. And that decision was unquestionably correct in principle; because the act of congress of 1792, which is similar in its provisions to the act of 1828, adopted only such state laws, regulating the form and effect of process upon judgments in their courts as were in existence in 1789; and did not adopt or recognize the authority of any law or regulation of this character which might be afterwards passed by the states; nor did it apply to states subsequently admitted into the Union: *Wayman v. Southard*, 10 Wheat. 1; 6 Cond. Rep. 1; *Bronson v. Kinzie*, 1 How. 311, 324. It is obvious, therefore, that the process acts of 1789 and 1792, could have no application to this state, or to other states admitted into the Union after their passage; and this, perhaps, was the reason of the passage of the act of 1828. Under the latter act, we think, the question as to the right of redemption admits of no doubt. It is certainly true that the laws of a state regulating the process of its courts, its mode of execution, and its effect, furnish no rule for the courts of the United States, unless adopted by the latter. To congress belongs the exclusive and absolute power of prescribing the form and effect of, and mode of proceeding on, executions issued upon judgments rendered in the courts of the United States. If this were not so, the judicial power of the federal government would be altogether inadequate to the important purposes for which it was designed. But instead of forming a uniform system regulating the process of the federal courts, varying from

that of the state courts, congress has deemed it the wiser policy to conform the process and modes of proceeding on executions upon judgments rendered in the United States courts, to those of the several states. This policy was adopted, no doubt, in view of the various forms of process and different modes of proceeding to carry into effect their judgment which existed in the several states. In some, the sale of real property, upon execution, was absolute and unconditional; in others, subject to redemption within a limited period; and again, in others, it could not be sold at all, but was only liable to be extended upon an *elegit*. Other differences, in this respect, both in regard to real and personal property, existed in different states, which, for the present purpose, need not be further noticed. It must have been foreseen, therefore, by congress, that the probable tendency of a uniform regulation, giving to the final process of the federal courts a form and effect variant from that of the state courts, would produce, perhaps, not infrequent collisions and conflicts between the federal and state tribunals; which has happily been avoided by the passage, from time to time, of the process acts above referred to.

The act of 1828, in the language of the supreme court of the United States in the case of *Ross et al. v. Duval et al.*, 13 Pet. 45, 53, "adopts, in specific terms, the execution laws of the states." And in the case of *Bronson v. Kinsie et al.*, 1 How. 325, Mr. Justice McLean says, "the settled policy of the federal government is, to adopt the state laws regulating final process. And so far as the acts of congress have operated, state laws have governed executions in the federal courts." And, again, in the case of the *Bank of the United States v. Halstead*, 10 Wheat. 51; S. C., 6 Cond. Rep. 22, 26; the court say, that the process acts of congress adopt "the effect as well as the form of the state process."

From these authorities, and, indeed, from the plain language of the act of congress, it is too clear to admit of doubt, that lands in this state, sold by virtue of process from the federal court, are subject to redemption, under the act of 1820, chapter 11, in precisely the same manner as if sold under final process of our courts. Again, the right to redeem land, sold under process of the federal courts, might perhaps be maintained upon the ground that the redemption law of 1820, prescribes a rule of property; and, therefore, by the thirty-fourth section of the judiciary act of 1789, furnishes the rule of decision. But it is not necessary to place the determination of the present case

upon this ground, as the right is clear beyond all question, upon the former ground.

2. It is not contended, and can not be, that the deed of trust was not operative to vest in the complainant all the equitable interest or estate in the tract of land in question, remaining in Allison after the execution sale. And if such transfer may be made, as most certainly it may, it necessarily follows, that the assignee is vested with all the rights and equities of the defendant in the execution whose land was sold.

This, however, is not now to be regarded as an open question; it was in effect, decided by this court in the case of *Jones v. The Planters' Bank*, 5 Humph. 619 [42 Am. Dec. 471]; and still more recently and still more directly, in the case of *Kennedy v. Howard*, 6 Id. 64. In the latter case it was held, that an assignment by title bond, after execution sale, vested the assignee with the equitable estate of the defendant in the execution, and clothed him with all the equities of the assignor, and entitled him to redeem from one holding the legal title in trust for the assignor, although the assignee had given no pecuniary consideration for the assignment. That case asserts a broader principle than is necessary to the determination of the one under consideration. We are of opinion, therefore, that there is no error in the decree of the chancellor, and direct that it be affirmed.

THE PRINCIPAL CASE IS CITED to the point that the equity of redemption of a judgment debtor or mortgagor is assignable, in *Huffaker v. Bowman*, 4 Sneed, 98; *Graves v. McFarlane*, 2 Coldw. 169; *Stark v. Cheatham*, 2 Tenn. Ch. 303; *Weakly v. Cockrill*, Id. 319.

MANNING v. WELLS.

[9 HUMPHREYS, 746.]

INNKEEPER IS LIABLE FOR LOSS OF GOODS of a boarder only where he has been guilty of culpable negligence.

JUSTICE'S WARRANT MUST GIVE SOME GENERAL STATEMENT OF THE CAUSE OF ACTION; and if the warrant summons the defendant to answer no promises, and the evidence shows a liability in tort, it is inapplicable.

THE opinion sufficiently states the case.

Wickersham and Smith, for the plaintiff in error.

Delafield and Massey, for the defendant in error.

By Court, GREEN, J. The warrant in this case is issued against Manning, to answer Wells in a plea of trespass on the case on

promises. On the trial in the circuit court the plaintiff proved that he was boarding at the house of the defendant (who kept a public inn in Memphis), at twelve dollars and fifty cents per month, and lodged in a room that had no lock to the door, and that during the night, while he slept, his coat, worth twelve dollars and fifty cents, was stolen from the room. It appeared in evidence that the room in which the plaintiff slept was furnished for several persons to lodge, and that it was kept by the defendant for the accommodation of travelers generally; and that the defendant had offered the plaintiff another room that had a lock to the door, but that plaintiff objected to it, because some plastering had fallen down, and returned to the room from which the coat was taken.

The court charged the jury that the defendant was liable for the coat, if lost or stolen from his house, unless it happened by the act of God, or public enemies; but if the plaintiff had exclusive use and possession of the room, then the defendant would not be liable. The jury found for the plaintiff the value of the coat, and the defendant appealed to this court.

The question now is, Did his honor err in the instructions to the jury? And we think he did. The doctrine stated by his honor is certainly the true one, as applicable to the goods of a guest in an inn. But a guest is a traveler or wayfarer, who comes to an inn and is accepted: *Story on Bail.*, sec. 477. A neighbor or friend who comes to an inn on the invitation of the innkeeper, is not deemed a guest: *Bac. Abr.*, Inn and Innkeeper, 5; *Com. Dig.*, Action on Case for Negligence, B. 2. Nor is a person a guest, in the sense of the law, who comes upon a special contract to board and sojourn at an inn; he is deemed a boarder. And if he is robbed, the host is not answerable for it: *5 Bac. Abr.*, Inn and Innkeepers, 5.

These principles are settled by the authorities, and founded in sound reason. A passenger or wayfaring man may be an entire stranger. He must put up and lodge at the inn to which his day's journey may bring him. It is, therefore, important that he should be protected by the most stringent rules of law enforcing the liability of the innkeeper. In such case, therefore, the law makes the innkeeper an insurer of the goods of his guest, except as to losses occasioned by the act of God, or public enemies. But as a boarder does not need such protection, the law does not afford it. It is sufficient to give him a remedy when he shall prove the innkeeper has been guilty of culpable negligence.

In this warrant the defendant is required to answer on promises. But on the evidence the plaintiff seeks to make him liable for a tort. Although we do not hold justices of the peace to that technical strictness, which is required in proceedings in courts of record, yet, we have always held that they must give some general statement of the cause of action. Here the cause of action stated is repugnant to that proved. The evidence was, therefore, inapplicable to the action.

Let the judgment be reversed, and the cause remanded.

LIABILITY OF INNKEEPER FOR LOSS OR INJURY TO PROPERTY OF GUEST: See *Hill v. Owen*, 35 Am. Dec. 124, and note 125, 126; *Dickerson v. Rogers*, 40 Id. 642. The principal case is cited in *Wallace v. Canaday*, 4 Sneed, 367, to the point that an innkeeper is an insurer of the property committed to his care by a guest against everything but the act of God or the public enemy, or the neglect or fraud of the owner of the property.

THE PRINCIPAL CASE IS CITED IN *Odell v. Koppee*, 5 Heisk. 90, to the point that a justice's warrant must contain some sufficient statement to indicate to the defendant the charge he is to answer.

DUDLEY v. BOSWORTH.

[10 HUMPHREYS, 9.]

WHEN ONE MAKES PURCHASE OF LAND IN NAME OF ANOTHER, and pays the consideration money, a resulting trust immediately arises by virtue of the transaction, and the nominal purchaser will be a trustee for the person paying the purchase money; this presumption of a resulting trust may be rebutted by circumstances, but the burden of proof rests upon the nominal purchaser.

WHERE PERSON MAKING PURCHASE OF LAND IN NAME OF ANOTHER, and paying the consideration money himself, is under a natural or moral obligation to provide for the person in whose name the conveyance is taken, no presumption of a resulting trust arises, but the transaction will be regarded *prima facie* as an advancement for the benefit of the nominal purchaser.

RESULTING TRUST WILL NOT BE RAISED OR ENFORCED in contravention of public policy, or the provisions of a statute, as in the case of a conveyance in the name of another, made to hinder, delay, or defraud the creditors of the purchaser.

WHETHER CONVEYANCE TAKEN IN NAME OF ANOTHER THAN THE PERSON PAYING THE CONSIDERATION is an advancement to such other, or a resulting trust is created, depends upon the character of the transaction at its inception.

DEATH OF NOMINAL PURCHASER AND DESCENT of the mere naked title does not destroy or impair a resulting trust.

EQUITY. The opinion states the case.

S. A. Boyd, for the complainant.

Swan and Sneed, for the defendants.

By Court, McKINNEY, J. This bill is brought to enforce a resulting trust. It charges, in substance, that prior to the nineteenth day of June, 1824, the complainant purchased a lot of ground in the town of Knoxville, containing one fourth of an acre, from Gideon Morgan, for which he paid him one hundred dollars, the price agreed upon between them; that at the time of the purchase he was intemperate and improvident in his habits, and as his object was to secure a home for himself and family, his friends advised that Morgan should be procured to make the conveyance for said lot to William P. Dudley, his son, then an infant of tender years. That the object in making the conveyance to William was to secure the property in trust for the complainant's benefit, so as to guard against an unadvised or improper disposition thereof in some moment of intoxication. That complainant and his family continued to occupy said property for many years, and that he has always retained and still retains possession thereof, and has made valuable improvements thereon, worth in all from seven to eight hundred dollars. The bill further alleges that said William attained his majority in 1836, and died in 1838, and that during his life he never pretended to have any claim to said lot, but considered and treated it as the property of complainant. But that since his death some of the sons-in-law of complainant are setting up claim to the property as heirs at law of said William, who died intestate and without issue.

The answer of the defendants does not controvert the purchase and payment of the consideration money of said lot by the complainant, but alleges that he never asserted any claim thereto in the life-time of William P. Dudley; and that the latter always acted as the owner, paying the taxes, and making improvements thereon, and asserting his right to the same. The conveyance from Morgan is set forth in the record; it bears date the nineteenth day of June, 1824, and recites the payment of the purchase money, but does not show by whom paid. Morgan, the vendor, proves that at the solicitation of the complainant and William G. Blount he consented to sell, and did sell, to complainant the lot in question for one hundred dollars, which was paid to him by the complainant in a note for that amount, which he held on some person in middle Tennessee. That Blount seemed anxious to secure the complainant a home for

life, and said that if he did not make some such disposition of the note it would be squandered and be of no benefit to himself or family; that the deed was made to William P. Dudley, infant son of the complainant, as the best mode, as witness and others thought, of securing to the complainant a home for life. Other proof in the cause shows that the complainant possessed and occupied the property as stated in the bill. J. H. Crozier, for the defendants, proves that on the day William P. Dudley died he was called in to see him by the complainant and was informed by the complainant and his wife, that William desired witness to write his will, and that he wished to devise the lot in question to his mother for life; remainder to his sister Patsy. William expressed this wish, also, but died before any will was written. The chancellor decreed for the complainant, and we think there is no error in the decree.

The doctrine is well established, that when one makes a purchase of land in the name of another, and pays the consideration money, the parties being strangers to each other, a resulting trust immediately arises by virtue of the transaction, and the nominal purchaser will be a trustee for the person paying the purchase money. This rule has its origin in the natural presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than that of another; and that the conveyance in the name of the latter is a matter of convenience and arrangement between the parties for other collateral purposes: 2 Story's Eq. Jur., sec. 1201. This presumption may be rebutted, however, by circumstances, but the burden of proof rests upon the nominal purchaser to show that the party from whom the consideration moved did not mean the purchase to be a trust for himself, but a gift to the stranger: Hill on Trustees, 96, 97. And trusts of this character being unaffected by the statute of frauds, parol evidence is admissible, either to establish or to rebut the presumption of a trust.

This rule, however, is not of universal application; it has its exceptions, one of which is, where the party making the purchase and paying the consideration money is under a natural or moral obligation to provide for the person in whose name the conveyance is taken, no presumption of a resulting trust arises; on the contrary, the transaction will be regarded *prima facie* as an advancement for the benefit of the nominal purchaser. Therefore, if a parent purchase in the name of a son, the purchase will be regarded as intended as an advancement for the

son, and not a trust for the parent, unless it can be clearly shown to have been the intention that the child should not take beneficially, but as trustee: 2 Story's Eq. Jur., sec. 1202.

Applying these principles to the case under consideration, it is very clear, that the conveyance made in the name of William P. Dudley, for the lot in controversy, was not meant as an advancement to him, but a trust for the complainant. The presumption of an advancement is clearly and fully repelled by the contemporaneous acts and declarations of the purchaser: Hill on Trustees, 103, 105; by the avowed and inconvertible object and purpose of the conveyance in the name of the son, by the utter inability of the complainant to make any provision for his other children, and the continued claim and occupation of the premises by the complainant.

It is certainly true, that a resulting trust will not be raised or enforced, in contravention of public policy, or the provisions of a statute, as in the case of a conveyance in the name of another, made to hinder, delay, or defraud the creditors of the purchaser. But, in the record before us, there is no evidence that the deed was made with any such intention, or for any such purpose. It is also true, that an implied or resulting trust may be rebutted, as well to part of the land, as to part of the interest in the land purchased in the name of another. Thus, where A. took a mortgage in the name of B., declaring that he intended the mortgage to be for B.'s benefit, and that the principal, after his own death, should be B.'s, and A. received the interest therefor during his life-time; it was held, that the mortgage belonged to B. after the death of A.: 2 Story's Eq. Jur., sec. 1202. But, there is no evidence whatever in this case of any such declaration or intention on the part of the complainant; we think the contrary is fully manifested; and the casual expression of Morgan, that the conveyance in the name of the son, was thought the best means of securing the complainant a home for life, can have no effect to limit the trust; such limitation must depend alone upon the manifest intent of the purchaser. We do not think, that the implied assent of the complainant to the disposition of the property desired to be made by the son on his death-bed, sufficient to rebut the trust so clearly established in this case. Whether a trust or advancement, depends upon the character of the transaction in its inception, and can not be changed by subsequent acts or declarations, of so unsatisfactory and equivocal a nature.

The death of the nominal purchaser, and the descent of the

mere naked legal title, can not affect the trust. The authorities to which we have been referred upon this point merely show that it has been a subject of controversy, whether, if the consideration money is expressed in the deed to have been paid by the person in whose name the conveyance is taken, parol proof alone is admissible, after the death of the nominal purchaser, against the express declaration of the deed. The negative is maintained by several of the older authorities, on the ground that the admission of parol evidence in such case would be contrary to the statute of frauds; but the preponderance of authority, especially of modern cases, is in favor of the admissibility of such evidence, in the case stated, as well after the death of the nominal purchaser as in his life-time, although contrary to the express recital in the deed, and that the statute is not broken in upon by the admission of such proof: Sugd. on Vend. 136, 9th ed.; *Lench v. Lench*, 10 Ves. 517; Hill on Trustees, 69; 2 Story's Eq. Jur., sec. 1201, and cases there cited.

It might have sufficed, however, in the present case, simply to have remarked that the deed to William P. Dudley contains no recital of the payment of the purchase money by him, and, therefore, no such question can arise in this case.

The decree of the chancellor is affirmed, with costs.

RESULTING TRUSTS: See note to *Neill v. Keese*, post, 746, where the subject is discussed at some length. The principal case is cited in *Click v. Click*, 1 Heisk. 612, to the point that parol evidence is admissible to show a resulting trust, although the deed to the grantee is absolute.

VANBIBBER v. SAWYERS.

[10 HUMPHREYS, 81.]

PURCHASER AT MASTER'S SALE, UNDER ORDER OF A CHANCERY COURT, makes himself a party to the proceedings, for some purposes, and subjects himself to the jurisdiction of the court, but when the sale has been confirmed, the title vested in the purchaser, and his note delivered to the guardian of the infants entitled, and the court has divested itself of all control over the cause and the parties, it has no jurisdiction to entertain a motion by the guardian for a *scire facias* against the purchaser to appear and show cause why judgment on the note should not be rendered against him.

A *SCIRE FACIAS* was issued from the chancery court at Tazewell in 1848, averring that a suit was pending in that court in 1841 against the administrator of one Goin, deceased, and others, and that a decree was then entered that the slaves of Goin

be sold on a twelve-months credit; that Sawyers had purchased one of the slaves and given his note for the purchase money, and averring other facts as stated in the opinion; also that the guardian Vanbibber presented the note to the court, and moved that a *scire facias* issue to said Sawyers to show cause why judgment should not be rendered against him on the note. The chancellor overruled defendant's demurrer, and decreed against him, from which decree this appeal is taken.

Rodgers, for Vanbibber.

Nelson, for Sawyers.

By Court, McKINNEY, J. It is well settled that a purchaser at a sale made by a master, under the decretal order of a court of chancery, thereby makes himself a party to the proceedings in the cause, for some purposes, though not a party originally; and subjects himself to the summary power of the court, in the exercise of its inherent jurisdiction, to enforce and give effect to its own orders and decrees, to compel him to complete his purchase, by paying the purchase money.

This jurisdiction will be exercised in all proper cases, so long as the control of the court over the cause and the parties continues, as was done in the case of *Deaderick et al. v. Smith et al.*, 6 Humph. 138. But the case under consideration is wholly different from that case. Here, the sale had been confirmed by the court, the title to the slave, purchased by Sawyers, had been vested in him by decree of the court; the note in question, upon a final adjustment of the matters in the cause, had been delivered to Vanbibber, as guardian, by the clerk and master; and a final disposition made of the cause; and all this more than two years before the institution of this proceeding. Nothing further remained to be done in the cause. The court had divested itself of all control over the cause and parties; and had no jurisdiction therefore to entertain the motion made in this cause. The decree of the chancellor will be reversed, and the motion dismissed.

THE PRINCIPAL CASE IS CITED to the point that a purchaser at a sale made by a master under a decretal order of a court of chancery thereby makes himself a party to the proceedings in the case, for some purposes, though not a party originally, and subjects himself to the summary process of the court, in the exercise of its inherent jurisdiction, to enforce and give effect to its own orders and decrees, in *Dibrell v. Williams*, 3 Coldw. 531; *Majors v. McNeilly*, 7 Heisk. 299; but where the court has finally disposed of the matter, it has lost its jurisdiction: *Planters' Bank v. Fowlkes*, 4 Sneed, 463, citing the principal case.

BATES v. LANCASTER.

[10 HUMPHREYS, 134.]

ACTION WILL NOT LIE AGAINST A STAKEHOLDER OF AN ELECTION BET by the losing party, if the stakeholder has paid over the money after the election in good faith to the winner.

THE opinion states the case.

M. M. Brien, for Bates.

W. Cullum, for Lancaster.

By Court, TURLEY, J. We think that there is no error in this case. We readily concede that money in the hands of a stakeholder, which has been bet upon an election, may be stopped in his hands by the loser before it is paid over to the winner; but that is not this case, as it appears from the proof. The money had been paid over by the stakeholder before he was requested not to pay it. The good faith of the stakeholder has been called in question. The proof shows that the wager was upon the last presidential election; and that the stakes were paid over to the winner on the fifteenth day of November, after the election. This, it was insisted, was too soon, and before the result of the election was known. The wager was partly upon the general result of the election in the United States and partly upon the result in the state of Tennessee. The plaintiff lost on both; and whether the stakeholder paid the amount over in good faith and after he knew the result, is a question of fact which was submitted to the jury and found in favor of the stakeholder. We are satisfied that the proof sustains the verdict; but it is argued that the judge erred in his charge to the jury upon this subject.

He said: "If the stakeholder was directed to pay over the money lost to the winner, and no time specified when the payment should be made, if the payment was made after the election to the winner in good faith, such payment would exempt the stakeholder from liability, provided he had not been previously notified not to pay over the stakes." This charge is, in our opinion, strictly correct, for the stakeholder could not have paid over the stakes in good faith if he had paid them before he knew of the results of the elections upon which the wager depended.

Let the judgment of the circuit court be affirmed.

LIABILITY OF STAKEHOLDER: See *Stacy v. Foss*, 36 Am. Dec. 755; *Shackelford v. Ward*, 1d. 435; *Dauterive v. Broussard*, 39 Id. 550; *McAllister v. Hoffman*, 16 Id. 556.

BUTLER v. BOYLES.

[10 HUMPHREYS, 155.]

FACT THAT ARBITRATOR WAS REQUESTED BY ONE OF THE PARTIES TO EXAMINE WITNESSES, and that he did ask questions of the witnesses, and read to the other arbitrators a paper that was not evidence, and was objected to at the time, is not sufficient of itself to sustain a bill to set aside the award on the ground of corruption and partiality in one of the arbitrators.

ARBITRATORS MAY, BEFORE AWARD IS MADE UP AND DELIVERED, KEEP THE CASE OPEN for consideration or further proof and investigation, but after they have made up and delivered their award, their power is at an end; they can not recall the case and reinstate it before them.

THE opinion states the case.

Barry, for Butler.

Guild, for Boyles.

By Court, GREEN, J. This is a bill to set aside an award and to obtain a decree for certain slaves claimed by the complainant. It is alleged in the bill that Beason, one of the arbitrators, acted partially and corruptly in making the award, and in refusing to rehear the cause, after the award was made and delivered.

The grounds relied on to establish the corruption of the arbitrator are, that he was requested by one of the parties to examine witnesses, and that he did, during the trial, ask questions of witnesses; and that he read to the arbitrators a paper that was not evidence: the objection was made at the time. We do not think these circumstances, in the absence of other proof, sufficient to establish the charge of partiality.

A judge may very properly ask questions of witnesses; and especially may an arbitrator do so, as the tribunal is less dignified, less formal, and usually unassisted by counsel. That the arbitrator was requested to question the witness, is no proof of partiality. There was nothing secret about it; nothing that showed the existence of an influence in favor of the party making the request.

2. The complainant insists, that as three of the five arbitrators agreed to rehear the case, he ought to have had the benefit of another trial, and that the award is not binding.

The proof shows that the award was agreed on, and was signed by all the arbitrators, and that on the same evening, after they had left the house where the arbitration had taken place, three of the five arbitrators agreed, in writing, to give the complainant a new trial; but that the arbitrator Beason refused, when applied to for that purpose, to rehear the case

We think this arbitrator acted correctly in refusing to rehear the case, under the circumstances. Unquestionably, an arbitrator may, before an award is made up and delivered, keep the case open for consideration or further proof and investigation. But after he has made up and delivered his award his power is at an end. He can not recall the case and reinstate it before him.

Upon the whole, we perceive no error in this record, and affirm the decree.

AWARD IS NOT FINAL, THOUGH SIGNED AND SEALED and read to the parties, where the arbitrators retain the award in their own hands, with a view of hearing any objections that the parties might make, and weighing and deciding them: *Byars v. Thompson*, 37 Am. Dec. 680.

CONDUCT OF ARBITRATORS CAN NOT BE IMPEACHED by plea alleging that they made the award without hearing all the legal and pertinent evidence offered relative to the matter in dispute, or that they decided the matter upon their own personal knowledge concerning it: *Doolittle v. Malcon*, 31 Am. Dec. 671; and see note thereto collecting cases on setting aside an award generally.

BANK OF TENNESSEE v. HILL.

[10 HUMPHREYS, 176.]

COURT OF CHANCERY IS AS MUCH BOUND TO GIVE EFFECT TO STATUTE OF LIMITATIONS as a court of law, and will not prohibit the use of this defense in a court of law except in plain cases of a fraudulent abuse of the advantage of the lapse of time gained by the party seeking to use it; but a mere request to delay suit, or to institute suit against another, instead of the person making the request, does not constitute such a case.

EQUITY. At the hearing on the bill, answer, and proof, the bill was dismissed and the bank appealed. The opinion states the case.

Ewing and Nicholson, for complainants.

Meigs and Lea, for defendant.

By Court, TURLEY, J. This bill is filed by the Bank of Tennessee, to prohibit the defendant, H. R. W. Hill, from pleading and relying upon the statute of limitations as a defense to his liability as indorser upon a bill of exchange, drawn by B. S. Tappan & Co., in favor of George O. Parker, and indorsed by him to Daniel P. Perkins, by Perkins to H. R. W. Hill, and by Hill to the bank.

It appears from the pleadings and proof, that after the bill was dishonored by protest, Hill, the last indorser, was desirous that he should not be sued thereon; and that the bank should pursue Perkins, his previous indorser, who, it was supposed, by both Hill and the bank, was good, and able to pay the bill; that Hill informed the bank that Perkins owned a tract of land in Williamson county, which would be sufficient in value to pay the bill, and that he was desirous that the bank should seek its remedy out of the land before suing him. This the bank did, by instituting proceedings against Perkins and this tract of land by attachment, which, by the law's delay, remained so long in court, that the statute of limitations ran in favor of Hill, before a suit at law was commenced against him; the land attached was secured by superior liens, and thereby the bank obtained nothing by its proceedings against Perkins; and upon instituting suit against Hill, he relies upon the statute of limitations in his defense.

Now, the question is, whether a court of chancery can prohibit this defense under the circumstances of this case; and we think not, because it is a high power in a court of chancery (which is in the general, as much bound to give effect to the operation of the statute of limitations as courts of law), to prohibit the use of this defense in a court of law, and one not to be exercised, but in very plain cases of a fraudulent abuse of the advantage of the lapse of time, gained by the party seeking to use it.

We do not deem it necessary or proper, in the present case, to enter into an investigation of the doctrine upon this subject, in order to show when this power of a court of chancery may be properly exercised; it is enough for us at present to hold, that a non-request to delay suit, or institute suit against another, instead of the person making the request, does not constitute this case, and that is all that can be made of the present case.

Hill denies that he ever promised that he would not plead the statute of limitations, if the bank delayed suit as against him, till it should constitute a defense; admits that he requested a suit against Perkins; and gave information of his owning the land attached: the bank insists that this was equivalent to a promise not to plead the statute of limitations, provided it would proceed against the land, and time should thereby elapse, by which the claim against Hill would be barred; but we can not look upon it in such light; and are constrained to hold it to be the common case of one who induces an indulgent creditor not

to sue by promises to pay, or by protestations that he is not pecuniarily liable, and that he ought not to be sued, before the remedy against those who are, has been exhausted, whereby he becomes released by the operation of time. In all such cases, it becomes the imperious duty of the creditor, if he wish to be protected against the bar of time, so to contract; to hold otherwise, would be to destroy the defense of statute of limitations, which has of late years been looked upon most favorably both at law and equity.

The decree of the chancellor is therefore affirmed.

ENJOINING PLEADING STATUTE OF LIMITATIONS.—The circuit court of the United States, sitting as a court of equity, was asked to enjoin certain defendants in a suit at law from pleading the statute of limitations in *Andreae et al. v. Redfield*, 12 Blatch. 407. The defendant, prior to the bringing of the suit, had been collector of the port of New York, and while such collector, the plaintiffs in the bill had paid to him, under protest, an excess of duties, for which excess they had a lawful claim to be repaid. The statute of limitations was about to take effect, and plaintiffs were about to bring suit. An officer of the custom-house at New York represented to the attorney for plaintiffs that the presentation of their claims to a designated officer would stop the running of the statute according to the practice there, and that if the claims were presented and suits were thereafter brought, the statute could not and would not be pleaded in defense. The defendant had gone out of office at the time the representation was made, and said he had no control of the matter, but expressed his confidence in the experience and knowledge of the officer in charge, and concurred in his statement. Relying on this statement and on the recognition of their claims by the government, they presented them and delayed suit until after the running of the statute. The claims were not paid, and plaintiffs brought an action at law upon them, and the defendant pleaded the statute of limitations. The law's delay kept the case in court more than seven years, and then plaintiffs filed a bill in equity praying for an injunction to restrain the defendant from interposing and insisting upon the statute as a defense. The defendant demurred to the bill for want of equity. The circuit court sustained the demurrer and dismissed the bill, and plaintiffs appealed to the supreme court of the United States. That court affirmed the decision of the circuit court, and held that, independent of the long delay in bringing the bill, conversations of the kind mentioned could not benefit the complainants for several reasons: 1. Because they did not amount to a promise that the statute of limitations should cease to run; and if they did, they could not avail them, because not in writing. 2. They did not amount to a contract to that effect; and if they did, they were without consideration. 3. They could not have the effect to estop the respondent from pleading the bar of the statute, because both parties were equally well informed of all the facts: *Andreae v. Redfield*, 98 U. S. 225, 239.

WITT v. RUSSEY.

[10 HUMPHREYS, 208.]

JUDGMENT, VALID UPON ITS FACE, CAN NOT BE INVALIDATED UPON CERTIORARI and *supersedeas*, when it comes up collaterally, by parol or other proof *dehors* the proceedings.

JUDGMENT DEFENDANT, ON CERTIORARI FOR A NEW TRIAL, MAY SHOW BY PAROL that the judgment was rendered upon an indorsement of a note for an amount beyond the jurisdiction of the justice's court rendering it, but can not show this on *certiorari* and *supersedeas* to quash the execution issued on the judgment.

WITT recovered judgment in a justice's court against Russey and others as indorsers on a note, and execution issued. Russey removed the case by *certiorari* to the circuit court, where a motion to quash the execution prevailed. Plaintiff appealed. The opinion states the further facts.

Turney, for Witt.

Carter, for Russey.

By Court, TURLEY, J. This is an attempt on the part of a defendant in an execution to impeach the validity of the judgment by parol proof. He says his liability arose out of an indorsement, and that the amount is greater than that over which a justice of the peace has jurisdiction by law; the proceedings before the justice do not show in what character the liability of the defendant arose, either in the warrant or the judgment; but the justice is examined as a witness, and proves that it was as indorser. This was illegal; we have held repeatedly that if a judgment be valid upon its face, it can not be invalidated upon *certiorari* and *supersedeas* when it comes up collaterally, by parol or other proof *dehors* the the proceeding.

The circuit judge, then, erred both in not dismissing the petition and in giving relief upon the proof. If defendant had appealed, or if the *certiorari* had been for a new trial, and had shown a legal excuse for not appealing, the relief sought could have been had, for then there would have been a new trial, and the want of jurisdiction could have been taken advantage of, but this *certiorari* and *supersedeas* is not for a new trial, but to quash the execution.

Judgment reversed and petition dismissed.

JUDGMENT, COLLATERAL ATTACK ON: See note to *Thacker v. Chambers*, 42 Am. Dec. 431, where prior cases in this series are collected. The principal case is cited to the point that a judgment not void on its face can not be attacked collaterally and shown by parol to be a nullity, in *Stanley v. Sharp*, 1 Heisk. 420; *Starkey v. Hammer*, 1 Baxt. 442.

THE PRINCIPAL CASE IS CITED in *Mason v. Westmoreland*, 1 Head, 557, to the point that if a justice of the peace exceed his jurisdiction by giving judgment against an indorser for an amount beyond the jurisdiction of his court, the indorser can not avail himself of this fact by *certiorari* to quash the judgment or execution.

WINCHESTER v. BEARDIN.

[10 HUMPHREYS, 247.]

WHERE ONE PERSON IS COMPELLED TO PAY MONEY WHICH ANOTHER IS BOUND by law to pay, a promise by the latter is raised by law to reimburse the person paying.

WHERE PERSON IS SUBJECTED BY LEGAL PROCESS TO PAY MONEY WHICH ANOTHER is bound by law to pay, it can not be required that the former shall have exhausted every possible means of litigation, in resisting the payment, before he shall be entitled to his action for money paid.

TERM "DEFENDANTS" IN A JUSTICE'S JUDGMENT "AGAINST THE DEFENDANTS" means those defendants only on whom process was served, and who were before the court.

IF JUSTICE'S JUDGMENT IS ENTERED AGAINST ALL THE DEFENDANTS, WHERE SOME ARE NOT SERVED with process and do not appear, the judgment will not be void as to those served, but only erroneous or voidable, and can be reversed on writ of error.

JUDGMENT OF REVIVOR AGAINST EXECUTORS OF DECEASED PLAINTIFF does not confer upon the defendant any right to give security for a stay of execution, but where no execution has issued before the death of the plaintiff, if the executors consent, the judgment of revivor may be stayed under the act of 1842, chapter 136, section 4.

ASSUMPSIT. Verdict and judgment for plaintiff. Defendant appealed.

White, for the plaintiff in error.

Guild, for the defendant in error.

By Court, GREEN, J. This is an action brought by Beardin against Winchester, for money laid out and expended for the use of the defendant.

From the bill of exceptions, it appears that F. L. McDaniel, Alexander Williams, A. R. Wynne, and O. D. Beardin, on the twenty-ninth of January, 1845, executed their bill single, due one day after date, to Isaac P. Parker for two hundred dollars. McDaniel was the principal, and Williams, Wynne, and Beardin were sureties in the note. On the second of February, 1846, Parker brought suit on the note against all the parties, before a justice of the peace. All the defendants were served with process except Wynne, who was not found. The justice gave judg-

ment against the defendants for one hundred and nine dollars and thirty-five cents.

Upon this judgment no execution issued; and Parker, the plaintiff, died. On the third of August, 1846, a *scire facias* issued to revive the judgment in the name of the executors of Parker, and was served on all, except Wynne, who was not found. On the return of the *sci. fa.* the judgment revived, the tenth of August, 1846; and the executors of Parker consenting that it should be stayed, George W. Winchester became security for the stay of execution. Neither Williams nor Beardin, the sureties in the note, were present at the time, nor did they desire Winchester to stay the judgment.

After the stay was out, execution issued, which was superseded as to Williams, the twenty-fifth of May, 1848; and as to Winchester, the third of June, 1848; and McDaniel being insolvent, Beardin's property was levied on, and sold, and the execution was satisfied. Beardin, at the date of the said levy, and sale, resided in Missouri.

Having paid said judgment, by operation of the execution, Beardin brings this suit, to recover the amount so paid, from the security for the stay of execution. A verdict and judgment were rendered for the plaintiff, in the circuit court, from which judgment the defendant prosecutes this appeal in error to this court.

1. It is insisted by the plaintiff in error, that this is a voluntary payment by Beardin; that if Winchester was bound to pay the money before Beardin was liable, Beardin should have superseded the execution and compelled the plaintiff to make his money out of those who were first liable; and not having done so, the law will not imply a contract on the part of Winchester to repay the money to him.

By the act of 1841-2, c. 136, sec. 1, it is provided, "that when any person, or persons, may be security or indorser for any debtor or debtors, and said debtor or debtors, securities or indorsers, may be sued and judgment rendered against them, if any person or persons shall stay the same for the length of time given for the stay of execution upon such judgment, such person or persons staying shall be liable, in default of the principal debtor, to pay the debt and costs of said judgment, and the original security or securities, indorser or indorsers, shall be exonerated therefrom, unless the principal debtor and security in the replevy shall both become insolvent, or unless such original security or securities, indorser or indorsers, shall

have specially joined with such debtor or debtors in procuring such stayor."

In the case before us we have seen that Williams and Beardin were original securities for McDaniel; that neither of them was present, or joined with McDaniel, in procuring Winchester to become the stayor, and consequently, by the above statute, Winchester was liable to pay the debt, in default of McDaniel, before Beardin, the original security.

The effect of the statute, upon parties thus situated, is to interpose the stayor before the original surety; and to place such original surety in the situation of surety for the stayor. For he is only to be liable if the principal debtor, and the stayor, shall both become insolvent. The plaintiff in error, Winchester, by failing to pay this money, which he was bound by law to pay, Beardin has been compelled by process of law to pay it.

In Story on Contracts, section 474, it is said, "where one man is compelled to pay money which another is bound by law to pay, a promise by the latter is raised by law to reimburse the person paying." And Chitty says, Contracts, 6th ed., 594, where the "plaintiff is compelled to make a payment of the defendant's legal debt, in consequence of his neglect or omission to discharge it, the law infers that the defendant requested the plaintiff to make the payment for him, and gives the action for money paid."

In this case Beardin, the plaintiff below, has been compelled to pay money which Winchester was bound by law to pay; and he is therefore entitled to recover it, in this action, for money paid. It is urged that Winchester having obtained a *supersedeas*, by which the execution was stopped as to him; that fact was sufficient ground for Beardin to obtain a *supersedeas* also, and that not having done so, his payment was not compulsory.

We do not know upon what ground Winchester's application for a *supersedeas* was made. How could Beardin know that Winchester had no good ground to be released from his liability? And if Winchester were released, as not being liable as stayor, then the plaintiff had a right to make the money out of Beardin's property. Certainly Beardin could not have obtained a *supersedeas* simply by stating in his petition that Winchester, the stayor, had superseded the execution as to him. In order to have entitled him to a *supersedeas*, he would have been required to show that Winchester was liable as stayor.

It can not be required, that a party who is subjected, by legal

proceedings, to pay money, which another is bound by law to pay, shall have exhausted every possible means of litigation, in resisting the payment, before he shall be entitled to his action for money paid.

It has already been suggested that Beardin occupied the relation of surety for Winchester, as the latter, by law, was primarily liable, on failure of the original debtor; and if a surety pays money for his principal, even without suit, he may recover it in an action for money paid.

2. It is next insisted, that the judgment which was stayed was void, and therefore, the stayor incurred no liability. The argument is, that the original warrant was against Wynne, as well as against McDaniel, Williams, and Beardin; that it was not served upon Wynne, but that judgment was rendered against him as well as against the others; and that being so rendered, it is void as to Wynne, and, therefore, it is argued it is void as to all the parties. In the first place, we are not to infer from the judgment of the justice, that Wynne was included in it. The justice writes under the warrant simply, "judgment against the defendants for one hundred and nine dollars and thirty-five cents."

By the word "defendants," is to be understood those persons only on whom process had been served, and who were before the court. In the case of *Valentine v. Cooley*, Meigs, 618 [33 Am. Dec. 166], a *sci. fa.* was served on a part of the heirs only, and the record showed the "defendants" had demurred, and the demurrer was overruled. The court held, that this appearance, and demurrer by the "defendants," could not be regarded as an appearance for those who were not served with process. So here, we can not regard the word "defendants," as used by the justice, to mean others than those who were before him, by the service of process. Especially should this construction be placed on the word, as we see the justice in issuing the execution, did not include the name of Wynne in it; which he would have done, if he had given judgment against him. There is, therefore, no judgment against Wynne.

But had judgment been entered against Wynne in terms, although void as to him, it would not have been void as to the other defendants. In the case above referred to, of *Valentine v. Cooley*, the court say, "as all the parties were not before the court, the judgment against the adults was irregular, and could have been reversed *in toto* by writ of error: 2 Petersdorf, 578, pl. 5.

But although erroneous, it was not void as to those defendants who were properly before the court."

The remark of the court, in the case of *Trousdale and Bugg v. Donnell*, 4 Humph. 273, must be understood in reference to the case before the court. There had been no service on Bugg, and he and Trousdale both appealed. The only question was, whether there was error in the judgment, as to Trousdale. The judgment was certainly erroneous, and was properly reversed. The court must not be understood, by the words used, "void as to Trousdale," to mean, that it was as to him, a nullity; but that it was voidable, and liable to be reversed.

3. It is next contended that as the security for the stay was entered after the judgment was revived by the executors of Parker, such stay was without authority of law, and created no legal obligation on Winchester to pay this money.

The fourth section of the act of 1842, before referred to, provides, "that in all cases, where any justice of the peace shall hereafter render a judgment against any one or more defendants, the said justice may receive and enter security for the stay of said judgment, at any time before the same is paid, or execution is issued, with the consent of the plaintiff or his agent, and such security shall be bound in the same manner and to the same extent, as if the judgment had been stayed within the time now prescribed by law."

In the case before us, no execution had issued before the death of Parker, and when the judgment was revived in the name of the executors, one of them went before the justice of the peace, and agreed that the defendant, McDaniel, might then stay it, and upon this consent of the executor, Winchester became security for the stay. It is a case falling precisely within the letter of the statute. It is no attempt to stay the judgment of revivor, on the ground of that judgment conferring any right to a party, then to give security for the stay. If that were the question, the counsel for the plaintiff in error would be correct. But this is the stay by consent of the plaintiff, of the original judgment, before execution issued.

We think there is no error in this record, and affirm the judgment.

ONE COMPELLED TO PAY THE DEBT OF ANOTHER may recover from that other: *City of Baltimore v. Hughes' Adm'r*, 19 Am. Dec. 243. The principal case is cited to this point in *Holt v. Davis*, 3 Head, 632; and *Chaffin v. Campbell*, 4 Sneed, 193.

THE PRINCIPAL CASE IS CITED to the point that a judgment may be valid as to one person, although voidable as to another, in *Crank v. Flowers*, 4 Heisk. 631.

BATSON ET AL. v. MURRELL, ADM'R.

[10 HUMPHREYS, 301.]

ADMINISTRATOR OR EXECUTOR CAN NOT LAWFULLY RETAIN DEBT DUE HIM from the estate which he represents, which was barred by the statute of limitations before he administered.

EQUITY. The opinion states the case.

Thompson and Shackelford, for the complainants.

Munford and Robb, for the defendant.

By Court, **TURLEY, J.** Some time in the month of May, 1846, Agnes Johnson died in the county of Dickson, state of Tennessee, and Thomas Murrell administered upon her estate; and at the October term, 1846, of the circuit court of the county, filed his bill, *ex parte*, alleging that the perishable property belonging to the estate was not sufficient to pay the debts of the estate; and asking a decree to sell two negroes belonging to it, for that purpose. A decree was given by the circuit court to that effect. And the complainants, the heirs at law and distributees of the said Agnes, file this, their bill, to restrain a sale of the negroes under the decree, upon the alleged ground, that there are no debts due from the estate to make it necessary to sell the negroes; and that the attempt to do so by the administrator is a fraud upon their rights.

It appears from the proceedings in the case, that there are no debts of the estate, requiring a sale of the negroes, unless certain demands of the administrator against the estate, in his own right, are to be so regarded; and it is insisted that they are not; because they are barred by the statute of limitations; to which it is replied, that an executor or administrator is not bound to plead the statute of limitations; and that therefore he may retain for his own debts, though they be barred by the statute; and of course may, if need be, file his bill for a sale of negroes, under the statute in such case made and provided.

Then the only question presented for our consideration is, whether an executor or administrator can lawfully retain a debt due him from the estate which he represents, which was barred by the statute of limitations, before he administered. And we are very clear that he can not, upon unquestionable principles of right and wrong.

It is not intended to be questioned, that an executor or administrator is not bound to plead the statute of limitations, to an action commenced against him by a creditor of the estate;

for he may know that the debt is a just one, and that it ought in *foro conscientie* to be paid, though it be barred by the statute; and representing the estate in the place of the deceased, being bound morally and legally for its proper protection, and having no interest in the debt sued for, there can be no reasonable supposition that he will collude with the creditor to defraud it; and therefore it is considered perfectly safe, to let him rely upon the statute of limitations or not, at his own discretion, as the deceased himself could have done had he been alive.

But very different is it, when he himself seeks to charge the estate with his own debt which is barred by the statute of limitations; his position then becomes antagonistic to the estate; and other creditors and the distributees are the persons to judge as to the propriety of resisting his claim upon the ground that it is barred by the statute; and this they may do upon a bill to settle the estate, or as in the present case, to prevent the sale of negro property, upon an application to sell it for the payment of such debt; or in the case of creditors by setting it up as a defense against a retainer, upon the plea of fully administered.

A contrary principle would never do; men can not be trusted with such a high fiduciary power, to be exercised by them in cases affecting their own claims; the necessary consequence would be, that they never would fail to pay their own debts barred by the statute, no matter how iniquitous it might be not to set up the defense; and it would become a matter of struggle, with every creditor upon whose claims the statute was operative, for the administration of the estate, with the sole view of saving his debt.

There is no adjudged principle of law permitting such thing, and there never should be. Let the creditor whose claims are barred by the statute, permit the administration to go into other hands; then he can be met at arm's length by an adversary, who can properly represent the estate; if he can satisfy him that the bar of the statute ought not in conscience to be taken advantage of, well and good; he can then get his debt; more than this he ought not to claim.

In the case of *Tebbs v. Carpenter*, 1 Madd. 298, under the common decree in an administration suit, a creditor applied to prove a debt barred by the statute of limitations; and the executor refusing to interfere, the plaintiff, as residuary legatee, insisted upon setting up the statute; and Sir John Leach, M. R., held that it was competent for the complainant, or any other person interested in the fund, to take advantage of the statute

before the master, notwithstanding the refusal of the executor; and this decision was confirmed by Lord Chancellor Brougham upon appeal.

This is a much stronger case than the one now under consideration, for who can doubt, if the chancellor permitted a person interested in the fund to stop a creditor barred by the statute of limitations, when the executor refused to do it, that he would much more readily have permitted him to stop the executor himself, in an attempt to charge the fund with his own debt barred by the statute?

We therefore reverse the decree of the chancellor in this case, and give the relief asked by the complainants.

STATUTE OF LIMITATIONS DOES NOT RUN AGAINST ADMINISTRATOR'S CLAIM against his intestate's estate, because he can not sue himself: *State v. Reigart*, 39 Am. Dec. 628.

THE PRINCIPAL CASE IS CITED and approved in *Byrn v. Fleming*, 3 Head, 663; *Wharton v. Marberry*, 3 Sneed, 607; *Harrison v. Henderson*, 7 Heisk. 335. It seems that the statute extends to all cases where the full time to form the bar of the statute is permitted to expire before the administrator or executor makes known his claim and intention to retain it: *Wharton v. Marberry*, 3 Sneed, 607; *Byrn v. Fleming*, 3 Head, 663; *Harrison v. Henderson*, 7 Heisk. 335.

WILLIAMS v. ALLEN ET AL.

[10 HUMPHREYS, 337.]

NO SALE OF PERSONAL PROPERTY IS COMPLETE so as to vest an immediate right of property in the buyer, so long as anything remains to be done as between the buyer and seller; hence where a person bargained for some corn in pens on the bank of a river, at one dollar per barrel, to be subsequently measured, and the corn is destroyed by flood before being measured, the loss must fall on the seller, and the purchaser may recover money advanced upon the price.

ASSUMPSIT. The opinion states the case.

J. C. Guild, for the plaintiff.

Baldrige and Head, for the defendants.

By Court, **McKINNEY, J.** It appears from the bill of exceptions in this case, that in the latter part of the year 1847, the plaintiff bargained with the defendants for the purchase of a quantity of corn. Previous to the purchase, the corn had been put up in pens, on the bank of Bledsoe's creek, near its junction with Cumberland river. The bargain was for all the corn in the pens, at the price of one dollar per barrel; and the quantity

not being then known, was to be ascertained afterwards by actual measurement. It does not appear that any time was fixed either for the measurement of the corn, or payment of the price. In the month of December, 1847, before the corn was measured, it was swept off by a flood, and wholly lost. It appears from the proof that, after the purchase, the plaintiff assumed to be owner of said corn; and forbade an officer to levy upon it as defendant's property, stating, that it belonged to him, that he had bought it and paid part of the price, and was to pay the balance on his return from market. On the other hand, there is proof that when the flood began to threaten the loss of the corn, the defendant, Robert Allen, applied to some of the witnesses to aid him in saving it, "and called it his corn at the time." The witness Mathews heard a conversation between plaintiff and defendant, Robert Allen, some time after the contract for the purchase of the corn. Defendant "wished plaintiff to let him have a horse in part pay for the corn; plaintiff told him that the corn was not measured and delivered to him, and he was not bound to pay until that was done; yet to accommodate him, he would let him have the horse."

It further appears from the proof, that between the time of the contract and the loss of the corn, plaintiff let the defendants have a horse, some pork, and a small amount of money, towards the payment of the price of said corn, to recover back the value of which the present suit was brought.

On the trial in the circuit court, the judge instructed the jury: "That if the plaintiff bought a parcel of corn from defendants, which was in pens, separate and distinguishable from all other corn, at the price of one dollar per barrel; and there was nothing to be done by defendants but to measure it with plaintiff, and deliver it, the property in the corn vested unconditionally in the plaintiff, and the risk was of course his."

This instruction, we think, was incorrect. The general principle is well established, that no sale is complete, so as to vest an immediate right of property in the buyer, so long as anything remains to be done, as between the buyer and seller.

Where goods are sold by number, weight, or measure, so long as the specific quantity or measure is not separated and identified, the sale is not completed, and the goods are at the risk of the seller: Story on Con., sec. 800. The contract may be complete and binding in other respects, but the property in the goods remains in the vendor, and they are at his risk, if any act

is to be done by him before delivery, either to distinguish the goods or ascertain the price thereof: Ch. Con. 375, note 1.

Though the subject-matter of the contract be clearly ascertained, yet if the price can not be calculated until the parties have weighed the goods, no property therein passes to the buyer till such act be done: *Simmons v. Swift*, 5 Barn. & Cress. 857; Ch. Con. 377.

Where several bales of skins (stated in the contract to contain five dozen in each bale) were sold at a certain sum per dozen, but it was the duty of the seller to count over the skins, to see how many each bale actually contained, and before doing so they were consumed by fire, Lord Ellenborough and Sir James Mansfield held that no action could be maintained against the purchaser for the value of the skins; and that the loss fell entirely upon the seller: *Zagury v. Furnell*, 2 Camp. 242; see also *Hanson v. Meyer*, 6 East. 614; *Rugg v. Minett*, 11 Id. 210; *Simmons v. Swift*, 5 Barn. & Cress. 857.

And a mere assumption of ownership or control by the purchaser, will not be sufficient evidence of a delivery. At most, it affords merely a presumption of delivery, which may be repelled by evidence showing that the title remained in the vendor.

The foregoing authorities, which, we think, lay down the law correctly, clearly show, that the circuit judge erred in directing the jury, that the property in the corn in question was vested in the plaintiff, notwithstanding the failure of the defendants to measure and deliver it. On the contrary, by reason of their failure to do so, the right of property remained unaltered; and consequently the risk and loss were exclusively theirs.

The judgment will be reversed.

IN SALES OF PERSONAL PROPERTY, IF ANYTHING REMAINS TO BE DONE between the parties to put the articles in a deliverable state, the contract is not complete, and the property does not pass: *Pleasants v. Pendleton*, 18 Am. Dec. 726; but delivery by a vendor is sufficient where all has been done by him that he may do, though something remains to be accomplished by the vendee: *Hunt v. Thurman*, 40 Id. 683. The principal case is cited and approved in *Bond v. Greenwald*, 4 Heisk. 460.

CASES
IN THE
SUPREME COURT
OF
TEXAS.

CALLAHAN v. PATTERSON ET AL.

[4 TEXAS, 61.]

WIFE'S SEPARATE PROPERTY.—EQUITY WILL NOT DECREE SPECIFIC PERFORMANCE of a contract for the sale of the wife's separate property where the bond for title was not acknowledged by her in the manner prescribed by law, although this was owing to her sickness, and part of the consideration was a debt due from her before marriage.

PRIVY EXAMINATION OF WIFE APART FROM HER HUSBAND is indispensable to the conveyance of her separate property.

SEPARATE PROPERTY OF WIFE IS LIABLE FOR HER DEBTS contracted before coverture.

HUSBAND IS BOUND TO SUPPORT HIS WIFE OUT OF HIS OWN PROPERTY, if able to do so, without resorting to her separate property.

IF HUSBAND IS NOT ABLE TO SUPPORT HIS WIFE and her children, her separate property may be resorted to and made liable for that purpose.

WHERE JURY HAS BEEN WAIVED, THE JUDGE IS SUBSTITUTED to the same attributes that would have been vested in a jury.

TRANSFER BY WIFE OF HER SEPARATE PROPERTY, under the forms prescribed by law, will pass all her rights to the property, unsupported by a consideration, inuring to her benefit. *Per* Hemphill, C. J., and Wheeler, J. Liscomb, J., doubted.

SPECIFIC performance of contract for sale of land. The petition sets out the purchase of the land; that it was the separate property of the wife; that part of the purchase price was applied to an antenuptial debt of the wife, and the balance for necessities furnished her after her marriage; that the defendant James D. Patterson and his wife executed a penal bond to make good title to the land; that owing to the sickness of the wife, and the distance to a notary, it was not acknowledged by her; that she

died, leaving the minor defendant, Robert Patterson, her only offspring; that the defendant James D. was a poor man, and not able to respond in damages for the breach of the bond. The answer admitted the facts alleged in the petition, but denied that they were sufficient to entitle the plaintiff to a decree in his favor. Judgment for defendants; plaintiff appealed.

Vanderlip and Gordon, for the appellant.

No counsel for the defendants.

By Court, LEECOMB, J. The first question presented for our consideration is, Can the specific relief prayed in the petition be granted? Second. Is the petitioner entitled to any relief?

It seems to have been a favorite object with the framers of our constitution, to secure to the wife her separate property; and in the nineteenth section of the general provisions they have provided, that all "property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband." The first legislation on this subject, under the constitution, will be found in the act of the first state legislature, entitled an act defining the mode of conveying property in which the wife has an interest. It provides, "where a husband and his wife have signed and sealed any deed or other writing purporting to be a conveyance of any estate or interest in land, slave or slaves, or other effects, the separate property of the wife, or of the homestead of the family, or other property exempted by law from execution, if the wife appear before any judge of the supreme or district court, or notary public, and, being privily examined by such officer, apart from her husband, shall declare that she did freely and willingly sign and seal the said writing, to be then shown and explained to her, and wishes not to retract it, and shall acknowledge the said deed or writing, so again shown to her, to be her act; thereupon said judge, or notary, shall certify such privy examination, acknowledgment, and declaration, under his hand and seal, by certificate annexed to said writing, to the following effect or substance," etc.

It is manifest that the contract has not been executed and authenticated in the mode required by the act of the legislature just cited, to create any binding obligation on the wife, or to justify this court in divesting her heir of title in his mother's

land. But we are asked to give an equitable construction to the act, and to consider that as done, that was intended by the parties to be done, in the face of and in contravention of an express statute. We disclaim any right so to contravene and nullify such statute; up to the last moment, and even when about to acknowledge the contract, according to the statute, she has a right to retract and repudiate it. This statute, even when strictly observed, affords but a flimsy protection to the separate property of the wife. Such is the influence the husband acquires over the wife that, however worthless and profligate he may be, he would be able, generally, to procure her assent to transfer her property, with all forms required by the statute; and the proceeds would be spent by him in riot and debauch, if so inclined.

It may well be questioned, however, if a transfer, with the forms required, would pass all her rights in the property so transferred, unsupported by a consideration inuring to her benefit. It seems to me, that the spirit of the constitution, in giving and securing whatever separate property she may own, would be entirely defeated, if her property could be conveyed, without her receiving the benefit. Such a construction would not be repugnant to, nor inconsistent with, the provisions of our statute; because, when necessary to be sold for her benefit, the statute would afford the requisites, to be observed in such transfer. I do not wish to be understood, as deciding this last question, as it is not embraced in this case, nor necessary to a decision. I have only referred to it, in connection with the point arising on the contract sought to be enforced, for the purpose of eliciting investigation, on a question believed to be entitled to great consideration.

We will next consider, whether the plaintiff is entitled to any relief under his petition. We will lay down three propositions that will have a bearing on the question we are discussing; and they are believed to be incontrovertible: 1. That the separate property of the wife is liable for her debts, contracted before coverture; 2. That the husband is bound to support his wife, out of his own property, if able to do so, without resorting to her separate property; 3. That if the husband is not able to support his wife, and her children, her separate property may be resorted to, and made liable for that purpose.

For authorities to support these propositions, see *Smith v. Poythress*, 2 Fla. 93 [48 Am. Dec. 176]; *Smith v. Kane*, 2 Paige, 303; *Cater v. Eveleigh*, 4 Desau. 20 [6 Am. Dec. 596]; *Durr v.*

Lowyer, 2 McCord Ch. 369. Under the first proposition, it is found from the petition, and the evidence, that a debt of twenty dollars, incurred by the wife before coverture, was paid, as a part of the consideration of the contract. Consequently, that amount could claim satisfaction out of her separate property, if proved to the satisfaction of the court below. Under the second proposition, the evidence is far from satisfactory. It is, that he was a very poor man. This is too vague and indefinite; the wants of poor people are quite limited, and they are not apt, either to indulge in extravagances, or wish to do so.

The issue to be inquired into, from the evidence, is, whether he was able to support his wife and children, after marriage; and this should be answered in the affirmative, or the negative; if answered in the negative, then, under the third proposition, it would follow, that the separate property of the wife would be held liable for the necessary support of herself and her child. The testimony, as to furnishing these necessary supplies, by the proceeds of the contract, is as vague and indefinite as to the ability of the husband to support her and her children, by his own means. The petition does not disclose the amount of the consideration for the contract, nor the amount applied to the necessities of the wife; nor does it appear, from the evidence. This ought certainly to have been averred and proved. If these facts had been shown, so far as appropriated to the previous debts of the wife, before coverture, her property would be liable; and, so far as appropriated to her absolute necessities, if the inability of the husband had been found, the separate property would, also, have been liable to pay. But, the testimony was not certain, as to any necessary fact, but the twenty dollars, for a debt before coverture. Now, if the evidence had been offered to a jury, to support the facts essential to a recovery, and they had found a verdict for the defendant, could the verdict be set aside in this court, by the observance of anything like uniformity and consistency in our decisions? It has been before said that nothing was proved, with anything like certainty to a common intent, but the appropriation of the twenty dollars; and as the amount of the consideration money was neither averred nor proved, might not the jury have fairly inferred, that this sum being so inadequate for the one hundred and sixty acres of land, cast a shadow on the whole transaction, that justified them in discrediting the evidence, and concluding that the contract was without consideration? If we believe that, from the evidence, such would have been the legitimate conclusion of the

jury, we can not say that the judgment in the case was contrary to evidence; because, a jury being waived, the judge was substituted to the same attributes that would have been vested in the jury. The extent of the liability of the husband, on his bond, is not adjudicated, because we have not believed it presented by the record. Whatever rights the plaintiff may have against him, can be fairly adjudicated, in a case where that liability is asserted, and sought to be enforced. The judgment is affirmed, without prejudice to the plaintiff. If he has good cause of action and grounds to subject the separate property of the wife, those rights can be asserted in another action.

HEMPHILL, C. J. I dissent from the proposition which questions whether a transfer by a wife, of her separate property, under the forms prescribed by the statute, would pass all her rights to the property, unsupported by a consideration, inuring to her benefit. The statute expressly declares that such conveyance shall pass all her right, title, and interest, therein conveyed; and I am not apprised of any rule, or principle of law or equity, by which an exception is made to this general provision.

The rule seems to be, that the conveyance of the *feme covert*, made under the forms of law, of her separate property, is as valid as if made by a *feme sole*, or other person having capacity in law to contract; and its effect can be avoided only by showing mistake, fraud, or duress: *Bein v. Heath*, 6 How. 241. The purchaser has no concern with the investment of the proceeds of the sale. Their misapplication may raise an equity against the husband, which, in proper cases, will be enforced out of his estate; but this will not invalidate the conveyance, as in favor of the purchaser. The powers of *femes covert* over their separate estate, created by law, and over its disposal, when attempted in the mode pointed out by the statute, and their powers, as defined by the doctrines of equity jurisprudence, over their separate estates, created by deed, have been discussed, to some extent, in the case of *Cartwright v. Hollis and Wife*, 5 Tex. 152, and *Hollis and Wife v. François and Border*, Id. 195 [*post*], decided at this term; and to them I refer for a more full exposition of my views, touching the point raised by the proposition in question.

WHEELER, J. I concur with the chief justice upon the point presented in his opinion, in this case, and in the reference to the opinion of this court, in the cases cited; in which, also, I fully concur.

Judgment affirmed.

POWER OF FEME COVERT OVER HER SEPARATE ESTATE: See note to *Thomas v. Folwell*, 30 Am. Dec. 233-241, where the subject is discussed.

LIABILITY OF SEPARATE PROPERTY OF FEME COVERT FOR HER DEBTS: See note to *Ewing v. Smith*, 5 Am. Dec. 589-593; also note to *Thomas v. Folwell*, 30 Id. 233-241.

MITCHELL v. ZIMMERMAN.

[4 TEXAS, 75.]

INSTRUCTION MUST BE UNDERSTOOD IN REFERENCE TO THE ISSUE AND EVIDENCE in the case. The words employed must be taken in their ordinary and popular acceptance.

IF PARTY INTENTIONALLY MISREPRESENTS MATERIAL FACT, or produces a false impression by words or acts, in order to mislead or obtain an undue advantage, it is a case of manifest fraud.

ANY INTENTIONAL MISREPRESENTATION OR CONCEALMENT OF MATERIAL FACTS in the making of a contract, in cases in which the parties have not equal access to the means of information, will vitiate and avoid the contract, and it is immaterial whether the misrepresentation be made on the sale of real or personal property, or whether it relates to the title to land or some collateral thing attached to it.

WHERE PARTY MAKES MISREPRESENTATION OF FACT, supposed to be peculiarly within his knowledge, whether he knew it to be false or made the assertion without knowing whether it was true or false, is wholly immaterial.

RULE OF CAVEAT EMPTOR DOES NOT APPLY where one party to the contract entered into it by reason of the false and fraudulent representations of another who is supposed to possess superior means of information.

OWNER OF PREMISES MUST BE SUPPOSED TO BE PECULIARLY COGNIZANT OF QUANTITY OF LAND fit for cultivation in a tract which he undertakes to sell or lease. And a stranger coming to buy or lease has both a natural and proper right to look to him for such information and to expect the truth.

EVERY PERSON REPOSES, AT HIS PERIL, IN THE OPINION OF OTHERS, when he has equal opportunity to form and exercise a correct judgment of his own.

WHEN MISREPRESENTATION IS MADE BY VENDOR AS TO THE QUANTITY OF LAND, though innocently, the right of the purchaser is to have what the vendor can convey, with an abatement out of the purchase money for so much as the quantity falls short of the representation.

LESSEE OF LAND HAS RIGHT TO ABANDON AND AVOID THE LEASE altogether, or remain upon and cultivate the land actually conveyed and have an abatement of the price *pro tanto* the deficiency, where the lessor fraudulently misrepresented the quantity.

DEFENDANT IS NOT ESTOPPED FROM DENYING THAT ANYTHING IS DUE from him to plaintiff by his declarations at the time of making his last payment that "he did not admit the justice of the claim, but would pay rather than go to law," and asked further time on the balance stipulated in the contract.

Suit for two hundred and twenty-five dollars, balance due on a written agreement. Defendant admitted the agreement, but alleged that he was induced to make it by the fraudulent representations of plaintiff. The evidence showed two payments made on the agreement, one after the expiration of the agreement or lease; that the defendant then complained of the plaintiff, and said he had been advised not to pay the rent, and did not admit the justice of the claim, but said he would pay rather than go to law, and asked further time on the balance stipulated in the contract. Judgment for defendant; plaintiff appealed.

Lewis and Rivers, for the appellant.

Gillespie, for the appellee.

By Court, WHEELER, J. It is insisted, on behalf of the appellant, that the court erred in the instruction to the jury, and that the verdict was not warranted by the evidence.

The instruction given must be understood in reference to the issue and evidence in the case. The defense relied on was the fraudulent misrepresentation of the plaintiff in respect to the quantity of land, within the rented premises, in a good condition for cultivation. The issue was as to this alleged fraud and deception, and to this point the evidence was directed. The charge then must be understood as having had an especial and direct reference to this issue, and the evidence respecting it. The words employed must be taken in their ordinary and popular acceptation. And, thus understood, the instruction was, in effect, that if the plaintiff had induced the defendant to enter into the contract, by fraudulent misrepresentations, by which the latter had been deceived to his prejudice, the plaintiff was entitled to recover only the actual value of the rented premises; otherwise, he was entitled to recover the full amount contracted for, less the payments previously made. This instruction as applied to the case in evidence was, it is conceived, correct. If the party, says Story, intentionally misrepresents a material fact, or produces a false impression by words or acts, in order to mislead, or obtain an undue advantage, it is a case of manifest fraud: Story's Eq. Jur., sec. 192. It is a rule in equity, that all the material facts must be known to both parties, to render the agreement just and fair in all its parts: 2 Kent's Com. 491. And if there be any intentional misrepresentation or concealment of material facts, in the making of a contract, in cases in which the parties have not equal access to the means of

information, it will vitiate and avoid the contract: *Id.* 482; *Loury v. Pinson*, 2 Bailey, 324 [23 Am. Dec. 140]. It is immaterial whether the misrepresentation be made on the sale of real or personal property; or whether it relates to the title to land, or some collateral thing attached to it: *Culver v. Avery*, 7 Wend. 380 [22 Am. Dec. 586].

That there was, in this case, a gross and palpable misrepresentation and deception, intentionally practiced upon the defendant by the plaintiff, in a most material fact, seems scarcely to admit of a doubt. The plaintiff assumed to know, and stated the fact to be, that there were of the premises one hundred and forty acres of land in a good condition for cultivation; whereas the fact was that there were not fifty acres in that condition. But whether the party, thus misrepresenting the fact, knew it to be false, or made the assertion without knowing whether it were true or false, is wholly immaterial; for, it has been justly said, the affirmation of what one does not know or believe to be true, is equally, in morals and law, as unjustifiable as the affirmation of what is known to be positively false: 1 Story's Eq. Jur., sec. 193; *Ainslie v. Medlycott*, 9 Ves. 21. The present, therefore, seems to have been a case of manifest, positive fraud on the part of the plaintiff, of a character to vitiate and avoid the contract.

It can not with justice be said that the parties had equal means of information respecting the facts, and that therefore the maxim of *caveat emptor* ought to apply. Their means of information can not be said to have been equal. And that rule does not apply where one party to the contract entered into it by reason of the false and fraudulent representations of another who is supposed to possess superior means of information: *Irving v. Thomas*, 18 Me. 418. A false representation relating to the value of an estate, the knowledge of which is usually confined to the owner and those standing in confidential relations to him, does not come within the rule that the party making it is not responsible to one deceived by it; by reason of its being a matter which is or should be equally well known to both parties: *Id.* And a lessee, it has been held, can not be considered as having waived such defense to an action on the lease, from the mere fact that he had been upon the premises before the lease was executed: *Id.* The owner of the premises must be supposed to be peculiarly cognizant of the fact of the quantity of land fit for cultivation, which he undertook to state, and which a stranger coming to lease the premises is not sup-

posed to know. It was both natural and proper for the latter to look to the former for information, and he had a right to expect the truth. Nothing less could accord with the plainest dictates of honesty and fair dealing, or could comport with the duty of the plaintiff, in morals and law. The representation was in a matter respecting which the defendant is not supposed to have been, equally with the plaintiff, acquainted with the facts; and it was made in a manner so positive and definite as naturally to induce the former to forbear using the means of information which, for his own security, he might otherwise have employed. And these are the circumstances which render the misrepresentations of a character to avoid the contract: 1 Story's Eq. Jur., secs. 198, 199; 2 Kent's Com. 487.

It is, indeed, true that every person reposes at his peril, in the opinion of others, when he has equal opportunity to form and exercise a correct judgment of his own; but that is not the case of the present defendant. If, says Sugden, an estate be represented as containing a given quantity, although not professedly sold by the acre, the circumstance that the purchaser was intimately acquainted with the estate, would not necessarily imply knowledge of its exact contents; while a particular statement of the quantity would naturally convey the notion of actual admeasurement, and therefore the court would not be warranted in inferring that the purchaser knew the real quantity: Sugd. on Vend. 293, 294. And, *a fortiori*, this would be the case, where the purchaser was wholly unacquainted with the premises.

Upon the discovery of the fraud, it doubtless was competent for the defendant to have abandoned, or restored the premises to the plaintiff and thereby wholly to have avoided the contract. But as it appears that he could not have done so without inconvenience and injury, and could not have been restored to his original condition before making the contract, it was not, as we conceive, necessary for him to have done this, to enable him to resist the payment of so much of the price stipulated for the premises, as the quantity fell short of the representation: *Wyman v. Heald*, 17 Me. 329; *Waters v. Travis*, 9 Johns. 465. The rule is stated to be, that if an estate be sold at so much per acre, and there is a deficiency in the number conveyed, the purchaser will be entitled to compensation: Sugd. on Vend. 291. And the rule is the same, says Sugden, though the land is neither bought nor sold professedly by the acre; the presumption is, that in fixing the price, regard was had, on both sides, to the quantity which both supposed the estate to consist of. The demand of

the vendor and the offer of the purchaser, are supposed to be influenced in an equal degree, by the quantity which both believed to be the subject of their bargain. The general rule, therefore, is, that when a misrepresentation is made as to the quantity, though innocently, the right of the purchaser is to have what the vendor can convey, with an abatement out of the purchase money, for so much as the quantity falls short of the representation: *Id.* And surely the right of the vendee or lessee will not be prejudiced by the fact, that the representation was not innocently, but intentionally and fraudulently made. It is a very old head of equity, said Lord Eldon, *Evans v. Bicknell*, 6 Ves. 182, that if a representation be made to another person going to deal in a matter of interest, the former must make the representation good, if he knew it to be false.

It appears to have been optional with the defendant whether he would at once abandon and avoid the contract altogether, or remain upon and cultivate the land actually conveyed, and have an abatement of the price, *pro tanto* the deficiency: *Evans v. Bicknell*, 6 Ves. 182; *Quemel v. Woodlief*, 2 Hen. & M. 173, n.; *Jolliffe v. Hile*, 1 Call. 301 [1 Am. Dec. 519]; *Nelson v. Carrington*, 4 Munf. 332 [6 Am. Dec. 519]; *Glover v. Smith*, 1 Desau. 433 [1 Am. Dec. 287]; *Peay v. Briggs*, 2 Mill Const. 100 [12 Am. Dec. 656]. The right of the defendant therefore, to his defense, was not waived nor lost by his omission to restore the premises. Nor is it conceived to have been affected by his subsequent promises of payment; since those promises were accompanied with protestations against the justice of the claim, and appear to have been induced by the fear of litigation. The defendant had already paid more than the proportionate value of the quantity of land found to be in good condition for cultivation; and upon no principle of equity or justice could more be required of him. The plaintiff had no right to demand more, and any promise which the defendant may have made after the contract had been in equity executed, and his liability under it extinguished, was without consideration, a mere *nudum pactum*, not obligatory upon him: 2 Bla. Com. 448.

The instruction given by the court, as a legal proposition, was more favorable to the appellant than he could have required; for it asserts that if there was no fraud on the part of the plaintiff, he was entitled to the full amount stipulated in the contract; whereas, had the misrepresentation been innocently made, as we have seen, still the defendant would have been entitled to an abatement of the price, for so much as the actual

quantity fell short of the representation. But this is not an error of which the appellant can complain.

The defense relied on appears to have been a valid defense to the action, and the verdict to have been fully supported by the evidence; and we are of opinion, therefore, that the judgment be affirmed.

Judgment affirmed.

MISREPRESENTATION OF MATERIAL FACT, THOUGH UNINTENTIONAL, made by one of the parties to a contract, whereby the other party is induced to contract, is as much a fraud as though intended: *Tyson v. Passmore*, 44 Am. Dec. 181, and note. Where a vendor is induced to make the sale by misrepresentations made to him by the purchaser in respect to material facts peculiarly within his knowledge, by which the seller is deceived to his injury, the sale is void, and the title does not pass to the purchaser: *Griffin v. Chubb*, 7 Tex. 603.

AFFIRMATION OF WHAT ONE DOES NOT KNOW OR BELIEVE TO BE TRUE is equally in morals and law as unjustifiable as the affirmation of what is known to be positively false: *Juzan v. Toulmin*, 44 Am. Dec. 448, and note.

INSTRUCTIONS MUST BE TAKEN AND CONSIDERED IN REFERENCE TO THE EVIDENCE. That an instruction be correct in its application to the particular case, is all that is required: *Davis v. Loftin*, 6 Tex. 489.

THE PRINCIPAL CASE IS CITED to the point that where a misrepresentation as to the quantity of the land is made by the vendor, though innocently, the right of the purchaser, if he does not abandon the contract, is to have what the vendor can convey, with an abatement of the purchase money for so much as the quantity falls short of the representation, in *Walling v. Kinnard*, 10 Tex. 508; and to the point that if a party undertake to make a material statement, not knowing whether it is true or false, and thereby mislead another to his injury, it is no difference that he did not know that the statement was false, in *Henderson v. R. R. Co.*, 17 Id. 576.

SHELTON v. WADE.

[4 TEXAS, 148.]

IT IS WITHIN DISCRETION OF COURT TO REFUSE TO DISMISS APPEAL on account of the mere informality or insufficiency of the appeal bond, where the appellant will immediately give a good and sufficient bond.

CONSTITUTION GUARANTEES RIGHT OF APPEAL.—The laws regulating the exercise of the right are intended to afford the party every possible facility in its furtherance consistent with a due regard to the rights of the opposite party, and they should be so construed as most certainly and effectually to attain this object.

IT IS NOT NECESSARY THAT PRINCIPAL IN APPEAL BOND should have signed; the execution of the bond by the sureties is sufficient.

MOTION to dismiss an appeal. The opinion sufficiently states the grounds of the motion.

Harris and Pease, for the appellant.

Munger, for the appellee.

By Court, WHEELER, J. The affidavit of the appellant is regarded as having sufficiently accounted for the delay in filing the record; and it was so considered and determined by the court at the last term. It therefore only remains to determine whether the appeal ought to be dismissed for the want of a sufficient appeal bond. It is believed to be the settled practice, to hold it within the discretion of the court, to refuse to dismiss an appeal on account of the mere informality or insufficiency of the appeal bond, where the appellant will immediately give a good and sufficient bond. And it was so held by the supreme court of the republic, in the case of *Crosby v. Huston*, 1 Tex. 203. We see no objection to the exercise of this discretion. The constitution guarantees the right of appeal. The laws, regulating the exercise of the right, are intended to afford the party every possible facility in its furtherance, consistent with a due regard to the rights of the opposite party; and they should be so construed, as most certainly and effectually to attain this object. It is difficult to conceive of any just cause, which the appellant can have, to complain, when he has already been secured by a sufficient bond. His security, in this respect, would seem to be his only proper concern. To dismiss the appeal for the want of a sufficient bond, when one amply sufficient has been given, would be to drive a party to his writ of error, and thus to increase the delay and expense of litigation, without securing any ultimate advantage to the party.

The objection to the bond, for the want of the signature of the appellant, can not be maintained. It was not necessary that the principal should have signed; the execution of the bond by the sureties was sufficient; the principal being as effectually bound by the judgment, without signing the bond, as he could have been by it. This has been repeatedly decided: *Anonymous*, Hard. 149; *Harrison v. Bank of Kentucky*, 3 J. J. Marsh. 376; *Thom v. Savage*, 1 Blackf. 51.

We are of opinion that the motion to dismiss be overruled.

Ordered accordingly.

SIGNATURE OF OBLIGOR IS NOT ESSENTIAL TO VALIDITY OF APPEAL BOND duly sealed by him: *Parks v. Haglerigg*, 43 Am. Dec. 106. The principal case is cited to the point that an appeal bond need not be signed by the appellant, in *Lindsay v. Price*, 33 Tex. 280.

OBJECTION THAT APPEAL BOND WAS NOT ACKNOWLEDGED before an authorized officer, being merely technical, the court will retain the appeal and per

mit the bond to be properly acknowledged, upon the usual terms, if a dismissal would sacrifice any substantial right of the appellant; but not where the appeal itself rests upon merely technical grounds: *Ridabock v. Lery*, 35 Am. Dec. 682. And see *Harper v. Archer*, 43 Id. 472. The principal case is cited to the point that an appeal will not be dismissed merely for informality or insufficiency in the bond, if the appellant will immediately cure the defect by giving a sufficient bond, in *Berry v. Martin*, 6 Tex. 264; and to the point that where an appeal bond was for too small an amount, the appellant will be permitted to file a new bond, in *Scranton v. Bell*, 35 Id. 415; and *Hollis v. Border*, 10 Id. 279.

CROZIER ET AL. v. KIRKER.

[4 TEXAS, 232.]

STATUTE PROVIDING THAT WHERE PARTY WILL MAKE OATH THAT HE HAS NO OTHER EVIDENCE than his own oath to establish a material fact he may testify himself touching such fact, contemplates that the party proposing to testify in his own case shall, in his preliminary examination touching his right to do so, state the fact or facts to which he proposes to testify.

IN ALL CONTRACTS CONCERNING NEGOTIABLE PAPER, ACT OF ONE PARTNER binds all, even though he sign his individual name, if it appear on the face of the paper to be on partnership account, and to be intended to have a joint operation.

INSTRUCTION IS ERRONEOUS WHICH ASSUMES FACT TO BE PROVEN instead of leaving it to the jury.

PERSON HOLDING HIMSELF OUT AS PARTNER, though in fact no partnership exists, is liable to a creditor who contracts with the firm.

EVERY PARTNER HAS IMPLIED AUTHORITY TO BIND HIS COPARTNER by the making of notes and the drawing and accepting of bills for commercial purposes consistent with the object of the partnership; and to rebut this presumption of authority, there must be proof of fraud, or a knowledge of the want of authority, or notice to the party seeking to charge the firm that the other partners would not be responsible for the acts of their copartners.

ACTION on a promissory note payable to plaintiffs and signed "J. Lombardo & John Kirker." Lombardo admitted the making of the note by him, and that it was made on the partnership account. It was proved that Lombardo & Kirker were partners, at and prior to the time of the making of the note, in the retail of spirituous liquors. About a week after the making of the note, Lombardo went down westward, with an adventure of merchandise, and Kirker told one of the witnesses, at the time, that he and Lombardo were partners in that adventure also. Kirker swore that he did not authorize Lombardo to make the note; that it was given for liquors and goods which Lombardo

had taken down westward; and that he, Kirker, was not in partnership in that adventure. The court refused to give the first and second instructions of plaintiffs, viz.: "1. That the partnership name may consist of the persons composing the firm; and in the absence of proof of a particular name, the names of both, signed by either, would be *prima facie* binding on both, if a partnership be proved." "2. That if the jury found from the evidence that Lombardo and Kirker were partners, then either could sign the name of both to a promissory note, and it lies upon the one claiming not to be bound to show that the note was not given for partnership purposes, and that the person to whom the note was given knew it, or had cause to suspect it." Judgment for defendant; plaintiffs appealed. The other facts in the case sufficiently appear from the opinion.

O. C. Hartley, for the appellants.

J. B. Jones, for the appellee.

By Court, WHEELER, J. In the decision of this case, it becomes material to consider the rulings of the court: 1. In admitting the defendant Kirker to testify; 2. In the instructions to the jury; and, 3. In refusing a new trial.

1. The first question, here presented, must be determined by a reference to the fifty-seventh section of the act to regulate proceedings in the district court. This section was intended to provide for a class of dealing, so trivial in amount as not to justify, in all cases, the obtaining of formal proofs. It provides, that where the party will make oath that he has no other evidence, than his own oath, to establish a material fact, he may himself testify touching such fact. This innovation upon the common-law rules of evidence, was introduced from the supposed necessity of the case, and is allowed where there is a destitution of other means of proof; but it is not to be extended beyond the express enactment. This evidently contemplates, that the party proposing to testify in his own case, shall in his preliminary examination touching his right to do so, state the fact, or facts, to which he proposes to testify. He is not to be allowed to testify generally, but only as to such facts as he may be unable to prove by other evidence. This is the evident meaning of the statute; and it was not admissible to extend its operation beyond the obvious import of its terms. The court, therefore, erred in not requiring the party to state the facts, touching which he proposed to testify, and in not confining his testimony to those facts. But the party was not only permitted

to testify generally, but when it was objected, that he was speaking as to facts which, it was apparent, he could prove by other evidence, the court still refused to arrest his testimony, and ruled, that "the jury should decide whether he swore to any fact which he could prove by anybody else, and if so, they should reject so much of his testimony." This, it would seem, was to submit to the jury, a difficult inquiry; for it is not easy to perceive, how they could know whether or not the party could prove the same facts by other evidence. It was at least an inquiry which it did not belong to them to determine.

2. As to the rulings of the court respecting instructions to the jury. The first branch of the instruction given, that is, "that in order to bind all the partners, the note given in evidence must be signed with the partnership name and style," is erroneous. On the contrary, in all contracts concerning negotiable paper, the act of one partner binds all, even though he signs his individual name, if it appear on the face of the paper, to be on partnership account, and to be intended to have a joint operation; and the holder may, at his election, enforce payment either jointly, against the firm, or separately, against the party whose signature is attached: *Gow* on Part. 39; 3 Kent's Com. 41; *Doty v. Bates*, 11 Johns. 544; *Hunt v. Adams*, 6 Mass. 519. Here one partner had signed the names of both, and there could be no doubt, from the face of the paper, that it was intended to have a joint operation. The instruction, therefore, was not only erroneous, as a legal principle, but it was so, especially, in its application to the case in evidence.

The remaining branch of the instruction, viz., "that a limited partnership in the bar-room did not authorize either to charge the other for goods not in the nature of the partnership business," is erroneous in two respects: 1. It assumes the fact to have been proved, instead of leaving it to the jury to find the fact from the evidence: *Cobb v. Beall*, 1 Tex. 342; *Lightburn v. Cooper*, 1 Dana, 273. 2. It was not proved as assumed, that the partnership was "limited" to the bar-room; but, on the contrary, there was evidence that the defendants were also partners in the "adventure down west," in the furtherance of which, the note in suit, was given.

The first proposition asked by the plaintiffs, as an instruction, was clearly correct, and ought to have been given. It is difficult to conceive upon what ground it was refused. It was not only correct in the abstract, but it was a proper instruction to have been given in this case. There had been no proof that this

firm was known by any particular name. They had signed and used the name of "J. Lombardo & Co.," but whether on more than one occasion, does not appear, nor does it appear that that was the name by which they were accustomed to act and contract, or by which they were known.

The second and third propositions, asked as instructions, by the plaintiffs, are correct, with the qualification that it be understood, as it doubtless was supposed to be, that the making of the note referred to, was within the scope of the partnership, or that it was given in a partnership transaction; and this ought, perhaps, to have been expressed.

3. As to the ruling of the court, in refusing a new trial. This was asked on various grounds, but it will only be necessary to consider that which relates to the finding of the jury upon the evidence. It was proved that the note sued on was given in a partnership transaction; the adventure in which the defendant Kirker had admitted that he was a partner. The only evidence relied on to discharge the defendant Kirker from liability upon the note was his own testimony, that he did not authorize Lombardo to make the note, and that he, Kirker, was not a partner in the adventure. It may be true, that Kirker did not expressly authorize Lombardo to make this note; but it is certainly true, that he held himself out to third persons as a partner in the transaction in which it was given. He so stated to the witness. And this was an implied authority to Lombardo, his ostensible partner, to use his name, and as to third persons was binding upon him, whatever may have been the private understanding between the partners. If a person hold himself out as a partner, though in point of fact no partnership exists, he is liable to a creditor who contracts with the firm: Comyns on Con. 481; 3 Kent's Com. 41.

Where (says Starkie) two or more unite in partnership for carrying on a particular trade, or other purpose, they become, in point of law, so identified with each other that the acts and admissions of any one, with reference to the common object, are the acts and declarations of all, and are binding upon all. The very constitution of this relationship furnishes a presumption that each individual partner is an authorized agent for the rest: 2 Stark. Ev. 582. And the acts and representations of parties may be conclusive evidence of their partnership in favor of strangers who are not cognizant of their private arrangements, but who must be guided by external indications, although as between themselves they are not partners: Id. 583. Hence,

if a person has represented himself to be a partner, and has been trusted as such, he is bound by that representation; and it is no defense for him to show that he was not in fact a partner: *Id.* 586. Every partner has an implied authority to bind his copartners by the making of notes, and the drawing and accepting of bills for commercial purposes, consistent with the object of the partnership: *Harrison v. Jackson*, 7 T. R. 210; *Gallicay v. Mathew*, 10 East, 264; *Ridley v. Taylor*, 13 *Id.* 175. And to rebut this presumption of authority, there must be proof of fraud, or a knowledge of the want of authority, or notice to the party, seeking to charge the firm, that the other partners would not be responsible for the acts of their copartners: 2 Stark. Ev. 143, 589. There is no pretense of fraud in the present case; and the notice given was not until long after the making of the note sued on. The facts relied on by the defendant constituted no defense to the action, and the plaintiff, under the evidence, was entitled to recover. The verdict, therefore, was against evidence, and ought to have been set aside, and a new trial granted.

Judgment reversed.

ONE PARTNER CAN BIND HIS COPARTNERS BY NOTE IN NAME OF FIRM in those partnerships only that are engaged in a trade or concern in which the issuing or transfer of bills is necessary or usual, unless express authority for the purpose is given: *Lanier v. McCabe*, 48 Am. Dec. 173, and note; see also *Flemming v. Prescott*, 45 *Id.* 766.

PRAYER FOR INSTRUCTION MAY ASSUME as many facts as the party thinks his testimony will prove, but if there is no legal testimony to prove a single one of those facts, the prayer must be denied: *Whiteford v. Burckmyer*, 39 Am. Dec. 640. A charge which assumes a fact to be proved which is not proved is erroneous: *Wells v. Barnett*, 7 Tex. 584; *Hardy v. De Leon*, 5 *Id.* 211; *Wheeler v. Moody*, 9 *Id.* 372; *Gay v. McGuffin*, *Id.* 501; *Gibson v. Hill*, 21 *Id.* 225; *Drinkard v. Ingram*, *Id.* 650; *Howerton v. Holt*, 23 *Id.* 51; *Fridgan v. Buchannon*, 24 *Id.* 655.

FITZHUGH v. CUSTER.

[4 TEXAS, 301.]

CONTROLLING PRINCIPLE WHICH PERVADES OUR ENTIRE SYSTEM OF CIVIL JURISPRUDENCE is that which forbids a multiplicity of suits, and requires the rights of the parties incident to the subject-matter of the suit, whether they be of a legal or equitable character, to be determined in a single controversy.

AT COMMON LAW IT WAS THE PRACTICE TO CONSIDER RETURN TO RULE TO SHOW CAUSE why a *mandamus* should not issue as conclusive, and to remit the prosecutor to an action on the case, or to a crim-

inal information, for a false return, before a peremptory *mandamus* would be awarded; but this is repugnant to our system of procedure, which repudiates two suits where the matters at issue can be properly tried and determined in one.

DOCTRINE THAT JUDGMENT MUST STAND UNLESS REVERSED FOR ERROR, or set aside for fraud, does not apply where the want of jurisdiction is made a question; this may always be set up when a judgment is sought to be enforced, or any benefit is claimed under it.

WHERE RECORDS OF COURT, IN CONTESTED ELECTION CASE, show that no quorum of judges was present, that the contestants' attorneys submitted the case to arbitration, that the award of the arbitrators was made the judgment of the court, the whole proceedings are a nullity, because the award was not rendered as a judgment by a court, there being no quorum.

APPEAL. Custer received certificate of election as sheriff. Fitzhugh, also a candidate, contested the election. The court records showed that no quorum of the justices of the court appeared, but that the counsel of the contestants agreed to, and did submit, the controversy to arbitrators; that it was declared by them, there being a tie between the contestants, that the election be set aside, and a new one was ordered. This award was entered as the judgment of the court. An election was ordered, and Fitzhugh declared elected, and received the certificate. Custer applied for writ of *mandamus* to compel Fitzhugh to deliver him the office. It was ordered to issue by the court. Fitzhugh appealed. The opinion states the other facts.

Everts, for the appellant.

Cravens, for the appellee.

By Court, HEMPHILL, C. J. The first assignment will be disposed of very briefly. No motion to dismiss, nor action of the court upon such motion, appears of record. In the opinion delivered by the judge, there is a casual observation from which it may be inferred that such motion was made, but this furnishes no such evidence of the point raised, or of the ruling of the court, as will authorize the exercise of appellate supervision.

The second assignment may be considered as embracing, though not very distinctly, two propositions: 1. That the return was sufficient, in its statement; and the writ should have, therefore, been refused. 2. That if the truth of the fact stated in the return could be impeached in the same suit in which it was filed, yet the judgment of the county court being valid, its obligation could not be disregarded.

The first proposition suggests a question of great importance in our practice, which has been discussed but very briefly, if at

all, by counsel, and which has not been decided in any of the cases for *mandamus* which have been before the court. There is no doubt that at common law, if the return showed sufficient legal reason against the award of the writ, the proceedings on the *mandamus* terminated. Its verity could not be questioned in that suit; and the only remedy of the prosecutor was by bringing an action on the case for a false return, or a criminal information, where the rights of the public, rather than those of any individual in particular, were concerned; and if judgment be given establishing the falsity of the return, a peremptory *mandamus* would then be awarded: *The Case of the Surgeons' Company*, 1 Salk. 374; *Rex v. Abingdon*, 2 Id. 431, 432; *Bagg's Case*, 11 Co. 99, b; Wil. M. C. 427, 428, 429, 443. This continued, in all cases of *mandamus*, until by the statute of 9 Anne, c. 20, the return to writs issued for offices and franchises, in corporations and boroughs, were made traversable, as to their material facts; and such further proceedings were directed to be had, as if the applicant for the writ had brought his action for a false return. And by the statute of Wm. IV., c. 21, the same rule was extended to all cases for *mandamus*, and the prosecutor was authorized to plead to, or traverse the return; and his antagonist to take issue, reply, or demur; and the same proceedings to be had as on action for a false return.

The mischiefs, designed to be obviated by permitting the facts of the return to be immediately controverted, and their truth or falsity ascertained, are very forcibly depicted in the preamble to the statute of Anne. Many of the offices into which divers persons had illegally intruded themselves were annual offices. And it had been found very difficult, if not impracticable, by the laws then in being, to bring the rights of such persons to the offices to a trial and determination within the compass of the year. And where they were not annual, it was difficult to determine the right before such persons had done divers acts in their said offices prejudicial to the peace, order, and good government, within the cities, towns, etc., wherein they had acted: "And whereas divers persons, who had a right to such offices, or to burgesses, franchises, etc., of such cities, have either been illegally turned out of the same, or refused to be admitted thereto; having, in many cases, no other remedy to procure themselves to be admitted or restored thereto than by writs of *mandamus*, the proceedings on which are very dilatory and expensive, whereby great mischiefs have already ensued, and more are likely to ensue, if not timely prevented."

The remedy provided was to require the defendants to make a return to the first writ of *mandamus*, and to authorize the prosecutor, as already stated, to controvert the return and have the matters at issue at once ascertained and determined.

The statute of Anne has not been made of force in this state, nor has any one containing provisions of a similar character, specifically applicable to writs of *mandamus*, been adopted; and the question arises, whether under our system of procedure and pleadings, we may not well hold, that the truth of all matters which are alleged in the pleadings in any action, may and should be ascertained and determined in the same suit, without the necessity of resorting to a second action—for the express and sole purpose of determining whether the matters stated are true or false. That this proposition should be answered in the affirmative, it seems only necessary that it should be stated. If the facts can be controverted at all, they can be determined as well in one as in two or any number of actions.

A controlling principle, which pervades our entire system of civil jurisprudence, is that which forbids a multiplicity of suits, and requires the rights of the parties, incident to the subject-matter of the suit, whether they be of a legal or equitable character, to be determined in a single controversy. This is conceived to be a great improvement over the system, which permitted two suits in relation to the same subject-matter, one for the trial of the legal, and the other of the equitable rights of the parties; and which authorized a judgment, obtained in one form, to be, perhaps immediately, enjoined by the same court, under powers vested by a different jurisdiction. This rule of procedure, requiring the rights of the parties to be tried in one action, has been enforced from the first organization of our courts, and under the former, as well as the existing system of jurisprudence; and by the seventh section of the act organizing the district courts, etc., Laws of 1846, p. 202, the court is directed to grant all such orders, writs, or other process necessary to obtain the relief prayed for, and to so frame the judgments of the court, as to afford all the relief which may be required by the nature of the case, and which is granted by courts of law or equity. A marked characteristic of our system, is the repudiation of two suits, where the matters at issue can be properly tried and determined in one; and the party entitled, must have the judgment, whether his rights be founded on the principles of law or equity.

If rights of legal and equitable cognizance, can be blended

and tried in the same suit, and this for the beneficial purpose of putting an end to litigation, and for the speedy and cheap administration of justice, it would seem that no rule of law or practice could be tolerated under our system, which would prohibit an inquiry into the facts pleaded in a suit, and yet permit a second action for that express purpose. If any advantage could be derived by the trial of the dispute as to the facts, in a separate action, we might hesitate in the rejection of the rule, however inappropriate and apparently repugnant to our system of procedure. But there is none. Its only results are delay and expense to the parties, and their concomitant mischiefs.

It would be a fruitless task, to attempt to explore the reasons upon which the rule was originally founded. Its absurdity and insufficiency for any good purpose, are established by its partial abolition nearly a century and a half since, in England, and its subsequent complete abrogation in all cases of *mandamus*.

The introduction of the writ of *mandamus*, by name, does not necessarily bring with it all the rules of practice, regulating the issue of the writ. The rules of pleading, in cases of *mandamus*, are judicious, and should be enforced when not incompatible with statutory regulations. The certainty of pleading, required both in the application and the return, was to some extent indicated in the case of *Cullem v. Latimer*, 4 Tex. 329, decided at the present term. That the rules which govern the writs of *mandamus* at common law, are modified, as well by our statutes, as by the structure and organization of our courts—and we may add, in this case, by the principles which lie at the foundation of our system of procedure, was decided by the supreme court of the republic, in the case of *Bradley v. McCrabb*, Dallam's Dig. 508. In the opinion, it is stated, that in deciding on the proper practice to be pursued under our laws, and the organization of our courts, we derive but little assistance from an examination of the practice of the common-law courts of England; and the decisions thereon, are no further binding, than as they are applicable to the structure of our courts of justice. There, the terms of the courts are frequent and long continued, and the difference between the time of the *teste* and the return of the writ, varies according to the distance of the respondent from the place where the sessions of the courts are holden. Here the courts are held but twice in the year. The term of many of them does not exceed six days, which is two days less than the minimum period allowed in England between the *teste* and the return of writs of *mandamus*. The dissimilarity between the

organization of the English and our courts, is so great, that no deduction can be drawn from the English practice, as to the proper period of notice under our judicial establishment. The question then arises, whether, on a just interpretation of our statute laws, considering the powers of the district courts and the objects to be obtained by the remedy, a writ of *mandamus* can be returned to the term from which it issued. This question will admit of but one answer. If we examine the usages of other courts where the common law prevails, we will find that the rule to show cause, the alternative, and the peremptory *mandamus*, have all been granted at the same term of the court, etc.

This decision was made under the statute of the twenty-fifth of January, 1841, which directed judges, in issuing writs of *mandamus*, to observe the rules which govern the writs of *mandamus* at common law, as modified by the statutes of the republic; and its principal object was to prevent writs issuing without notice to the respondent.

It was urged in that case that the defendant was entitled to the five days' notice, before the commencement of the term, under the statute which directed all original process to be executed five days before the return day thereof: Laws of 1836, 201; but it was held, in effect, that the writ might be issued during the term, and that the defendant was entitled neither to the five days' previous notice, nor was he entitled to the period allowed in England, as our courts might often close before the expiration of the term of notice. This decision has, it is believed, been generally approved; and in subsequent laws, it has been specially provided, that writs of *mandamus* may be returned at the term at which they were issued.

If, from the character of the writ, the nature of the remedy, and the structure of our courts, we were authorized to disregard the positive rules fixed by either law in relation to notice, it seems that, in accordance with the principles regulating our system of procedure, we may disregard the ancient rule of common law, requiring the facts pleaded in the answer, to be controverted, not in the same, but in a new and separate action.

We proceed to examine the second proposition embraced in the assignment, viz.: as to the power of the court to disregard the judgment of the county court, vacating the election of the seventh of August, and treating its order as a nullity. It may be contended that the latter court, having jurisdiction over the subject-matter and the parties, their judgment is conclusive, however irregular may have been the mode of arriving at their

decision. The correctness of these positions may be admitted, but they leave untouched the controlling question in the case, viz.: whether the judgment was rendered by a court of competent jurisdiction; or, rather, whether the order vacating the election of the seventh of August emanated from a court, or from an unauthorized individual. The doctrine contended for, that a judgment must stand, unless reversed for error, or set aside for fraud, does not apply where the want of jurisdiction is made a question. This may always be set up when a judgment is sought to be enforced, or any benefit is claimed under it; and this is not inconsistent with the principle which ordinarily forbids the impeachment or contradiction of a record: Cow. & Hill's notes to Phil. Ev. 800, note 551.

In this case there is no impeachment of the verity of the record. The want of jurisdiction is shown upon its face. The entry commences by stating that there was no quorum; and in a continuous narrative, shows the submission to arbitration; the award of the arbitrators; and that this was made the judgment of the court. If a contested right to an office be the proper subject to arbitrament—and if, under the rules and principles of the common law, independent of the statute, rights cognizable by the county court may be arbitrated, and the award, by appropriate proceedings, be made the judgment of the court; yet, this award has not the force of a judgment, for the reason that it was not rendered as such by a court. The members present, if any, could exercise no judicial functions requiring a quorum. The entry by the clerk, of the judgment, was unauthorized; and the whole proceeding is as absolutely null as if conducted before, and determined by any private individual or individuals, without the pretense of judicial authority. There being no error in the judgment of the court, it is ordered that the same be affirmed.

Judgment affirmed.

FACTS STATED IN RETURN TO MANDAMUS.—The facts stated in a return to a *mandamus* are supposed to be true, and are not traversable; if they are false, the remedy is by action against the person making the return: *Brosius v. Reuter*, 2 Am. Dec. 534; and where the return is accompanied by affidavits, affidavits in reply are not admissible: *People v. Corporation of Brooklyn*, 19 Id. 502; see also *Universalist Church v. Trustees*, 27 Id. 267.

JUDGMENT OF COURT HAVING NO JURISDICTION of the person or subject-matter is a nullity, and will be disregarded even when it comes into question in a collateral proceeding: *Swiggart v. Harber*, 39 Am. Dec. 418, and note; *Smith v. Tupper*, 43 Id. 483, and note.

LYNCH ET AL. v. BAXTER ET UX., ADM'X.

[4 TEXAS, 431.]

SALE OF LAND BY ADMINISTRATOR IS JUDICIAL SALE, and operates *in rem*. In such case it is a general rule that *caveat emptor* applies, and the purchaser takes his purchase without warranty, express or implied.

WHERE ADMINISTRATOR EXECUTING ORDER OF COURT TO SELL LANDS gives the purchaser a bond for a warranty title, it is not in his character as administrator, and he can not bind the estate of his intestate by such a covenant. Whether he would be bound personally, left undecided.

VENDEE CAN NOT RESIST PAYMENT OF PURCHASE MONEY, on ground of defect of title, while he retains the warranty bond and continues in the possession of the land.

HEIRS MAY MAKE VALID PAROL PARTITION OF LAND among themselves, where they are all of age, and if one is not of age at the time of the partition, it is nevertheless valid, if acquiesced in and confirmed by such heir after coming of age.

VERBAL PARTITION OF LAND WAS BINDING under the Mexican law where possession was taken.

IN ACTION ON PROMISSORY NOTE GIVEN FOR PURCHASE OF LAND, possession of warranty bond for title and possession of the land afford ample and legal consideration to entitle the plaintiff to recover, without regard to title.

JUDGMENT OR ORDER OR DECREE OF COURT OF GENERAL JURISDICTION, on any subject to which jurisdiction has attached, however erroneous, defective, or irregular, can never be questioned or avoided in a collateral way.

JUDGMENT OF PROBATE COURT CAN NOT BE QUESTIONED COLLATERALLY on account of any error or defect in it. The only inquiry that can be made is, Had the court competent jurisdiction to render such judgment?

SETTLEMENT OF SUCCESSIONS IN PROBATE COURT IS PROCEEDING IN REM acting on the land directly, and a decree for its sale can not be collaterally attacked. If the sale was without any necessity existing at the time the order was made, still it was conclusive until set aside in proceedings having that object directly in view; and the purchaser, having purchased without fraud or collusion with the administrator, would be protected by the sale, if made under decree of a court having jurisdiction.

PARTY WHO PRODUCES TRANSCRIPT OF PART ONLY OF RECORDS OF COURT can not object that certain things do not appear by it to have been done which should have been done, for they are not thereby shown not to have been done, and the appellate court is bound to believe they were done and are of record.

BY SECTION 29 OF ACT OF 1840, ADMINISTRATOR MUST APPLY FOR ORDER FOR SALE of the slaves and real estate as soon as the facts of the insufficiency of the proceeds of the perishable and other personal property to pay the debts of the estate is apparent; hence, if this fact should satisfactorily appear to the court before the order for the sale of the perishable and other personal property is made, there would be no error in its decreeing the sale of both the real and personal property in the same order.

ACTION by Mrs. Baxter, administratrix *de bonis non*, and her husband, on a promissory note given by Lynch to Cooper, the first administrator of the estate of one Hensley, for the purchase of certain land belonging to said estate. The evidence showed that the land in question was part of land formerly belonging to one Harmon Hensley, father of plaintiff's intestate; that he died leaving several heirs, all of age except one Margaret; that the same year the heirs divided the land by metes and bounds in equal parts; that since then all the heirs had acquiesced in the partition and enjoyed and used the parts allotted to them. The other facts appear in the opinion. Judgment for plaintiffs; defendants appealed.

Webb, for the appellants.

Munger and Lewis, for the appellees.

By Court, LINSComb, J. The first and second objections taken by the appellants to the judgment of the court below, may be considered together. The sale of the land was a judicial sale, and operated *in rem*. In such cases, it is a general rule that *caveat emptor* applies, and the purchaser takes his purchase without warranty express or implied; and if the administrator, in executing the order of the court, gives the purchaser a bond for a warranty title, it is not in his character as administrator, and he can not bind the estate of his intestate by such a covenant; as a personal undertaking between him and the purchaser, how far it would be valid, is not now before us, and consequently, we pass it by: *The Monte Allegre*, 9 Wheat. 616. But if considered independent of the circumstances of the sale in this case, and if it was a case of individual private contract, the defense set up could not be available; because it is repugnant to the plainest principles of law and justice, to allow this defense to be heard, whilst the vendee holds on to the bond, and continues in the possession of the land purchased: *Dufour v. Camfranc*, 11 Mart. (La.) 615 [13 Am. Dec. 360]. And had there been no contract in writing, and had it been a private contract between the vendor and vendee, and the vendee had given his note for the payment of the land and gone into possession, he could not avoid payment, notwithstanding the statute of frauds, if the plaintiff was able and willing to make title: *Rhodes' Adm'r v. Storr*, 7 Ala. 346.

But the evidence offered by the defendant in the court below, entirely failed in establishing a superior outstanding title to that of the plaintiff's intestate. The evidence of Johnson Hens-

ley, a witness, and the only one offered (and he was introduced by the defendants), proves that the land was a part of the head-right league of his father, Harmon Hensley; that H. Hensley was also the father of the plaintiff's intestate; that the father died in 1834, leaving several children, all of whom were of age, excepting one daughter about fifteen years of age; that shortly after the death of his father, the children, by consent, divided his land into equal shares; that they set apart the best allotment to the sister, who was a minor; that she was married in 1835, and that she and her husband had sold her share to the plaintiff's intestate; that each of the heirs had entered upon and enjoyed their several shares, and had acquiesced in the partition so made in 1834, and made no complaint; the witness did not know whether the partition was by an agreement in writing, or not.

The appellants' counsel supposes this partition was illegal and void, and to show that it is so, refers to the act of congress of the republic, of 1840. The requisitions of that act, six years after the amicable partition, could not disturb rights growing up under it; the parties, with the exception of one, were of an age to divide out the land that had descended to them, by consent, even if the act of 1840, or a law similar in its terms, had been in force at the time the partition was made, and the other's acquiescence and confirmation after she was of age to act for herself, would bind her.

There can be no doubt, that at the time the partition was made, a verbal sale of land between individuals was binding, and the contract as valid as if evidenced by writing. It was so decided by this court under the republic: *Scott and Solomon v. Maynard and Wife*, Dallam's Dig. 551, and the authorities there cited. But if the law at that time had required that the partition should be in writing, it could not be disturbed now; the right to the respective shares, according to the partition, is now established beyond controversy by the statute of limitations.

Leaving the fact of the appellant Lynch being a purchaser at a judicial sale, out of the question, and placing him in the more favorable position of a vendee under a private contract with Cooper, the bond he sets up in his plea, and the possession of the land would afford ample and legal consideration for the note sued on, to entitle the plaintiffs to recover. We do not intend to be understood, in commenting on the evidence of outstanding title, to be considered as giving it our judicial sanction; if, however, it is objectionable, it is not for the appellants to raise the

objection, as the witness was introduced by them, though objected to by the plaintiffs.

We now come to the last objection, and the one most relied on in the very able and ingenious argument of the appellant's counsel: that the decree of the probate judge, ordering the sale, is a nullity. That the judgment, order, or decree, of a court of general jurisdiction, on any subject to which the jurisdiction has once attached, however erroneous, defective, or irregular it may be, can never be questioned or avoided in a collateral way, until it has been reversed, set aside, or revoked in a proceeding having that object directly in view, has been considered as well settled for the last century, and can not be now disturbed. It has, however, been supposed by some, that the proceedings of a court of limited jurisdiction are not entitled to the same regard, and that the records of such courts must show a strict conformity to all the requisitions of law; and that unless they do show such conformity, their acts confer no rights and impose no obligations on any one, and may be treated, whenever and wherever presented, as entire nullities, and void. Such is the position assumed by the appellants' counsel; and he contends that the decree of the probate judge, ordering the sale of the land, for the purchase of which the note sued on in this case was given, is of that kind. The record of the probate court, used in evidence on the trial below, was introduced by the appellants, and does not purport to be a complete record of all the proceedings in that court, in relation to the administration in which the order of sale was made; the appellants can, therefore, claim no advantage arising from the fact of its being only a part of the record.

The decree of the probate court ordering the sale of the land belonging to the estate of Cooper's intestate, was made under the provisions of the twenty-ninth section of an act regulating the duties of probate courts, and the settlement of successions, passed by the congress of Texas, at the session of 1840, and is in the words following: "Every executor or administrator is bound, within three months after his appointment, to petition the court of probate, granting letters testamentary or of administration, for the sale of all the perishable property belonging to the succession, and all or such portion of the other personal property, except slaves, as may be shown to the court, to be necessary for the payment of debts against said estate; and in case, or if on further information he finds that the proceeds of the sale of the personal property will not be sufficient for the payment of the said debts, he shall then, within six months after

his appointment, or as soon as he ascertains the said deficiency, petition the probate court for the sale of the slaves and real estate of the decedent, or so much thereof as may be necessary for the payment of said debts; and the said court, on full and satisfactory proof of the existence of the debts, and the necessity of the sale, shall order the same on cash or credit as may be most advantageous to said estate, or as the nature of the claims against said estate may require."

The record offered in evidence of the decree ordering the sale, supposed by the appellants to be so defective as to amount to a nullity, shows a petition on oath, preferred by the administrator in the words following: "To the Hon. John H. Money, chief justice of the county of Austin, and judge of probate for the said county: The petition of Walter C. Cooper, administrator of James Hensley, deceased, respectfully represents that there is about five hundred dollars' worth of property belonging to the succession, which he thinks is likely to be wasted, unless the same should be disposed of; your petitioner further represents that the debts, already presented against said succession, amount to about twelve hundred dollars, and the expenses of the administration make it necessary to sell some of the real estate, in addition to the perishable property belonging to the succession. Your petitioner would, therefore, pray your honor to issue your decree to sell the perishable property of the said estate, and so much of the real estate as may be necessary to satisfy the debts of the said succession, and the expenses on the same, and as in duty bound your petitioner will ever pray. D. Y. Portis, Att'y P. Q."

Which was sworn to in open court, by Walter C. Cooper, the administrator, and attested by the clerk. Then follows: "Walter C. Cooper's petition for the sale of the perishable property and real estate. In the probate court, May term, 1841, the within petition having been read and considered, it is, therefore, ordered, adjudged, and decreed, that Walter C. Cooper, administrator of the estate of James Hensley, deceased, proceed to sell all the perishable property belonging to the said succession, at the late residence of the deceased. And that he also proceed to sell so much of the real estate belonging to the said succession, as shall be of value sufficient to pay the debts of the said succession, and the expenses of administering the same. J. Money, Probate Judge, A. C."

Then follows an order from a justice of the peace of Washington county, to three individuals, to appraise two tracts of

land, part of the league of Harmon Hensley; the return of the appraisers; then the administrator's return of the account of sales of two tracts of land appraised, the first sold to Rebecca Allen, and the second to J. R. Lynch (one of the appellants), amounting to nine hundred and eighty-one dollars and eighty-seven cents. This return is sworn to by the administrator before the probate judge, and the order of the judge, as follows: "Let the foregoing be admitted to record. Oct. 28th, A. D. 1841. J. H. Money, Probate Judge."

The objections taken to the proceedings of the probate court, just cited, that will be noticed, are: that the petition does not show a conformity with the law, in this, that it does not show that the perishable property had been exhausted before applying to the probate court, for an order of sale of the real property; that the record does not show the facts constituting the necessity for a sale of the real property; that the record should show the evidence by which the judge of the probate court acted in awarding the decree directing the sale of the real property; that the probate court being a court of limited jurisdiction, if the record does not disclose all the facts necessary to the exercise of its jurisdiction in giving its judgments and decrees, they are void.

The question how far a defective judgment, order, or decree of the probate court, could be considered, in a collateral matter, has been much discussed in the supreme court of Alabama, in a case calling in question a sale of real estate, by an administrator, in a suit brought for the same property by the heirs of the intestate, and in its principles and features, in many respects similar to the case before us. By the statute of the state of Alabama, after an order of sale has been decreed, the administrator is required to give bond to conduct the sale according to law, before he can obtain the order from the clerk of the orphans' court. In the case of *Wyman et al. v. Campbell et al.*, 6 Port. 219 [31 Am. Dec. 677], the circuit court charged the jury, "that if the administrator had sold the real estate of his intestate, without giving bond according to law, his proceedings were absolutely void." This charge was assigned as error, in the supreme court of the state. In overruling the opinion of the judge of the circuit court and reversing the judgment, Chief Justice Collier discusses with great ability, the right to question the judgment of the probate court, on account of any error or defects in such judgment, in a collateral inquiry. He puts the judgment of that court, upon the footing of all other judgments, that the

inquiry can only be, Had the court competent jurisdiction to render such judgment? If it had, however erroneous it may be, that judgment can not be controverted, until it has been reversed or set aside by an appellate tribunal, in a proceeding having that object directly in view: *Id.* 241, 242. The chief justice, in adverting to the fact that the opinion he was then giving, ran counter to the opinion of the court in *Wiley and Gayle v. White and Lesley*, that had been twice before the court, reported in 2 Stew. 331, and in 3 Stew. & P. 355, proceeds: "The very great respect we entertain for the learning of the judges who concurred in the opinion in that case, and the propriety of upholding the doctrine of *stare decisis*, have induced us to give to this case a more careful and elaborate examination. Principles the opposite of those we have stated, would be productive of the severest and most extensive injury. It is impossible to conjecture the vast amount of property held under sales made by order of an orphans' court, and we all know that in at least three fourths of the cases, the records are remarkable for their want of technicality and legal precision. Let the rule be established and continued, which requires the record to disclose every material fact, and which makes indispensable to the passing of the title, publication of the petition to sell, the return of the sale, the execution of a bond by the administrator, to the orphans' court, and everything else which the statute prescribes as preparatory to a decree, and a large majority of the titles acquired through such a channel would be overturned. In questions of doubt, arguments drawn *ab inconvenienti* deserve great consideration. It is worthy of remark, that the distinction between void and voidable judgments, seems not to have been considered in the case of *Wiley and Gayle v. White and Lesley*, but it is assumed that the proceedings of the orphans' court, may be collaterally impeached for an omission to disclose on its records, an observance of everything enjoined by statute, upon the ground that it is a court of limited jurisdiction. This reasoning only proves the order to have been voidable, if the authority of the court was shown, and that it could not hold good on an appeal or writ of error, but does not show that it was void *per se*, so as to subject it to an indirect attack."

Having participated in the case of *Wiley and Gayle v. White and Lesley*, it may be permitted me to bear testimony to the correctness of Chief Justice Collier's remarks, that although twice before the court, the distinction between void and voidable judgments was not presented or considered; but it was taken

for granted that, as the orphans' court was of limited jurisdiction, its judgment could be collaterally attacked. And at that time cases were not as well discussed as at a subsequent period. The remarks of the chief justice, as to the extent of evil that would result from a different rule, are most strikingly applicable to our own state. If irregularities in the alcaldes' courts, in the probate courts of the republic, and under the state organization, could nullify the decrees and judgments, property would be unsettled to an extent far more distressing than can grow out of land titles emanating from different sovereignties.

I have been so forcibly struck with the practical good sense of the remarks of the supreme court of Ohio on this subject, that I trust I shall be pardoned for introducing them here. In the case of *The Lessee of Goforth v. Longworth*, 4 Ohio, 129 [19 Am. Dec. 588], the court says: "It is held to be well settled, that courts give a liberal construction to statutes authorizing sales of real estate by executors and administrators. Public policy requires that all reasonable presumptions should be made in support of such sales, especially respecting matters *in pais*. The number of titles thus derived, and the too frequent inaccuracy of clerks and others concerned in effecting these sales, render this necessary. If a different rule prevailed, purchasers would be timid, and estates consequently be sold at diminished value, to the prejudice of heirs and creditors."

The doctrine we have been discussing was again presented in the supreme court of Alabama, at a more recent period, in *Hilliard and Wife v. Binford's Heirs*, 10 Ala. 977, and Chief Justice Collier, reviewing and sustaining *Wyman et al. v. Campbell et al.*, held, that where the record of the orphans' court recites "that a citation issued, as required by the statute, and therefore orders that the will be admitted to probate," it is at most voidable only and can not be collaterally impeached, but must be avoided, if erroneous, in a direct proceeding.

That the probate court has jurisdiction over the estates of deceased persons can not be doubted; that this jurisdiction was brought into exercise directly upon the property, by the petitioner praying the decree for an order of sale of the land, is equally clear. The land was the subject-matter on which the court exercised its jurisdiction; whatever might be the order, it was a question before a competent court, and its decision was subject to revision by appeal, but could not be attacked in a collateral way. That it was a proceeding *in rem*, can be made manifest by supposing that the heirs of the intestate had sued

Lynch, the purchaser, and attempted to show that this judgment or decree for the sale of the land was void, because they had no notice and were not parties to the proceedings of the probate court. The answer would be, that it was not necessary to make them parties, because the proceedings were *in rem*, acting on the land directly, and that the decree of the court could not be collaterally attacked. If the sale was without any necessity existing at the time the order was made for such sale, still that order was conclusive until it had been set aside by proceedings having that object directly in view; and the purchaser, having purchased without fraud or collusion with the administrator, would be protected by the sale, if the decree under which it was made was the decree of a court of competent jurisdiction. This would come clearly within the rule laid down in *Wyman et al. v. Campbell et al.*, and the purchaser would not be affected by any irregularity in the proceedings, or error in the judgment of the court, in making that decree; all the vigilance the law would exact from him would be to see that the court making the decree had competent jurisdiction, and he could not be called upon to inquire whether the evidence before the judge, of the necessity of the sale, had been spread on the record or not.

This would be decisive of the case, according to the principles discussed in the cases we have examined. It is said that a different rule has been recently laid down in New York, in the case of a proceeding before the surrogate. If so, it is repugnant to the opinion of Chancellor Kent, in *Mooers v. White*, 6 Johns. Ch. 360; and to the opinion of the supreme court of the United States, in *Thompson v. Tolmie*, 2 Pet. 168; and to the opinion of the supreme court of South Carolina, in *Brown et al. v. Gibson*, 1 Nott & M. 326; and to the whole course of the Alabama decisions, since *Wyman et al. v. Campbell et al.*, already cited.

But suppose that the rule of law should be otherwise, and it was competent for the appellants, in this case, to call in question, in this suit, the correctness of the decree of the probate judge, in ordering the sale, and we were now called on to reverse the decree as a case brought before us on an appeal; for this is the effect of permitting the decree to be questioned, if it was made by a competent tribunal. Would the appellants be in a better condition? For the purpose of answering the question, we will again refer to the petition. It shows, that is to say, it represents the perishable property to be insufficient to pay the

debts, and asks an order or decree for its sale, and for the sale of the real estate, or so much as may be sufficient for the payment of the debts; the petition states the value of the perishable property, and the amount of debts presented. The appellants, however, say that the value of the perishable property does not appear upon the record; that there ought to be better evidence. To which they may be answered very appropriately, that the record, or part of the record, offered in evidence, does not purport to be the whole record of the succession; that it is the evidence of the appellants, and if they had brought up the whole record, it would have been found that this perishable property had been appraised, and the appraisement properly returned as required by law, into the probate court, and then admitted to record. The law required this to be done, and as it is not shown not to have been done, not even a presumption against it raised by the evidence introduced by appellants, we are bound to believe that it is so of record.

It may be well said, that if everything that the appellants insist should appear on the record, really ought there so to appear, for aught that appears in evidence, it is in the record. The appellants brought the regularity of those proceedings into the discussion, and as evidence, offered the certified copy of the petition for a sale, the decree ordering the sale, the account of the sale returned by the administrator, and the order of the probate judge, that it should be admitted to record; and the clerk certifies that it is a copy of these particular proceedings, and not that it is a complete transcript of the record of the succession. The same may be replied to the objection that it ought to appear on the record, that the decree was based on other and better evidence of the amount of the debts against the estate, than is found in the petition, that as the law required a return of all these debts to be made to the court; and also, that as they were required by law to be presented to the judge for his approval, we are bound to believe that all this was before the judge, and in this way he arrived at the conclusion, that from the amount of debts and the appraised value of the perishable property, a sale of real estate was absolutely necessary for the payment of the debts and the expenses of administration. The judge of the probate court might, if so inclined, have entered his decree more formally, and recited the nature of the evidence that produced the conviction in his mind, that the estate was really indebted to an amount beyond the value of the perishable property, and that from the tableau of debts he was fully satis-

fied of the existence of these debts, and the necessity of the sale; but the law does not require him to state the evidence or satisfactory proof by which he arrived at his conclusion; nor can we say that his failure to do so renders the decree a nullity, or that it was reversible.

But it was said the decree ordering the sale of the perishable property and the real estate, under the same order, is not in conformity to law; that no order could legally be made for a sale of the real estate, until after the sale of the perishable property; and that there was no other means of ascertaining that there would be a deficiency of assets from that source, to pay the debts. It is certainly very clear, that the proceeds of the sale of the perishable property, ought first to be relied on as the fund for the payment of the debts; and such was and is the meaning of the law; but there is nothing that would restrain the probate court from ordering the real property to be sold, as soon as it was made to appear that there would be a deficiency from the perishable property.

The section is exceedingly awkwardly expressed. After directing that the administrator shall petition, within three months from his appointment, for the sale of all the perishable property belonging to the succession, and all or such portion of the other personal property, except slaves, as may be shown to the court, to be necessary for the payment of the debts against the estate, it then continues, with a comma after the word "estate," "and in case or if on further information, he finds that the proceeds of the personal property will not be sufficient to pay the said debts, he shall then, within six months after his appointment, or as soon as he ascertains the deficiency, petition," etc. The most satisfactory construction that can be put on the clause, or part of the section, last quoted, makes it his duty to petition as soon as the fact of the insufficiency is made apparent, without regard to the fact that the perishable property had not yet been sold. And in this case, it was apparent that there would be such deficiency, from the amount of debts presented, and the small amount that could be realized by the sale of the perishable property. And on this being satisfactorily proved to the judge, we can not perceive that there would be error in his decreeing the sale of both, at the same time.

In fine, if the decree of the probate court was before us for revision, I could not say, from the presentation of the record, that it ought to be reversed. I am, however, very clearly of the opinion, that if it was defective and erroneous and the error ap-

parent, that it could not be questioned by the appellants, in this suit; that it could only be attacked by proceedings having that object directly in view, that is to say, to reverse or revoke it. It may be an erroneous judgment; but it is a judgment of a court of competent jurisdiction, and is safe from a collateral attack.

It will be perceived, that from the view we have taken, even if the decree of the probate judge could be questioned in this suit, the judgment of the court below would be affirmed, because we discover no substantial errors or defects in that decree.

Judgment affirmed.

VENDOR IN POSSESSION DEFENDING AGAINST PURCHASE PRICE: See note to *Gans v. Renshaw*, 44 Am. Dec. 156, where cases in this series are collected.

PAROL PARTITION BY CO-TENANTS: See *Brown v. Wheeler*, 44 Am. Dec. 550, and note; *Dow v. Jewell*, 45 Id. 371, and note. Parol partition of land is not obnoxious to the Texas statute of frauds, but is valid and binding, and is placed beyond all doubt, where the parties have acted upon and acquiesced in such partition, and have never attempted to repudiate it: *Stuart v. Baker*, 17 Tex. 417.

CONCLUSIVENESS OF JUDGMENT: See *Smith v. Twpper*, 43 Am. Dec. 483, and note referring to prior cases in this series.

THE PRINCIPAL CASE IS CITED to the point that a sale of land by an administrator, under an order of the probate court, is a judicial sale, to which the rule of *caveat emptor* applies, and mere defect of title is no defense to an action to recover the purchase money, in *Williams v. McDonald*, 13 Tex. 323; *Thompson v. Munger*, 15 Id. 527; *Walton v. Reager*, 20 Id. 109. To the same point is *Edmondson v. Hart*, 9 Id. 554; *Dacey's Adm'r v. Burns*, 37 Id. 719. It is cited to the point that it is not essential to the title of the purchaser of property at an administrator's sale that the record should show a necessity for the sale; for the order of sale is conclusive of that question until it be set aside by a proceeding having that object directly in view, and the purchaser, in the absence of fraud, will be protected, in *Poor v. Boyce*, 12 Id. 449.

NEILL v. KEESE.

[5 TEXAS, 23.]

WHERE ONE BUYS LAND IN NAME OF ANOTHER AND PAYS THE PURCHASE MONEY, a trust results in his favor, and even after the death of the nominal purchaser, parol evidence is admissible to establish the trust, against the express declaration of the deed.

PAROL TESTIMONY OF DECLARATIONS OF DECEASED PERSON THAT ANOTHER PERSON was jointly interested with him in the purchase of certain land, the deed to which was taken in the name of such deceased person alone, is not competent to raise a resulting trust in such other person, without proof of the payment of part of the purchase money by him.

IN JURISPRUDENCE OF TEXAS THERE IS NO DIVISION OF JURISDICTION into common law and chancery; the same rule and measure of justice are ap-

plied to the same rights, whenever drawn into litigation, and are administered according to the principles of that forum by which they may be most effectually attained.

IN TEXAS, EQUITABLE TITLE MAY BE SET UP AS DEFENSE TO ACTION OF EJECTMENT.

STATUTES, BEING IN PARI MATERIA, AND RELATING TO SAME SUBJECT, are to be taken together, and so construed, in reference to each other, as that, if practicable, effect may be given to the entire provisions of each.

PROBATE COURT HAS AUTHORITY TO ORDER SALE OF SLAVES AND REAL PROPERTY AT PLACE other than the county seat, under the acts of January 21, 1841, and of February 4, 1841; those acts are not repugnant to each other.

STATUTES ARE NOT CONSIDERED TO BE REPEALED BY IMPLICATION, unless the repugnancy between the new provision and the former statute be plain and unavoidable.

EVIDENCE OFFERED, THOUGH NOT AMOUNTING TO PROOF OF FACT, but being a necessary ingredient, and constituting an indispensable link in the proof of that fact, should not be excluded, if otherwise unobjectionable.

EJECTMENT for certain town lots in Seguin. Plaintiff claimed title in his intestate, James Campbell. Defendant set up as defense that he was joint owner with said deceased; that he had been the former administrator of said deceased, and while such, petitioned the court and obtained an order to sell the interest of deceased therein. That he sold and conveyed his own and deceased's interest in the lots, and accounted for the decedent's share of the proceeds. At the trial, plaintiff proved title in Campbell. Defendant offered in evidence declarations of Campbell as stated in the opinion. Also the petition and order for a sale at Seguin of the lots, all of which evidence was excluded: the latter, on the ground that no evidence was admissible to prove a sale at Seguin, it not being the county seat. Judgment for plaintiff; defendant appealed.

Howard, for the appellant.

Robinson, for the appellee.

By Court, **WHEELER, J.** It is insisted on behalf of the appellant, that the court erred: 1. In excluding the evidence offered to prove the defendant's joint interest with the deceased in the lands in controversy. 2. In refusing to admit in evidence the petition and order of sale of the probate court of Gonzales county.

1. The only evidence offered by the defendant, to establish the title asserted by him, was the statement of a single witness, that he heard the deceased say that the defendant was jointly

interested with him in the lots. It is well settled, that where one buys land in the name of another, and pays the purchase money, the land will be held by the grantee in trust for him who pays the money. "The clear result of all the cases, without a single exception," says Story, "is that the trust of the legal estate, whether freehold, copyhold, or leasehold; whether taken in the name of the purchaser and others jointly, or in the name of others without the purchaser; whether in one name or several; whether jointly or successively, results to the man who advanced the purchase money. This is the general proposition supported by all the cases:" 2 Story's Eq. Jur., sec. 1201, n. 2, a. Whether after the death of the nominal purchaser parol evidence alone is admissible to establish the trust, against the express declaration of the deed, has been a subject of controversy; but it is now settled that such proof is admissible: *Id.*; *Lench v. Lench*, 10 Ves. 511; *Boyd v. McLean*, 1 Johns. Ch. 582; *Botsford v. Burr*, 2 Id. 404; *Fbote v. Colvin*, 3 Johns. 216 [3 Am. Dec. 478]; *German v. Gabbald*, 3 Binn. 302 [5 Am. Dec. 872]. In *Lench v. Lench*, 10 Ves. 511, the master of the rolls said: "Whatever doubt may have been formerly entertained upon this subject, it is now settled that money may in this manner be followed into the land in which it is invested; and a claim of this sort may be supported by parol evidence." The same doctrine was maintained by Chancellor Kent, in *Boyd v. McLean*, *supra*, after a careful review of the authorities and an elaborate examination of the subject.

But the question here is, not simply whether parol evidence is admissible, but whether the naked declaration of the deceased, of itself, and without proof of the payment of the purchase money, is sufficient to establish title in the defendant. And we are of opinion that it is not. It was so ruled by Chancellor Kent in the case last cited. He there said: "The cases uniformly show that the courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper title; and they have required the payment by the *cestui que trust* to be clearly proved. In the case of *Lench v. Lench*, Sir William Grant did not deem the unassisted oath of a single witness, to the mere naked declaration of the trustee, admitting the trust, as sufficient; and there were no corroborating circumstances in the case. He thought the evidence too uncertain and dangerous to be depended upon:" 10 Ves. 519.

Here there was but the oath of a single witness, to the naked

declaration of the deceased, that the defendant was jointly interested with him in the land; and we are of opinion that this was not competent evidence to establish title in the defendant; and that, therefore, it was rightly excluded.

It is insisted by the appellee that, as matters of trust are peculiarly cognizable in a court of equity, and as a mere equitable defense resting in parol can not be set up so as to defeat the legal title of the plaintiff in an action of ejectment at common law, this defense can not be set up in the present case, though supported by competent evidence. We think otherwise. In our own jurisprudence there is no division of jurisdiction into common law and chancery. We have not two rules by which to administer justice in the same case, nor two modes of applying the rule to the same rights, attaining different results. But the same rule and measure of justice are applied to the same rights whenever drawn in litigation, administered according to the principles of that forum by which may be most effectually attained the equity as well as the law of the particular case. Our courts are not restricted by the rules which limit and define the jurisdiction of courts of common law and chancery in England and those states whose laws recognize two separate jurisdictions, each administering justice according to its own peculiar forms and rules of procedure. Whatever may be the rights of a party recognized by law here, whether equitable or legal, they may be asserted in our courts without regard to these distinctions.

In Pennsylvania it is held that, as there is no court of chancery, an equitable title may be interposed to the plaintiff's right to recover in an action of ejectment: *Swayze v. Burke*, 12 Pet. 11; *Gordon v. Kerr*, 1 Wash. C. C. 322; and we have no doubt that here an equitable title may be interposed to the plaintiff's right to recover in an action like the present.

2. The petition of the administrator for the sale of the lands in question, and the order of the probate court thereon, bear date in June, 1841. The petition asked an order to sell at Seguin, a place other than the county seat; and although the order does not in express terms direct the sale at Seguin, yet, taken in connection with the petition, it is to be considered an order to sell at that place. It evidently was so understood by the administrator, and so intended by the probate court. The evidence was excluded upon the sole ground that the probate court had no authority to order the sale at a place other than the county seat. It therefore becomes material to determine whether the probate court had authority to make the order in question.

The act upon which the appellant relies to support the authority of the probate court to order the sale at Seguin is "An act to regulate public sales," approved January 21, 1841; which provides that all sales by sheriffs, constables, administrators, etc., "may be held at the residence of the owner of the property, or at the late residence of a deceased person, or at any other place, by consent of the parties interested, which will be most advantageous to the sale of the property; provided that real estate and slaves shall be sold at the court-house of the respective counties, unless an order of the court be had to sell at some other place:" 5 Stat. 66.

This statute, by clear and necessary intendment, gives to the probate court the authority to order a sale of lands and slaves elsewhere than at the court-house of the county. But it is insisted that the provision giving that authority was virtually repealed by a statute passed at a subsequent day of the same session. The latter act is entitled "An act to regulate sales by judgment or decree of a probate court or court of chancery," was approved on the fourth day of February, 1841, and enacts "that all sales, whether by order, judgment, or decree of any probate court, or court of chancery, shall be regulated and governed by the laws governing sales under execution, and all laws which relate to sales under execution shall be applicable to such sales as above stated, and that this act shall take effect and be in force from and after its passage:" 5 Stat. 179.

These statutes, being *in pari materia*, and relating to the same subject, are to be taken together, and so construed in reference to each other as that, if practicable, effect may be given to the entire provisions of each. This, it is conceived, may be done by considering the former, as it evidently was intended, as a law "governing sales under execution." It is to be considered as if incorporated with, and as constituting a part of, the laws enacted upon that subject. When, therefore, the latter statute declares that "all sales by order of any probate court, or court of chancery, shall be regulated and governed by the laws governing sales under execution," we must refer for the rule of procedure to the existing laws upon the subject of such sales; and among them we find the act first above cited of the twenty-first of January, 1841, which gives to the court the authority to order the sale at a place other than the court-house.

Thus considered, there is no repugnancy between the provisions of these statutes. They may stand together, and effect may

be given to the entire provisions of each. And thus to construe and give effect to them, is in accordance with the established rule of construction: 1 Kent's Com. 463.

The object of the rule is to ascertain and carry into effect the intention of the legislature, and it proceeds upon the supposition that the several statutes relating to one subject, were governed by one spirit and policy, and were intended to be consistent and harmonious in their several parts and provisions. It would not be a reasonable mode of construing the acts of the legislature, so to construe them as to make one act repeal another passed at the same session. It can not be supposed that it was their intention that acts thus passed should abrogate and repeal one another. A construction which repeals former statutes and laws by implication, is not to be favored in any case: *Stone v. Green*, 3 Hill (N. Y.), 472. Statutes are not considered to be repealed by implication, unless the repugnancy between the new provision and the former statute be plain and unavoidable: 1 Kent's Com. 466, n. b.

Since, then, the act of the twenty-first of January, conferring upon the probate court the authority to order a sale of lands elsewhere than at the court-house, was not repealed by the subsequent act of the fourth of February, there can be no doubt of the validity of the order to sell at Seguin.

The order did not, of itself, amount to proof of a sale. The mere order of sale, without proof also of a legal and valid sale under it, could not divest the title of those claiming under the deceased; nor could it, of itself, afford any evidence that the title had passed out of his representatives: *Hickey v. Stewart*, 3 How. 750. Yet it was a fact admissible in evidence, as laying the foundation for introduction of other evidence of the alleged sale. But the ruling of the court in excluding it, effectually precluded the defendant from introducing such other evidence as he may have had it in his power to adduce, to establish the fact of a sale. The evidence offered, though it did not amount to proof of the fact, was still a necessary ingredient in that proof. It constituted an indispensable link in the chain of evidence; and the court erred in excluding it; for which the judgment must be reversed, and the cause remanded for further proceedings.

Judgment reversed.

RESULTING TRUSTS—DEFINITION.—There seems to be considerable diversity of opinion among law writers and law lexicographers as to the true definition of a resulting trust, and as to what circumstances create a resulting

trust, some instances being placed under the head of resulting trust by some writers, and the same instances under constructive trusts by others. Mr. Pomeroy, in his work on equity jurisprudence, seems to us to draw the distinction between them most clearly and logically. He says: "In all species of resulting trusts *intention* is an essential element, although that intention is never expressed by any words of direct creation. There must be a transfer, and equity infers the intention that the transferee was not to receive and hold the legal title as the beneficial owner, but that a trust was to arise in favor of the party whom equity would regard as the beneficial owner under the circumstances:" 2 Pomeroy's Eq. Jur., sec. 1031. Again he says: "Constructive trusts include all those instances in which a trust is raised by the doctrines of equity for the purpose of working out justice in the most efficient manner, where there is *no intention* of the parties to create such a relation, and in most cases contrary to the intention of the one holding the legal title, and where there is no express or implied, written or verbal, declaration of the trust:" Id., sec. 1044. This distinction of intention is recognized by Mr. Story, but he does not state it to be the criterion by which to distinguish resulting from constructive trusts, as he does not discuss trusts under those heads; but that it is, would seem to be implied from his language. He says: "We * * * shall next proceed to the consideration of some of the more usual cases of implied trusts, including therein cases of resulting and constructive trusts. Implied trusts may be divided into two general classes: first, those which stand upon the presumed intention of the parties; secondly, those which are independent of any such intention, and are forced upon the conscience of the party by operation of law:" 2 Story's Eq. Jur., sec. 1195. Following, then, the distinction laid down by Mr. Pomeroy, as we shall in this note, resulting trusts may be defined as those which arise where the legal estate in property is disposed of, conveyed, or transferred, but the intent appears, or is inferred from the terms of the disposition or from the accompanying facts and circumstances, that the beneficial interest is not to go or be enjoyed with the legal title. In such case a trust is implied or results in favor of the person for whom the equitable interest is assumed to have been intended, and whom equity deems to be the real owner: 2 Pomeroy's Eq. Jur., sec. 1031. The principle upon which such person is deemed to be the real owner is, that the consideration comes from or belonged to him; the equitable theory of consideration being, that the consideration draws to it the equitable right of property, and that the person from whom the consideration actually comes is the true and beneficial owner. The statute of frauds does not affect the creation of resulting trusts, for since in them the intention is never expressed but always inferred or presumed by law, from the circumstances of the case, it follows, as a matter of course, that there being no evidence of an intention to create a trust, it could not be possible that a declaration of intention, properly executed, would have been made.

CONSIDERATION PAID BY ONE, AND CONVEYANCE TAKEN IN NAME OF ANOTHER PERSON.—By far the most important class of resulting trusts is where property is purchased and the conveyance of the legal title is taken in the name of one person while the consideration or purchase price is paid by another. In such cases a trust arises at once in favor of the person paying the purchase money and the holder of the legal title becomes a trustee for him: 2 Pomeroy's Eq. Jur., sec. 1037; 1 Perry on Trusts, sec. 126, and cases there-cited; 2 Story's Eq. Jur., sec. 1201; *Dyer v. Dyer*, 2 Cox, 92; *Loyd v. Read*, 1 P. Wms. 607; *Young v. Peachy*, 2 Atk. 256; *Lehman v. Lewis*, 62

Ala. 129; *Case v. Coddling*, 38 Cal. 191; *Botaford v. Burr*, 2 Johns. Ch. 405; *Hampson v. Fall*, 64 Ind. 382; *Rider v. Kidder*, 10 Ves. 360; *Burks v. Burks*, 7 Baxt. 353; *Lee v. Browder*, 51 Ala. 238; *Murphy v. Peabody*, 63 Ga. 522; *DeValle v. Marshall*, 30 Ark. 230; *Brooks v. Shelton*, 54 Miss. 353; *Boekowitz v. Davis*, 12 Nev. 446; *Peabody v. Tarbell*, 2 Cush. 227. As said by Lord Chief Baron Eyre, in *Dyer v. Dyer*, 2 Cox, 92; S. C., reported in 1 Leading Cases in Equity, star-paging, 203: "The clear result of all the cases, without a single exception, is that the trust of a legal estate, whether freehold, copyhold, or leasehold; whether taken in the name of the purchaser and others jointly, or in the names of others without that of the purchaser; whether in one name or several; whether jointly or successively—results to the man who advances the purchase money. This is a general proposition, supported by all the cases, and there is nothing to contradict it; and it goes on a strict analogy to the rule of the common law, that where a feoffment is made without consideration the use results to the feoffor." It has its origin in the nature of presumption, in the absence of all rebutting circumstances, that he who supplies the money means the purchase to be for his own benefit, rather than for that of another; and that the conveyance in the name of the latter is a matter of convenience and arrangement between the parties, for other collateral purposes: 2 Story's Eq. Jur., sec. 1201. "This presumption is not an arbitrary one, but a reasonable one, founded in the general experience and observation of men:" *Edwards v. Edwards*, 39 Pa. St. 377, per Woodward, J. But in order that a resulting trust may be raised, it is absolutely indispensable that the payment should have been actually made by the person in whose favor the trust is sought to be raised, or that an absolute obligation to pay should have been incurred by him as a part of the original transaction of purchase at or before the time of the conveyance; no subsequent and entirely independent conduct, intervention, or payment on his part would raise any resulting trust: 2 Pomeroy's Eq. Jur., sec. 1037. The trust reverts to the source and origin of the consideration, whatever may be its character; and so it has been held that land set off in payment of a judgment recovered in the name of A., and with his knowledge and consent, for the benefit of B., will be held in trust for B., although the legal title is in A.: *Peabody v. Tarbell*, 2 Cush. 227.

CONVEYANCE TO ONE OR MORE—PART PAYMENT OF CONSIDERATION.—A resulting trust arises whether the title is taken in the name of one grantee only, or of two or more grantees jointly; in the latter case they are joint trustees: 2 Pomeroy's Eq. Jur., sec. 1038. So payment of a part of the purchase money will create a resulting trust to the extent of that part, as where two or more persons advance the purchase money, and the conveyance is taken in the name of one of them: *Botaford v. Burr*, 2 Johns. Ch. 405; *Case v. Coddling*, 38 Cal. 191; *Rhea v. Tucker*, 56 Ala. 450; *Cramer v. Hooser*, 93 Ill. 503; *Pierce v. Pierce*, 7 B. Mon. 433; *Morey v. Herrick*, 18 Pa. St. 123; *McCreary v. Casey*, 50 Id. 349; *Dikeman v. Norrie*, 36 Cal. 94; *Smith v. Patton*, 12 W. Va. 541; *Smith v. Smith*, 85 Ill. 189. To make a partial payment create a resulting trust at all, the money must be paid as a definite aliquot part of the consideration of the purchase, and then the trust will be of an aliquot part of the whole estate in the property; but unless the payment or advance be of a definite part of the consideration money, as such, no trust will result by implication of law, and without agreement: 1 Lead. Cas. in Eq., 4th Am. ed., 340; citing *White v. Carpenter*, 2 Paige, 218, 238, 239, 240, 241; *Sayre v. Townsend*, 15 Wend. 647, 650; *Freeman v. Kelly*, 1 Hoffm. 90, 96; *Evans' Estate*, 2 Ashm. 470, 482; *Smith v. Burnham*, 3 Sumn.

435, 462, 463; *Green v. Drummond*, 31 Md. 71; *Baker v. Vining*, 30 Me. 121; *Cutler v. Tuttle*, 4 C. E. Greene, 549, 562; *McGowan v. McGowan*, 14 Gray, 119. Thus in *Baker v. Vining*, 30 Me. 127, the court, per Tenney, J. say "No case has been found where a resulting trust has been held to arise upon payments made in common by the one asserting his claim and the grantee in the deed, wherein the grantor acknowledges the receipt of the consideration from him alone, when the amount belonging to one and the other is uncertain and unknown even to those who make the payments, and no satisfactory evidence is offered exhibiting the portion which was really the property of each. The trust springs from a presumption of law, because the alleged *cestui que trust* has paid the money. Such presumption must be attended with no uncertainty. The whole foundation is the payment, and this must be clearly established." But it has been said that where a purchase has been made with funds furnished jointly, the presumption is, in the absence of proof, that they were furnished in equal amounts from each person: *Shoemaker v. Smith*, 11 Humph. 81.

NO TRUST CREATED IF AGAINST POLICY OF LAW OR A STATUTE.—An exception to the rule that a resulting trust is raised in favor of the party advancing the consideration exists where it would break in upon the policy of the law or contravene any statutory provisions: 1 Perry on Trusts, sec. 131; 2 Story's Eq. Jur., sec. 1201 b; *Clos v. Boppe*, 23 N. J. Eq. 270; *Miller v. Davis*, 50 Mo. 572; *Proseus v. McIntyre*, 5 Barb. 424; *Baldwin v. Crampton*, 4 Halst. 891. Thus a conveyance, designed in fraud of creditors, will not be declared a resulting trust in favor of a party thereby seeking to be benefited: *Cutler v. Tuttle*, 19 N. J. Eq. 549. Neither will a trust be created where an alien purchases land, and for the purpose of evading the law prohibiting him from taking and holding real property, takes the conveyance thereof in the name of a third person: *Leggett v. Dubois*, 5 Paige, 114; S. C., 23 Am. Dec. 413; *Taylor v. Benham*, 5 How. 270; *Philips v. Crammond*, 2 Wash. C. C. 441. In *Leggett v. Dubois*, *supra*, Walworth, chancellor, says: "Equity will never raise a resulting trust in fraud of the laws of the land. It could not, therefore, in a case like the present, be raised in favor of an alien, in fraud of the rights of the state. The law will never cast the legal or equitable estate upon a person who has no right to hold it; although as estate may, by an express contract or conveyance, be vested in an alien, until office found, for the benefit of the people of the state. Where an alien, therefore, purchases land and takes an absolute conveyance in the name of a citizen, without any agreement or declaration of a trust, the law will not raise a trust in favor of the alien purchaser, who can not hold the land, any more than it would cast it by descent upon an alien heir, who can not hold it against the state." And when the purpose is to do that through the medium of another person which the party could not do in his own name, no resulting trust is raised; as where land was entered by a son in his own name, with the money of his father, where the father had already entered as much land in his name as he was allowed under the act of congress: *Alsworth v. Cordtz*, 31 Miss. 32.

PURCHASE IN NAME OF PERSON LEGALLY OR MORALLY ENTITLED TO SUPPORT.—Where the purchase is made by a person who is under a legal or moral obligation to support the person in whose name the conveyance is taken, the presumption that the purchase was for the benefit of the party furnishing the purchase money is rebutted, and no trust results to him, but equity raises a presumption that the conveyance was an advancement or gift to the nominal purchaser. Thus a purchase by a husband in the name of his wife

is presumed to be an advancement to her: *Walton v. Divine*, 20 Barb. 9; *Whitten v. Whitten*, 3 Cush. 194; *Fatheree v. Fletcher*, 31 Miss. 265; *Guthrie v. Gardner*, 19 Wend. 414; *Alexander v. Warrance*, 17 Mo. 228; *Cotton v. Wood*, 25 Iowa, 30. So a purchase by a father in the name of his son, who is not provided for, is presumed to be an advancement: *Dudley v. Bosworth*, 10 Humph. 12; S. C., ante, 690; *Dyer v. Dyer*, 2 Cox, 92; *Partridge v. Havens*, 10 Paige, 618; *Tremper v. Barton*, 18 Ohio, 423; *Stanley v. Brannon*, 6 Blackf. 195; *Proscus v. McIntyre*, 5 Barb. 432; *Pinney v. Fellows*, 15 Vt. 525; *Alexander v. Warrance*, 17 Mo. 228; *Douglass v. Brien*, 4 Rich. Eq. 322; *Butler v. M. Ins. Co.*, 14 Ala. 777; *Shepherd v. White*, 10 Tex. 72. A purchase by a mother in the name of her child, or in the joint name of herself and child, and payment of the price with her own separate funds, raises no resulting trust: 2 Pomeroy's Eq. Jur., sec. 1039; so also no trust arises, but the transaction is presumed to be an advancement or gift, where the person furnishing the purchase money stands *in loco parentis* to the nominal purchaser, as father-in-law and son-in-law: *Baker v. Leathers*, 3 Ind. 558; husband and wife's nephew: *Currant v. Jago*, 1 Coll. 261; uncle and nephew: *Jackson v. Fuller*, 2 Wend. 465; brother and sister: *Higdon v. Higdon*, 57 Miss. 264; father and illegitimate son: *Beckford v. Beckford*, Lofft. 490. But the rule does not apply to more distant relatives, or to strangers, although the person furnishing the purchase money may have placed himself *in loco parentis*: *Tucker v. Burrow*, 2 Hem. & M. 515; *Powys v. Mansfield*, 3 Myl. & Cr. 359. This presumption of an advancement or gift arising from the fact of the real purchaser being under a legal or moral obligation to support the nominal purchaser, may be rebutted by evidence showing the intent of the real purchaser to secure a trust for himself: *Shepherd v. White*, 10 Tex. 72; *Cotton v. Wood*, 25 Iowa, 30; *Jackson v. Matadorf*, 11 Johns. 96; S. C., 6 Am. Dec. 355; *Proscus v. McIntyre*, 5 Barb. 432; *Hodgson v. Macy*, 8 Ind. 121; *Butler v. M. Ins. Co.*, 14 Ala. 788.

TRUST MUST RESULT EO INSTANTI.—A resulting trust must arise, if at all, at the time the legal title is taken. Payment of the purchase money must have been made, or an obligation to pay incurred, at the time of the purchase, and no subsequent payment, however clearly proved, will answer the requirements of the law, for the trust arises out of the circumstance that the money of the real and not of the nominal purchaser formed at the time the consideration of the purchase, and became converted into land: 1 Perry on Trusts, sec. 133; 2 Pomeroy's Eq. Jur., sec. 1037; 1 Lead. Cas. in Eq., 4th Am. ed., 337; *Botsford v. Burr*, 2 Johns. Ch. 408; *Nixon's Appeal*, 63 Pa. St. 282; *White v. Carpenter*, 2 Paige, 218; *Page v. Page*, 8 N. H. 187; *Graves v. Dugan*, 6 Dana, 331; *Pennock v. Clough*, 16 Vt. 501; *Steere v. Steere*, 5 Johns. Ch. 1; S. C., 9 Am. Dec. 256; *Buck v. Pike*, 11 Ma. 9; *Jackson v. Moore*, 6 Cow. 706; *Gee v. Gee*, 2 Sneed, 395. It is expressed by Chancellor Kent thus, in *Botsford v. Burr*, *supra*: "If A. purchases an estate with his own money, and takes the deed in the name of B., a trust results to A., because he paid the money. The whole foundation of the trust is the payment of the money, and that must be clearly proved. If, therefore, the party who sets up a resulting trust made no payment, he can not be permitted to show by parol proof that the purchase was made for his benefit. * * * Nor would a subsequent advance of money to the purchaser, after the payment is complete and ended, alter the case. It might be evidence of a new loan, or be the ground of some new agreement, but it would not attach by relation a trust to the original purchase; for the trust arises out of the circumstance that the money of the real and not of the nominal, purchaser formed at the

time the consideration of that purchase, and became converted into land." Again he says: "The trust results from the *original transaction*, at the time it takes place, and at no other time, and it is founded on the *actual payment of money*, and on no other ground. It can not be mingled or confounded with any subsequent dealings whatever." And in *White v. Carpenter*, 2 Paige, 238, Chancellor Jones says: "The principle is, that the estate belongs to the party who advances the money out of his own funds, and on his own account, to pay for it; and the nominal grantee, who receives the title without paying or incurring any liability to pay any part of the consideration money, is looked upon, and in truth is, the mere conduit pipe or channel through which the estate and the title and interest in it pass from the grantor to the real purchaser, who pays the consideration for it. It follows, as a necessary consequence, that the trust must arise, if at all, at the time of the conveyance, and that the money or other consideration for the deed, which is the foundation of the trust, *must be then paid, or secured to be paid.*"

APPLIES TO PERSONAL AS WELL AS REAL PROPERTY.—The doctrine of resulting trusts, arising from payment of the consideration money, applies in all its phases to personal as well as to real estate. Hence a sale or transfer of a bond, annuity, shares of stock, mortgage, or any other chose in action, or other personal property, to one person, where the consideration proceeds from another, will raise a resulting trust in such chose in action, or other personal property, in favor of the latter person: 2 Pomeroy's Eq. Jur., sec. 1038; 1 Perry on Trusts, sec. 130; *Rider v. Kidder*, 10 Ves. 360; *Loyd v. Read*, 1 P. Wms. 607; *Sidmouth v. Sidmouth*, 2 Beav. 447; *Ex parte Houghton*, 17 Ves. 251; *Garrick v. Taylor*, 29 Beav. 79; *Ebrand v. Dancer*, 2 Ch. Cas. 26; *Creed v. Lancaster B'k*, 1 Ohio St. 1.

CONVEYANCE IN TRUST FOR UNCERTAIN AND INDEFINITE PURPOSE.—As before stated, the most common and important class of resulting trusts is the class so far treated of in this note, which arises from the fact that the consideration for the conveyance did not proceed from the grantee named, but from a third person, in whose favor, therefore, equity raised the trust. Besides this class, there are several other classes which we will briefly notice, as where a conveyance is made in trust for a certain purpose or purposes which are indefinite and uncertain, or are illegal, or which fail, or where a trust is expressly created in a part only of the estate conveyed, or where a conveyance has been made without any consideration whatever. In all of these cases a resulting trust may arise. First, then, where the purpose is uncertain or indefinite. It has long been a settled rule of law, that where property is given by will or deed upon trust, and the trust is too uncertain, indefinite, and vague to be carried into effect, a trust will result to the donor, his heirs, or next of kin: 1 Perry on Trusts, sec. 159; 2 Pomeroy's Eq. Jur., sec. 1032; *Nichols v. Allen*, 130 Mass. 211; *Olliffe v. Wells*, Id. 221; *Kendall v. Granger*, 5 Beav. 300; *Stubbs v. Sargon*, 3 Myl. & Cr. 507; *Morice v. Durham*, 10 Ves. 522; *Williams v. Kershaw*, 5 Cl. & Fin. 111; *Shaw v. Spencer*, 100 Mass. 388; *Sturtevant v. Jaques*, 14 Allen, 526; *Leslie v. Devonshire*, 2 Bro. C. C. 187; *Fowler v. Garlike*, 1 Ry. & M. 232; *James v. Allen*, 3 Mariv. 17; *Ellis v. Selby*, 7 Sim. 352; S. C., 1 Myl. & Cr. 286; *Dashiell v. Attorney General*, 6 Har. & J. 1.

CONVEYANCE IN TRUST FOR ILLEGAL PURPOSE.—Where property has been granted, bequeathed, or devised in trust for some purpose which is illegal, as in contravention of some statute or the policy of the law, the trust is void, and a resulting trust arises in favor of the grantor, or devisor, or his heirs or representatives: *Carrick v. Errington*, 2 P. Wms. 361; *Pilkington v. Boughey*, 12 Sim. 114; *Turner v. Russell*, 10 Hare, 204; *Tregonwell v. Sydenham*, 3 Dow,

194; *Cook v. Stationers' Co.*, 3 Myl. & K. 202; *Page v. Leapingwell*, 18 Ves. 463; *Lemmond v. People*, 6 Ired. Eq. 137; *Stevens v. Ely*, 1 Dev. Eq. 493. Thus, where a trust is created in favor of papists, prohibited by statute from taking: *Carrick v. Errington*, 2 P. Wms. 361; or where the trust is void under the statute of mortmain: *Pilbington v. Boughey*, 12 Sim. 114; *Arnold v. Chapman*, 1 Ves. 108; *Jones v. Mitchell*, 1 Sim. & S. 290; or where it tends to create a perpetuity: *Curtis v. Lukin*, 5 Beav. 147; or where it contravenes some policy of the law, as by emancipating slaves or placing them in a qualified state of slavery: *Stevens v. Ely*, 1 Dev. Eq. 493; *Lemmond v. People*, 6 Ired. Eq. 137. In *Stevens v. Ely*, *supra*, a testatrix before her death had conveyed certain of her slaves to the defendant in trust to permit them to live together and be industriously employed, and that the defendant should exercise a control over their morals and furnish them with necessaries. This bill was brought by Stevens, the grantor's executor, and prayed for a reconveyance. Henderson, C. J., said: "These trusts exclude the idea that he (the defendant) should hold the negroes as property. And the policy of the law forbids that they should be held otherwise. The trust therefore falls off, and the defendant holds them as property freed from the trust; or the beneficial interest results to the grantor—or rather, never was out of her. I shall not examine the cases which were cited and commented on at the bar. They all go to prove that unlawful trusts, motives, or intents render the grant void or not, as will best tend to suppress the illegal act or intent contemplated. Or if they do not render the grant void, they either fall off or result, as will best effect the same object." The defendant claimed that there was a distinction between attempting to create an illegal trust by deed and by a will, and that when attempted by deed, as in this case, no trust would result to the grantor, but her interest in the property would be forfeited, and the defendant himself would have the legal and beneficial interest. In answer to this, Henderson, C. J., said: "There can be no reason for raising a resulting trust for the heir, which does not equally operate to raise one for the grantor. It is said the heir takes all that the ancestor does not devise to another. The grantor retains all that he has not given away; and if the grantee can not take the beneficial interest, it remains in the grantor. For to every grant there must be a grantee—a taker. It is said the grantor had forfeited her estate by attempting an illegal trust. So has the deviser, and his heir takes nothing but what his ancestor had at his death. It is said, the forfeiture is inflicted on him to prevent the commission of such acts. Our own feelings, nay, our holy religion tells us, that we are more restrained by punishment to be inflicted on our children for our crimes than on ourselves. So that policy is on the other side. I can not, therefore, distinguish this case from a similar disposition made in a will."

CONVEYANCE IN TRUST FOR PURPOSE WHICH FAILS.—Where property is conveyed or devised in trust for particular objects or purposes, if those objects or purposes fail by lapse or otherwise, a resulting trust will arise for the benefit of the grantor or deviser, if the property is not otherwise disposed of: 2 Pomeroy's Eq. Jur., secs. 1032, 1033; 1 Perry on Trusts, sec. 160; 2 Story's Eq. Jur., sec. 1200, and cases cited; *Ackroyd v. Smithson*, 1 Bro. C. C. 503; *Williams v. Coad*, 10 Ves. 500; *Cruse v. Borley*, 3 P. Wms. 22; *Spink v. Lewis*, 3 Bro. C. C. 355; *Davenport v. Colman*, 12 Sim. 610; *Hutchison v. Hammond*, 3 Bro. C. C. 128; *Hawley v. James*, 5 Paige, 318; *Muckleston v. Brown*, 6 Ves. 63.

TRUST DECLARED AS TO PART ONLY OF ESTATE CONVEYED.—Where property is granted or devised, and a trust is declared in part only of the estate

thus granted or devised, or the purposes of the trust do not exhaust the whole beneficial interest, a trust in the remaining part or interest will result to the grantor, or the heirs or representatives of the devisor; 2 Pomeroy's Eq. Jur., sec. 1034; 1 Perry on Trusts, sec. 152; 2 Story's Eq. Jur., sec. 1199; *Lloyd v. Spillet*, 2 Atk. 150; *Elcock v. Mapp*, 2 Phila. 793; *Longley v. Longley*, 13 L. E. Eq. 133; *Marshall v. Crutwell*, 20 Id. 328; *Hobart v. Suffolk*, 2 Vern. 644; *Halford v. Stains*, 16 Sim. 488; *Davidson v. Foley*, 2 Bro. C. C. 203; *Parnell v. Hingston*, 3 Sm. & G. 344; *Levet v. Needham*, 2 Vern. 138; *Read v. Steadman*, 26 Beav. 495; *Culpepper v. Aston*, 2 Ch. Cas. 115; *Dawson v. Clarke*, 18 Ves. 254; *Swall v. Denny*, 10 Beav. 315; *Cooke v. Dealey*, 22 Id. 196; *Cottingham v. Fletcher*, 2 Atk. 155; *Benbow v. Townsend*, 1 Myl. & K. 506; *Hogan v. Stayhorn*, 65 N. C. 279; *Loring v. Elliot*, 16 Gray, 568; *McCallister v. Willey*, 52 Ind. 382; *Kennedy v. Nunan*, 52 Cal. 326; *Ponce v. McElroy*, 47 Id. 159; *Hogan v. Jacques*, 19 N. J. Eq. 123. The reason is, that the declaration of a trust as to part is considered sufficient evidence that the grantor or devisor did not intend the grantee or devisee to take the beneficial interest in the whole, and that the creation of the trust was the sole object of the transaction: 1 Perry on Trusts, sec. 152. But there is a distinction which must be observed between property given expressly for a particular purpose and subject to a particular purpose. In the latter case the beneficial interest is given to the grantee or devisee, subject to some charge which, when discharged, vests the whole remaining beneficial interest in such grantee or devisee: *King v. Denison*, 1 Ves. & Bea. 260; *Tregonwell v. Sydenham*, 3 Dow, 194; *Dawson v. Clarke*, 18 Ves. 247; *Downer v. Church*, 44 N. Y. 651; *Wood v. Cox*, 2 Myl. & Cr. 684. Lord Chancellor Eldon thus states this distinction in *King v. Denison*, 1 Ves. & Bea. 272: "If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more; and the effect of those two modes admits just this difference. The former is a devise of an estate of inheritance for the purpose of giving the devisee the beneficial interest, subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir; but where the whole legal interest is given for a particular purpose, with an intent to give the devisee of the legal estate the beneficial interest, if the whole is not exhausted by that particular purpose the surplus goes to the devisee, as it is intended to be given to him."

CONVEYANCE WITHOUT CONSIDERATION.—Where conveyance has been made, without any consideration expressed or implied, and does not state any use or trust, and is not intended as a gift, a presumption arises that it was intended it should be held for the benefit of the grantor, and a resulting trust will be created. This is in conformity to the rule of the common law, whereby, if a feoffment was made without consideration, the legal title only passed to the feoffee, and a use resulted to the feoffor: 2 Story's Eq. Jur., secs. 1197, 1198; 2 Pomeroy's Eq. Jur., sec. 1035; 1 Lead. Cas. in Eq. 349, 350; 1 Perry on Trusts, 161 et seq.; where the whole subject is discussed. In *Russ v. Mehus*, 16 Cal. 355, the plaintiff had conveyed to his father certain real estate, and brought that suit to set aside the conveyance. Cope, J., said: "It appears that the consideration was a verbal agreement by the father to make a will, and devise to the plaintiff certain property mentioned in the

complaint. The father died without having complied with the agreement, and the plaintiff claims that he is entitled to be restored to his original rights. The referee finds that this agreement was the only consideration for the conveyance, but whether this is the consideration expressed in the conveyance itself does not appear. Assuming that it is, we are unable to see why the case does not fall within the doctrine of resulting trusts. The agreement was void, and the conveyance was executed without any consideration, express or implied. It is shown that the transaction was not intended as a gift, and as there was no consideration, a trust resulted in favor of the plaintiff by implication of law." If a consideration is expressed in the conveyance, even though a nominal one, parol evidence is not admissible to show the trust: *Leman v. Whitley*, 4 Russ. 423; *Russ v. Mebus*, 16 Cal. 350.

PAROL EVIDENCE, WHEN ADMISSIBLE TO ESTABLISH.—In the first and most important class of resulting trusts, viz., where the trust arises in favor of the party furnishing the consideration, it has long been well settled that parol evidence is admissible to establish the facts necessary to create the trust, or out of which it results: 1 Perry on Trusts, sec. 137; 2 Pomeroy's Eq. Jur., sec. 1040; 2 Story's Eq. Jur., sec. 1202; *Ryall v. Ryall*, Amb. 413; S. C., 1 Atk. 59; *Gascoigne v. Thwing*, 1 Vern. 366; *Willis v. Willis*, 2 Atk. 71; *Lench v. Lench*, 10 Ves. 517; *Miller v. Bloose's Ex'r*, 30 Gratt. 744; *Smith v. Patton*, 12 W. Va. 541; *Rhea v. Tucker*, 56 Ala. 450; *Hyden v. Hyden*, 6 Baxt. 406; *Byers v. Wackman*, 16 Ohio St. 440; *Baker v. Vining*, 30 Me. 126; *Frederick v. Haas*, 5 Nev. 389; 1 Lead. Cas. in Eq., 4th Am. ed., 335, and cases there cited. Mr. Perry lays the rule down broadly, that the statute of frauds extends to and embraces only trusts created or declared by the parties, and does not affect trusts arising by operation of law: 1 Perry on Trusts, sec. 137, citing *Ross v. Hegeman*, 2 Edw. Ch. 373; *Larkin v. Rhodes*, 5 Port. 196; *Enos v. Hunter*, 4 Gilm. 211; *Smith v. Sackett*, 5 Id. 544; *Foote v. Bryant*, 47 N. Y. 544; *Black v. Black*, 4 Pick. 238; *Bryant v. Hendricks*, 5 Iowa, 256; *Judd v. Haseley*, 22 Iowa, 428; *Ward v. Armstrong*, 84 Ill. 151.

Hence, the person claiming a resulting trust in his favor may prove by parol the payment of the purchase money by him, although the deed recites it to have been paid by the grantee; so also it is admissible in opposition to a sworn answer denying it: *Boyd v. McLean*, 1 Johns. Ch. 582; and even after the death of the nominal purchaser: *Id.*; *Freeman v. Kelly*, 1 Hoffm. 98. But parol evidence is to be received with caution; hence it must be full, clear, convincing, and satisfactory: *Boyd v. McLean*, *supra*; *Baker v. Vining*, 30 Me. 126; *Thomas v. Standiford*, 49 Md. 181; *Billings v. Clinton*, 6 S. C. 90; *Lee v. Browder*, 51 Ala. 288; *Hyden v. Hyden*, 6 Baxt. 406; *Agricultural Ass'n v. Brewster*, 51 Tex. 257; *Parker v. Snyder*, 31 N. J. Eq. 164; *Whitemore v. Learned*, 70 Me. 276. Thus, in the last case, the court say, page 285: "That such a trust may be established at all by parol, was a rule reluctantly adopted in equity, and accompanied at its adoption with the requirement of full proof, or a high degree of force and weight in the testimony offered." And in a Tennessee case it is said, "that such a parol trust may be set up, contrary to the face of a deed, is well settled; but it is equally well settled, that in order to the establishment of such a trust in opposition to the terms of a written instrument, the proof must be *most convincing and irrefragable*." *Hyden v. Hyden*, 6 Baxt. 407, *per* Freeman, J. In a leading case on this subject, Chancellor Kent has said: "The cases uniformly show, that the courts have been deeply impressed with the danger of this kind of proof, as tending to perjury and the insecurity of paper title; and they have required the payment by the *cestui que trust* to be clearly proved." *Boyd v. McLean*, 1 Johns.

Ch. 590. Even the parol declarations of the nominal grantee that another paid the purchase money, will be evidence against him, and his heirs or devisees; but such evidence is most unsatisfactory on account of the facility with which it may be fabricated, but is nevertheless competent if clear and consistent, especially when corroborated by circumstances: *Harder v. Harder*, 2 Sandf. 17; *Malin v. Malin*, 1 Wend. 626. A resulting trust may also be rebutted by parol evidence. It is founded on an equitable presumptive intention, but this presumption may be rebutted by parol evidence that the person furnishing the purchase money intended to give the nominal grantee the beneficial interest: *Benbow v. Townsend*, 1 Myl. & K. 506; *Garrick v. Taylor*, 29 Beav. 79; *Rider v. Kidder*, 10 Ves. 360; *Steere v. Steere*, 5 Johns. Ch. 19; S. C., 9 Am. Dec. 256; *Page v. Page*, 8 N. H. 195; *Hunt v. Moore*, 6 Cush. 1; *Botsford v. Burr*, 2 Johns. Ch. 416; *Beecher v. Major*, 2 Drew. & Sm. 431; *Carier v. Montgomery*, 2 Tenn. Ch. 216; *Bellasis v. Compton*, 2 Vern. 294. So also this presumption may be rebutted as to part of the trust, and not as to the remainder: *Benbow v. Townsend*, *supra*.

PAROL EVIDENCE, WHEN NOT ADMISSIBLE.—It seems that in the other classes of resulting trusts, viz., where a conveyance is made in trust for a certain purpose, but which is indefinite and uncertain, or is illegal, or which fails, or where a trust is expressly created in a part only of the estate conveyed, or where a conveyance has been made without any consideration whatever, parol evidence is not admissible. The intention that the donee is not to enjoy the beneficial interest, but that a trust is to result, or the contrary intention, must appear expressly or by implication from the terms of the instrument itself by which the property is conveyed. If the instrument is a will, then no extrinsic evidence is ever admissible to show the testator's meaning. If the instrument is a deed, no extrinsic evidence of the donor's intention is admissible, unless fraud or mistake is alleged and shown: 2 Pomeroy's Eq. Jur., sec. 1036, and cases cited. Hence, if there is in fact no consideration, but the deed recites a pecuniary consideration even merely nominal as paid by the grantee, this statement raises a conclusive presumption that the grantee is to take the beneficial estate, and destroys the possibility of a trust resulting to the grantor, and no extrinsic evidence would be admitted to contradict the recital and to show that there is in fact no consideration—except in a case of fraud or mistake: 2 Pomeroy's Eq. Jur., sec. 1036; *Leman v. Whitley*, 4 Russ. 423; *Russ v. Mebus*, 16 Cal. 350; *Squires v. Harder*, 1 Paige, 404; S. C., 19 Am. Dec. 446.

HOLLIS ET UX. v. FRANCOIS ET AL.

[5 TEXAS, 195.]

NOTES, BONDS, OR AGREEMENTS OF MARRIED WOMAN are absolutely void at common law. Her separate existence is merged in that of her husband, and she can make no contract to charge her estate or render herself liable to an action.

IN EQUITY, MARRIED WOMAN HAS BEEN TREATED AS POSSESSING, IN A GREAT DEGREE, the powers of a *feme sole* over her separate property, and as possessing the necessary powers of charging, incumbering, or disposing of it at pleasure.

DOCTRINES OF COURTS OF EQUITY AS TO POWERS OF FEMES COVERT OVER THEIR SEPARATE ESTATES are not recognised as rules by which the powers of *femes covert* over their separate estates, under the Texas statute, and their consequent liabilities, are to be determined.

TEXAS STATUTE PRESCRIBES SPECIAL MODE FOR CONVEYANCE OR TRANSFER OF WIFE'S SEPARATE PROPERTY, and unless this mode be pursued, the wife has no power to charge her separate estate, except for necessities for herself and family and for expenses incurred for the benefit of her separate property; a note given for these alone, or jointly with the husband, would create a legal liability which can be enforced against either the common property or the separate property of the wife, at the plaintiff's discretion.

UNDER FORMER LAWS OF TEXAS, WIFE COULD ALIEN HER SEPARATE PROPERTY with the consent of her husband, and in case of his refusal or absence, by authorization of the judge.

PRESENT STATUTE HAS INTRODUCED, IN ADDITION TO ASSENT OF HUSBAND, the requisite of the privy examination of the wife, and, in fact, the customary mode for the transfer of the freehold and dower interests of the wife, under the strict rules of the common law.

STATUTE PROVIDING THAT FEMES COVERT MAY DISPOSE OF THEIR SEPARATE PROPERTY in a particular mode applies to the transfer of the most insignificant articles of her movables; but the restriction has been so far removed as to authorize her separate estate to be charged with necessities for herself and family, and expenses incurred for the benefit of her separate property.

WIFE CAN, BY COMPLYING WITH FORMALITIES PRESCRIBED BY STATUTE, pass her whole estate for the payment of her husband's debts; and her competence, under the same sanction, to pass a less interest, or to incumber her estate, can not be questioned.

WHERE WIFE JOINS HER HUSBAND, IN MORTGAGE OF HER ESTATE, FOR BENEFIT OF HUSBAND, as between the husband and wife, the mortgage will be considered the debt of the husband; and after his death, the wife or her representatives will be entitled to stand in the place of the mortgagee, and have the mortgage satisfied out of his assets.

IN ACTION TO FORECLOSE MORTGAGE GIVEN BY WIFE FOR HUSBAND'S DEBTS, if the husband has separate property, or there is community property, the court would doubtless have authority to decree payment out of such property, if sufficient, and if not, the balance to be satisfied out of the separate property of the wife, incumbered with the charge.

COURTS WILL EXAMINE WITH VIGILANCE TRANSFERS AND INCUMBRANCES BY WIFE OF HER SEPARATE PROPERTY, even when the formalities of the statute have been complied with, and protect the wife from undue influence or fraud, or compulsion of her husband or others; but where such defenses are insisted on, they must be averred by the wife and sustained by proof, as it is not incumbent on the plaintiff to establish a negative.

SUIT to foreclose mortgage on two slaves, the separate property of Elizabeth Hollis. The slaves were held by John Love, as trustee for said Elizabeth. In 1845, William Hollis and his wife Elizabeth purchased certain farming utensils, provisions,

and other necessities for the family of said Hollis and to carry on his farm; and in consideration therefor gave their note for five hundred and seventy-eight dollars and twenty-one cents. To secure the note, said William and Elizabeth, and the said Love, as trustee, executed and delivered to plaintiffs the said mortgage. The mortgage was acknowledged by said Elizabeth, as prescribed by the statute regulating the mode in which married women may dispose of their separate property. Decree of foreclosure entered; defendants appealed.

J. P. Henderson and Ardrey, for the appellants.

Thomas J. Jennings, for the appellees.

By Court, HEMPHILL, C. J. The grounds upon which the appellants rely to show that the judgment is erroneous, are: 1. That the contract of the wife, as a joint promisor with her husband, created no legal liability on her part, and was, as to her, absolutely null and void. 2. That the mortgage was but an accessorial contract, dependent upon the legal liability created by her signing the said note; and that it was null and void, and could not be enforced against her separate property.

The first proposition, if tested by the rules of the common law, or at least those administered in the common-law courts, is undeniably true. The notes, bonds, or agreements of a married woman are absolutely void at law. Her separate existence is merged in that of the husband; and she can make no contract to charge her estate, or render herself liable to an action: *Murray v. Barlee*, 3 Myl. & K. 209. But the case is wholly different in equity; her separate existence is there recognized both as to her rights, and the liabilities with which her property may be affected. She is treated, in equity, according to the rules of the English decisions, as possessing, in a great degree, the powers of a *feme sole*, over the separate property in which she has an absolute interest, and possessing, as incidents to her right of property, the necessary powers of charging, incumbering, or disposing of it at pleasure. Her power to charge is clear; and when her intention to do so is manifest, the liability attaches; and the execution of a note by a *feme covert* is regarded in equity as, *prima facie*, an evidence of her intention to charge her separate estate. The note, then, though void at law, can be enforced in equity against the separate estate of the wife, according to the rule of the English decisions; and although a wife incurs no personal liability by the execution of a note, yet it must be satisfied out of the *corpus* or profits of her separate estate.

The doctrines of courts of equity, as to the power of *femes covert* over their separate estates, are not recognized as rules, by which the powers of *femes covert*, over their separate estates, under our statute, and their consequent liabilities, are to be determined. The statute has prescribed a special mode for the conveyance or transfer of the property, and unless this mode be pursued, the wife has no power to charge her separate estate, except for necessities for herself and family, and for expenses incurred for the benefit of her separate property; a note given for these, alone or jointly with the husband, would create a legal liability, which can be enforced against either the common property, or separate property of the wife, at the discretion of the plaintiff: Acts of 1848, p. 77.

But the principal question in the case is as to the validity of the mortgage. Before examining the point, whether a mortgage executed as was this, with all the solemnities of the law, is valid, I will take a cursory survey of the power of *femes covert* to affect, by mortgage, their separate equitable estates. Their power to do so is quite clear. They can incumber them, by mortgage, for the payment of their husband's debts. They could give the estates to their husbands; and a mortgage, or other charge upon them, is regarded, *pro tanto*, as an appointment of the separate estate: *Vanderheyden v. Mallory*, 1 N. Y. 462; *Jaques v. Trustees*, 17 Johns. 549 [8 Am. Dec. 447]; 2 Story's Eq. Jur., secs. 1390, 1392, 1395, 1399; 2 Roper, 216, 217. These dispositions of the wife's equitable estate, in favor of the husband, will be closely scrutinized; and they must be free from symptoms of fraud, coercion, or undue influence: 2 Story's Eq. Jur., sec. 1395; *Bradish v. Gibbs*, 3 Johns. Ch. 550; 2 Roper's H. & W., 216, 224; *Milnes v. Busk*, 2 Ves. jun. 498, 500.

Waiving the examination of the doctrines of courts of equity, in England, as to the power of *femes covert* over their separate estates, I will proceed with the investigation of their powers as regulated by statute. The property in this case was, most probably, limited by deed; and a special mode of disposing of, or charging, the estate, may have been directed; but, as the deed was not admitted in evidence, its provisions can not be inquired into; and the question must be determined as if it had arisen upon the separate estate of the wife, under the law, and its mode of transfer, as established by the acts regulating the subject-matter. At the date of the execution of the mortgage, the statute of 1841, prescribing the mode of disposition of the property of the wife, was in force. It declared, in effect, that when

a husband and wife have conveyed any estate, or interest, in any land, slaves, or other effects, the separate property of the wife, if she appear before any judge of the district court or chief justice of the county court, and declare that she did freely and willingly seal and deliver the said writing, to be shown and explained to her, and wishes not to retract it, and shall acknowledge the said writing, so again shown to her, to be her act, and such privy examination, acknowledgment, and declaration being certified by the officer, the conveyance shall pass all the right, title, and interest which the husband and wife, or either of them, have in or to the property thereby conveyed.

The forms prescribed by the statute have been strictly pursued in the execution of this mortgage; and its validity would seem to be beyond dispute, provided the wife has competent authority to convey a less interest, or to incumber her estate, by complying, in the mode of making the charge, with the formalities prescribed for the conveyance of her entire estate. This can not be doubted, on principle; and it seems to be equally well settled, by the authorities.

By the rules of the common law, and independent of the wife's rights in equity, her personal property vested in the husband, and he was seised of a freehold interest in her estate of inheritance in land, and entitled to its rents and profits during their joint lives; but if he died before the wife, she took the estate, again, in her own right: 2 Kent's Com. 130. She could not contract in relation to her personal property, as it had passed to her husband; but, in her realty, she retained a dormant reversionary interest, which, on the death of the husband, revived into the right and title under which she held it before marriage. This interest she could, jointly with her husband, transfer, in England, by way of fine; and a deed, with a privy examination and acknowledgment by the wife, having been substituted for the conveyance by fine, in most of the states of the United States, she can convey such interest by deed, with the requisites of examination and acknowledgment, which are essential to its validity: *Id.* 151. This has no reference to the disposal of the separate equitable estate of the wife. In the alienation of this, she was not restricted to the conveyance by fine; nor was a private examination required to give validity to her deed: *Id.*; *Sturgis v. Corp.*, 13 Ves. 190.

Under our former laws, the wife could alienate her separate property, with the consent of her husband, and in case of his refusal, or absence, by authorization of the judge. The statute

has introduced, in addition to the assent of the husband, the requisite of the privy examination of the wife, and, in fact, the customary mode for the transfer of the freehold and dower interests of the wife, under the strict rules of the common law. As a substitute for the clumsy and expensive conveyance by fine, this mode is simple and convenient, but contrasts unfavorably, in these respects, with the mode prescribed under our former laws, or the assurance by which the separate property of the wife, in equity, may be transferred.

A privy examination before a magistrate was designed, and may have some tendency, to protect a *feme covert* from undue influence, or coercion, by her husband, or others; and its operation, if limited to conveyances of lands and slaves, would not be onerous; but when it is considered that it is required by the statute in all conveyances of any of the effects of the wife, and that it is as essential to give validity to transfers of the most insignificant articles among her movables—her poultry, for instance—as to the transfer of lands and slaves, it can not be denied, that such regulations are repugnant to the spirit of laws which recognize the capacity of the wife to hold all her separate property in her separate right, based as they are on the fundamental principle, that her separate existence and independent volition are not absorbed, at least entirely, by the coverture, in those of the husband. The bonds which the iron principle of the common law had thrown over the rights and powers of the wife, had been so far broken by courts of equity, as to afford her a reasonable degree of freedom in the disposal of her separate property. In fact, the common law knew nothing of the separate estate of the wife. It owes its foundation in states governed by the common law, and the rules for its control and disposal, to the principles of equity jurisprudence. In this state it is now, and always has been, established by law; and it would seem, if the mode for regulating its transfers must necessarily be sought in other systems, that the rules of equitable jurisprudence, or those which prevailed under our former laws, should have been consulted, rather than those modes of conveyance which were known to the common law. The terms and conditions and the principles of the law on which they are based, recognize to but a very limited extent the separate existence, civil capacity, or independent will of the wife. We may remark, however, that the restrictions upon the wife's power of disposal of her separate property to a particular mode, have been so far removed as to authorize her separate estate to be

charged with necessities for herself and family, and expenses incurred for the benefit of her separate property.

But to recur to the inquiry whether the wife can, by complying with the formalities prescribed for the conveyance of her entire interest, execute a valid mortgage of her separate property, for her husband's debts. It is held by the authorities, to be beyond question, that if a wife join her husband in a mortgage of her lands and levy a fine thereof, this will bind her and her heirs, notwithstanding her coverture; for, as by such a process she may make an absolute sale of the estate, so she may make a conditional one thereof: *Powell on Mort.* 706; 1 *Roper's H. & W.* 139. Chancellor Kent, in *Demarest v. Wynkoop*, 3 Johns. Ch. 144 [8 Am. Dec. 467], and in his Commentaries, vol. 2, p. 166, states the proposition as beyond doubt, that a wife may sell, or mortgage, her separate property, for the payment of her husband's debts; that she can deal with her land, by fine, as if she were a *feme sole*; and what she can do by fine in England, she may do here, by any legal form of conveyance, provided she execute under a due examination: *Wotton v. Hele*, 2 Saund. 177; *James v. Lyon*, 3 Yeates, 471; *Jamison v. Jamison*, 3 Whart. 457 [31 Am. Dec. 536]. The wife, in the case before the court, on her privy examination, acknowledged, after due examination of the contents of the mortgage, that the same was her act and deed, that she had freely and willingly executed the same, and wished not to retract. This was duly certified by the public officer. The law allows her, after these solemnities, provided as a safeguard, to pass her whole estate for the payment of her husband's debts; and her competence, under the same sanctions, to pass a less interest, or to incumber her estate, can not be questioned.

It will not be necessary, in this case, to examine the doctrine as to the wife's right of exoneration out of the estate of her husband, and to have a mortgage of her property, given to secure the payment of his debts, satisfied out of his assets, in case of his death. The general rule is, that where a wife joins her husband in a mortgage of her estate, for the benefit of the husband, as between the husband and wife, the mortgage will be considered the debt of the husband; and after his death, the wife, or her representatives, will be entitled to stand in the place of the mortgagee, and have the mortgage satisfied out of his assets: 3 Kent's Com. 167; *Powell on Mort.* 725, 726; *Id.* 875-877; *Clinton v. Hooper*, 1 Ves. jun. 186; 1 *Roper's H. & W.* 149.

There is no allegation that the husband has any separate, or that there is any community property; if there were, and the debt was, in fact, contracted for the husband's benefit, the court would doubtless have competent authority to decree payment out of such property, if sufficient, and if not, the balance to be satisfied out of the separate property of the wife, incumbered with the charge.

As stated in the previous part of the opinion, there is no doubt that courts of equity will examine transactions of this character, with vigilance, and protect the wife from undue influence, or the fraud or compulsion of her husband and others. There is no pretense that in this case there was any fraud, or coercion, exercised over the wife. Where such defenses are insisted upon, to repel the legal effects of the wife's execution of an instrument, under all the formalities of the law, they must be averred by the wife and sustained by proof; as it is not incumbent on the plaintiffs to establish a negative: *Field v. Sowle*, 4 Russ. 112.

The counsel, in their elaborate arguments, have examined, to a considerable extent, the doctrines prevailing under our former system of jurisprudence, as to the disability of the wife to bind herself as security for the husband, or to mortgage her property for the payment of his debts. There is no doubt, that under the sixty-first law of Toro, the wife could not bind herself as security for her husband, although it be alleged that the debt was converted to her benefit; and that when the husband and wife bound themselves, jointly, in one contract, the wife was not liable in anything, unless it be proved that the debt was converted to her benefit, and then she shall be bound in proportion to what shall have been so applied: Nov. Rec., lib. 10, law 1, tit. 3. Her privilege under this law, could be renounced; and in that event, to render her liable, it was not necessary that the debt inured to her benefit: *Banks v. Trudeau*, 2 Mart. N. S. (La.) 40; *Bein v. Heath*, 6 How. 228. Her disability to become security is also subject to certain exceptions: *Diccionario de Legislacion, verbo, Muger*.

It appears that under our former laws, she could have validly incumbered her separate estate, by renouncing the immunities guaranteed to her by law; and an awkward attempt at such waiver appears to have been made in the execution of the instrument. The doctrines of that system of laws are, however, not applicable to the case; and their investigation need not be pursued.

We are of opinion that there is no error in the judgment of the court; and it is ordered that the same be affirmed.

Judgment affirmed.

MARRIED WOMAN'S CONTRACTS AND COVENANTS: See note to *Burton v. Marshall*, 45 Am. Dec. 176, where prior cases in this series are referred to.

SEPARATE ESTATE OF MARRIED WOMAN IS IN EQUITY ANSWERABLE for debts contracted for its benefit: *Dyett v. N. A. Coal Co.*, 32 Am. Dec. 596, and note. See also note to *Thomas v. Folwell*, 30 Id. 233-241, where the subject of the powers of *femes covert* over their separate estate generally is discussed at some length. The doctrines of equity as to the power of married women over their separate estates are not recognized as rules under the Texas statutes: *Cartwright v. Hollis*, 5 Tex. 152.

WIFE IS ENTITLED TO RIGHTS OF SURETY FOR HUSBAND where she mortgages her separate estate or the reversionary interest in her realty to secure his debt, but not where she joins in a mortgage of his land for his debt: *Hawley v. Bradford*, 37 Am. Dec. 390. The principal case is cited to this point in *Sampson v. Williamson*, 6 Tex. 114.

THE PRINCIPAL CASE IS CITED AND APPROVED in *Sampson v. Williamson*, 6 Tex. 111; *Shelby v. Burtis*, 18 Id. 650; *Jordan v. Peak*, 38 Id. 439; *Rhodes v. Gibbs*, 39 Id. 442, to the point that a wife may mortgage her separate property for the payment of her husband's debts. And in *Shelby v. Burtis*, *supra*, to the further point that these mortgages by the wife, of her separate property, for the benefit of the husband, will be closely scrutinized, and must be free from symptoms of fraud, coercion, or undue influence. In *Magee v. White*, 23 Tex. 187 et seq., the principal case, with others, is reviewed, and a different view intimated upon the power of a married woman to mortgage her separate property for the debts of her husband. And a strenuous effort was made in the case of *Rhodes v. Gibbs*, *supra*, to overrule the authority of the principal case, and those following it, upon that point, but the court refused, and affirmed the principal case. The court say, p. 442: "This brings up the question so often heretofore before this court, Can the wife, under our constitution and laws, incur by mortgage her separate estate to secure the payment of a debt created by the husband before the execution of the mortgage? We are asked in this case to reopen this legal question, to review the former decisions of the court, and to reverse the rules laid down in *Hollis and Wife v. Francois and Border*, 5 Tex. 195, and the various decisions running down through the succeeding volumes of the reports. It is insisted by appellant's counsel that in some of the later cases the original rulings of the court have been already shaken. We know of but one case in which an intimation of the kind is to be found. We refer to the case of *Magee v. White*, 23 Tex. 180, in which a most learned and able decision of Judge Bell was delivered, and in which he does intimate an opinion that the former decisions of the court were unsound. That suit was upon a note only, without mortgage, and the part of the opinion referred to was not therefore authoritative even if the position had been squarely taken. * * * We believe the law as it is, and a sound public policy, alike demand that we adhere to the former decisions of this court on this subject."

HOWARD ET UX. v. NORTH.

[5 TEXAS, 290.]

ACTS OF FEMES COVERT IN PAIS MAY BE AND FREQUENTLY ARE VOID; but this does not impair the conclusive force of judgments to which they are parties; and if they be not reversed on error or appeal, their effect can not be gainsaid, where they are enforced by ultimate process, or where they are brought to bear on their rights, in any future controversy.

HUSBAND HAS BY LAW MANAGEMENT OF SEPARATE ESTATE OF WIFE, and the incidents essential to the due exercise of such authority, not for his own benefit, but for that of the community, or of the estate which he controls.

HUSBAND HAS NO SUCH INTEREST IN SEPARATE ESTATE OF WIFE as could be disposed of under execution in satisfaction of his debts.

WHERE JUDGMENT IS RECOVERED AGAINST HUSBAND AND WIFE, JOINTLY, without any specific directions in the decree as to the estate out of which it is to be satisfied, it would seem that, as a general rule, it may be levied upon and be satisfied out of the property of either the husband or wife, or of the community.

IT IS EQUITABLE THAT WIFE'S SEPARATE PROPERTY SHOULD RESPOND IN DAMAGES for the frauds in which she participates, in relation to her own property, and which inure to her exclusive benefit.

REASON OF RULE FAILING, RULE ITSELF SHOULD BECOME WHOLLY INOPERATIVE.

ACT CONCERNING EXECUTIONS IN TEXAS DOES NOT DIRECT MANNER IN WHICH RETURN of the officer shall be made, or what facts shall be stated. It does not require the return to embrace all the proceedings of the sheriff, or that it shall be recorded in the registry of deeds, or that it shall constitute record evidence of the purchaser's title.

ACT CONCERNING EXECUTIONS DOES NOT IMPOSE ON PURCHASER the duty of proving, by the return in writing, or by parol evidence, that the officer making the sale has not deviated in his acts from the mode prescribed by the statute for the execution of his authority.

LEVY CONSTITUTES BUT PORTION OF SHERIFF'S RETURN TO EXECUTION, and if the return is duly signed by the sheriff, it is no objection that his name was not signed to the levy itself.

IT IS NOT INCUMBENT ON PURCHASER AT EXECUTION SALE to see that the sheriff has properly advertised the sale. If any damage result to a defendant in execution, by the failure of the sheriff to comply with the law in this respect, he has his action for such damages against the sheriff.

DEFECTIVE NOTICE OR WANT OF PUBLICATION OF SALE OF PROPERTY UNDER EXECUTION will not vitiate the title of the purchaser.

PRIMA FACIE PRESUMPTION IS THAT OFFICER SELLING PROPERTY UNDER EXECUTION has discharged his duty according to the requisitions of the law.

WHERE TIME AND PLACE OF PUBLIC SALE ARE PRESCRIBED BY STATUTE, the sheriff has no authority to sell at any other time or place; and should he do so, his acts are not merely irregular but void, and can confer no title.

MISFEASANCE OF JUDGMENT OR EXECUTION IN SHERIFF'S DEED is not fatal to the title of the purchaser.

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WHEN DESCRIPTION OF LAND IN DEED IS SO INDEFINITE that it can not be identified with certainty, the deed becomes necessarily void, and confers no title.

MISTAKE OF SHERIFF IN COMPUTATION OF AMOUNT to be collected on an execution can not affect the title of a purchaser at the sale. Where a statute requires that land levied upon shall be appraised and sold, if the officer sell less than the whole tract, although sufficient to satisfy the execution, the sale is void, and confers no title on the purchaser.

WHERE EXECUTION SALE UNDER VALID JUDGMENT IS VOID, and the debtor brings suit to recover the property, if there be no fraud on the part of the purchaser, he will not be compelled to restore the property without being reimbursed the amount which he paid, and which went to satisfy the judgment.

PURCHASER OF PROPERTY SOLD UNDER EXECUTION has a right, in equity, when the property is recovered from him or his vendee by virtue of a superior title, to be substituted for the creditor, and have the amount of his purchase money refunded to him by the defendant in execution.

MULTIPLICITY OF ACTIONS IS REPUGNANT TO SIMPLICITY OF TEXAS SYSTEM of procedure, and will not be tolerated there.

ACTION to recover tract of land, claimed to be the separate property of the wife. That she originally had title was admitted, and the question was, whether her title had passed to the appellee. The land formed a portion of one half of a league, one quarter of which had been sold by the appellants to appellee. The latter instituted suit against the former, and recovered judgment for damages occasioned by their fraudulent representations in the said sale. Execution issued, was levied on the remaining quarter of the half-league, and enough of it sold to the appellee to discharge the execution. The opinion sufficiently states the other facts.

Neill, for the plaintiffs in error:

Robinson and Gillespie, for the defendant in error.

By Court, **HEMPHILL, C. J.** Several grounds have been urged by the counsel of the plaintiffs, for a reversal of the judgment; which may be resolved into two principal objections, viz.: 1. That the land is the separate property of the wife; and that a judgment against the husband and wife could not be enforced against this property so as to divest the wife of her title. 2. That if the judgment were legal and binding, as against the property of the defendants, or either of them, yet all the subsequent proceedings were illegal; and the acts under them confer no title on the purchaser of the land, who is defendant in the present suit.

One of the counsel of the defendant in error has, among

other matters, insisted that no question as to the wife's liability to respond in damages, out of her separate property, for the joint fraudulent representations of herself and husband, in the sale of a portion of that property, can now be raised. That this position is sound, can not be questioned. The judgment upon which the execution issued was rendered between the parties to this suit, by a court of competent jurisdiction, and, as between them and their privies, is conclusive unless fraudulently obtained. Whether this, or any other defense in abatement, or bar, on the ground of coverture, could have been successfully pleaded in that action, is not now to be considered. They were not pleaded nor urged at the trial of the cause; nor was a reversal of the judgment sought, on these or other reasons, before an appellate tribunal: and they form no such grounds as will avoid the force of that judgment in a collateral action. The acts of *femes covert*, in *pais*, may be, and frequently are, void; yet this does not impair the conclusive force of judgments to which they are parties; and if they be not reversed, on error or appeal, their effects can not be gainsaid, when they are enforced by ultimate process, or where they are brought to bear on their rights in any future controversy.

One of the counsel for the defendant has contended, that his title can be supported on the ground that the husband having, by statute, the management of the separate property of the wife, is vested with such an interest in that property, as can be the subject of sale under an execution issued against himself, or against himself and wife. This view of the legal effect of the husband's right to manage the separate property of the wife, is, we apprehend, entirely erroneous. The authorities to which he has referred, maintain no such doctrine, as applicable to the right of the husband in the separate, equitable estate of the wife, or its liability to execution on judgments recovered against himself. The doctrine was probably deduced from the rules by which, at common law, the husband was vested with a freehold interest in the lands of the wife; which he could voluntarily alienate, or which might be sold in satisfaction of his debts: 2 Kent's Com. 131. But the principles of the common law, especially when unmodified by equity, furnish no rule for the determination of the quantity or quality of the interest of the husband in the separate property of the wife, as fixed by law in this state. The common law knew nothing of separate property in the wife. Its origin is attributable to equity; and its recognition was a great innovation on that "immemorial policy" of the law, which

merged by force of the coverture, the separate existence and capacities of the wife in the husband. The right of the wife to hold all her property, in her separate right, is recognized by the law of the state. Her goods and chattels are not vested, by marriage, in the husband; nor is he entitled to a freehold estate in her realty. And all rules of law, founded upon such title in her property, are inoperative under a system by which such rights are wholly repudiated. He has, by law, the management of the estate of the wife, and the incidents essential to the due exercise of such authority, not for his own benefit, but for that of the community, or of the estate which he controls.

But, although the husband has no such interest in the separate estate of the wife, as could be disposed of, under execution, in satisfaction of his debts, and the title of the purchaser, if it rested on no other foundation, could not be supported; yet, where judgment is recovered against husband and wife jointly, without any specific directions in the decree as to the estate out of which it is to be satisfied, it would seem that, as a general rule, it may be levied upon and be satisfied out of the property of either the husband or wife, or of the community.

The operation of the rule may, in some cases, be oppressive; but its severity would generally be felt by the husband. He is frequently joined as a matter of form, on liabilities incurred by the wife, and which should be discharged out of her separate estate, and which would be so decreed, on a proper state of pleadings; but the wife would be seldom made a co-defendant with her husband, to answer to liabilities which should be charged upon his separate property. By the law, each of the partners in the conjugal society is entitled to separate property; but even at common law, it seems that where a judgment is obtained against husband and wife, the writ of *capias ad satisfaciendum* may be issued against both; and the courts have, in several cases, refused to discharge the wife, unless it appeared that there was collusion between the plaintiff and her husband, or that she was improperly joined in the action: *Roberts v. Mason*, 1 Taunt. 254; *Anonymous*, 3 Wils. 124; *Berriman v. Gilbert*, Barnes, 203; 2 Roper's H. & W. 129.

The wife, in this case, was the beneficiary in the transaction, which was the foundation of the action against herself and husband. Her land had been sold; and the proceeds, it must be presumed, were added to her separate property. She and her husband were charged with joint fraudulent representations in this sale; and of these charges they stand convicted by the

judgment of the court; and it is but equitable that her property should respond, in damages, for the frauds in which she participated, in relation to her own property, and which inured to her exclusive benefit. But, at all events, the purchaser is not affected by any equities which may have existed between husband and wife, to have satisfaction of the debt out of a particular fund. The judgment bound the property of both. The execution directed the levy to be made on their property. The officer obeyed his instructions. And the title of the defendant can not be impeached on the ground that the separate property of the wife was not liable to execution in satisfaction of a joint judgment against husband and wife.

It may be said, that there are cases in which a husband and wife must be joined, in a suit to enforce the liabilities of the wife; as, for instance, on a debt contracted by her, before marriage; and yet, if judgment be recovered during coverture, the debt becomes that of the husband, and must be enforced, out of his estate. This is unquestionably true, at common law. The rule is of almost universal operation. Even where a wife has a separate estate, created by deed, yet, unless its transfer to her separate use should be deemed fraudulent, as against her creditors, it is clear, on the authorities, that the wife, during the life-time of her husband, could not be made liable out of this estate, for any debts owing by her *dum sola*: *Vanderheyden v. Mallory*, 1 N. Y. 472; *Thomond v. Suffolk*, 1 P. Wms. 470; *Heard v. Stamford*, 3 Id. 409. But see *Biscoe v. Kennedy*, 2 Wils. 127. In the case of *Vanderheyden v. Mallory*, *supra*, it is considered extremely clear, that, by law, the wife, or her separate property, is not liable for her debts before marriage, during the life-time of the husband. It appears, however, that where imprisonment for debt is authorized, the *capias ad satisfaciendum* may issue against both husband and wife, for her debt when sole; and if the action be brought against the wife when sole, and pending the suit she marries, the *capias* shall be awarded against herself alone: 3 Bla. Com. 414; *Doyley v. White*, Cro. Jac. 323. Chancellor Kent, in his Commentaries, states, as the rule of law, that the wife, during coverture, can not be taken on *ca. sa.* for her debt *dum sola*, or a tort *dum sola*, without her husband; and if he escapes, or is not taken, the court will not let her lie in prison alone. It seems not a little strange that a wife during coverture, may be imprisoned for her debts *dum sola*, and yet, her separate estate be exempted from liability. It would be unavailing, however, to

prosecute this inquiry further; or to attempt to reconcile the authorities, if there be any conflict.

By none of these doctrines can the liabilities of husband, or wife, under our laws, for debt contracted by her when sole, be determined. Imprisonment for debt is not known to our jurisprudence; and the principal reason for charging the husband's estate with the liability, wholly fails under our rules regulating marital rights. By the common law, marriage operated as a gift to the husband of the wife's goods and chattels, and of a freehold interest in her lands; and though by deed she may have settled some of her property to her separate use, yet the remainder, if any, vested, on marriage, in the husband. Under such provisions, there was a degree of justice in the rule that the husband should discharge the wife's debts. But under our laws, none of the property of the wife can vest in the husband; and the reason of the rule (so far as it is founded on any reason) failing, the rule itself should become wholly inoperative: *Callahan v. Patterson et al.*, 4 Tex. 61 [*ante*, 712].

But though the husband be not liable, under the law of this state, yet, if judgment be entered against the husband and wife, jointly, with no specific directions as to the estate which shall be charged with the debt, it would seem, as we have stated, that whatever may be the rule at common law, yet here the judgment will operate as a lien upon, and may be satisfied out of, the property of either, or both.

We come now to the second proposition, or assignment of error, viz.: that if the judgment were binding on the property of the defendants, or of either of them, yet, the execution and subsequent proceedings were illegal, and the acts under them confer no title on the purchaser.

The objections urged upon our attention were taken at the trial, in the form of exceptions to the admissibility and legal effect of the evidence offered by the defendant. There are no bills of exceptions spread upon the record, but the objections are embodied in the statement of facts.

As it will be necessary to refer to certain provisions of the act concerning executions, to determine whether the objections to the defendant's title are valid, I will, in this place, transcribe some of the most important: Acts of 1842, p. 66. The fifth section directs the sheriff to advertise property, seized by virtue of an execution, at three public places in the county, at least twenty days for slaves and land; and one of the advertisements

to be posted up at the court-house of the county; and all sales of land and slaves shall be made at the court-house door of the county in which the sale takes place, on the first Monday of the month, between the hours of ten A. M. and four P. M., etc.

By the sixth section it is declared that if, on the sale of the property, more money is received than is sufficient to pay the amount of the execution, or executions, in the hands of the sheriff, or other officer, the surplus shall be immediately paid over to the defendant, his agent, or attorney.

The seventeenth section requires appraisers to be appointed, "who shall proceed to appraise the property levied on, at its fair cash value," etc. "The appraisement shall be reduced to writing, and signed by the appraisers, or a majority of them. The sheriff or other officer shall then proceed to offer the property, so levied on and appraised, for sale to the highest bidder, for cash, and if the highest sum bid does not amount to two thirds of the valuation made by the appraisers, there shall be no sale."

Section 22. That when a sale has been made, and the terms thereof complied with, the sheriff, etc., shall execute and deliver to the purchaser a conveyance of all the right, title, and interest, and claim, which the defendant had, in and to the property sold.

The principal question to be determined, is, whether the authority of the sheriff, to sell property under execution, is a mere naked statutory power, which must be strictly pursued, in order that title may pass; and this to be proved by the purchaser; or whether the provisions of the statute are to be regarded, in general, as directory to the sheriff, and if he make the sale authorized by law, his act will not be void as to *bona fide* purchasers, although he may have committed irregularities in the manner of executing his authority, for which he will be responsible to the party injured. The subject is not free from difficulties; and there is a considerable diversity of opinion among the authorities, so far as they have been accessible to examination.

In Louisiana, the doctrine was established at an early period, when the laws of Spain were in force, and it still continues to be the rule, with some modification, that a purchaser claiming title under a forced sale of property, must show that all the formalities required by law have been strictly and faithfully complied with; otherwise the sale will be annulled: *Delogny v. Smith*, 3 La. 421; *Mayfield v. Comeau*, 7 Mart. N. S. 185; *Mayfield v. Cormier*, 8 Id. 246; *Morris v. Crocker*, 4 La. 150; *Spiller v. Baumgard*, Id. 207; *Dufour v. Camfranc*, 11 Mart.

610 [13 Am. Dec. 360]; S. C., Id. 675. In a later case, it was held, that where a purchaser at a sale under execution shows a judgment, writ of execution, and sale to him under them, made by the proper officer, all previous proceedings by the latter are presumed to have been correctly made; but this, like all other presumptions, yields to contrary proof: *McDonough v. Gravier*, 9 La. 542. But in the same case the maxim is again stated that in forced alienations of property, the formalities required by law must be fulfilled to give validity to such alienations; and that persons interested may claim, for the want of such formalities, a rescission of the sales. A forced alienation is defined in *Dufour v. Camfranc*, 11 Mart. 610 [13 Am. Dec. 360], to be one resulting from a sale made at the time and in the manner prescribed by law, in virtue of an execution issuing on a judgment already rendered by a court of competent jurisdiction. The decisions of Louisiana are based on the principle that the power given the officer must be strictly pursued or his acts will be null. The act of sale is required by law to recite certain facts: Code of Prac., 693; and if these are omitted, or any of them, the buyer has not such a conveyance as the law directs, and is, therefore, without title; and this would probably be sustained on the principles which have governed the decisions in most of the other states. But the doctrine is carried further in Louisiana, and extends to all the prerequisites or formalities of the sale, whether required to be placed on record or not, or recited in the act of sale, or otherwise.

In Massachusetts, New Hampshire, and Maine, and, it is believed, in Connecticut, the general principle has been established that the return of the sheriff must show a strict compliance with all the requisitions of the statute; otherwise, extents of land (equivalent to sales under our laws) are held void. But the statute, in those states, points out, specifically, the facts which shall be certified by the officer, in his return; and the return must be recorded, and constitutes evidence of title.

The statute of New Hampshire, after giving specific instructions to the officer, levying on real estate in satisfaction of an execution, as to the mode of its appraisement, and its being set off for the creditor, etc., requires the officer to deliver seisin and possession of the property, so set off, to the creditor, or his attorney, and to make a full return of his proceedings, and to cause the execution and return to be recorded at length in the registry of deeds of the county, and returned to the office of the clerk of the court, to which it is, by law, returnable: R. S.

N. H., 394. An examination of a few of the cases will show, that the validity of the title depends on the sufficiency of the return; and this again depends upon there having been a full compliance with the statute; as the return must contain a report, at length, of all the proceedings of the sheriff; and consequently, it furnishes evidence whether the requisitions of the law have been observed, or not.

In *Porter et al. v. Bean*, 1 N. H. 366, in which title by extent, under execution, was pleaded, the court said: "The title, in this case, is by statute; and a conformity to its provisions, must evince its validity. In *Libbey v. Copp*, 3 Id. 46, the court held it to be well settled, that nothing will pass by an extent of an execution upon land, unless everything required by the statute, to make a valid extent, is expressly stated, or necessarily implied in what is stated in the officer's return. And a motion to permit the return to be amended, so as to make valid the extent, was overruled. The same rule of law was reiterated in *Simpson v. Coe*, 3 Id. 88. In *Whittier v. Varney*, 10 Id. 294, several cases were cited from the New Hampshire, Massachusetts, and Maine reports, in which extents were held void, on the ground that the return of the officer did not show that all the requisitions of the statute, in relation to appraisement, had been duly observed; but it was held, that the return, in that case, indicating that, in making the extent, the legal formalities were probably complied with, an amendment might be made, notwithstanding the intervening of a subsequent purchaser, or creditor; and that that amendment, when made, should relate back to the time of the levy, or return.

In Vermont, where the statute is similar to those of New Hampshire, Massachusetts, etc., an extent of lands under execution, by which the estate of one man, by operation of law, is passed to another, has always been considered a proceeding *stricti juris*; and hence it has been uniformly held, that all the material facts necessary to show that the law has been complied with, should appear by the officer's return: *Sleeper v. Newbury Seminary et al.*, 19 Vt. 453. See also *Pierce v. Strickland*, 26 Me. 277; *Smith v. Keen*, Id. 411; *Ladd v. Blunt*, 4 Mass. 402; *Howe v. Starkweather*, 17 Id. 243; *Davis v. Maynard*, 9 Id. 242; *Eddy v. Knap*, 2 Id. 154; *United States v. Slade*, 2 Mason, 71.

Under statutes of this character, where the return must show all the proceedings of the officer, no parol proof is admitted to establish his acts. The return in writing furnishes authentic and the only evidence; and by law it constitutes a portion of

the title. Under the statute it must embrace certain specific facts; and if these are not embodied, the title has not the requisites prescribed by law, and can not operate, therefore, as a legal transfer of the property. But in most of the states the rule is well settled that a purchaser is not bound, nor is his purchase affected by the irregularities of the sheriff, committed in making the sale, where such irregularity has taken place without the concurrence or participation of the purchaser: *Forman v. Hunt*, 3 Dana, 621; *Blight v. Tobin*, 7 T. B. Mon. 622 [18 Am. Dec. 219]; *Natches v. Minor*, 10 Smed. & M. 246; *Ware v. Bradford*, 2 Ala. 682; *Boggs v. Chichester*, 1 Green (N. J.), 212. But a clear distinction is recognized to exist between a sale without authority, and one where there is an authority not strictly pursued: in the former case, the sale is void; in the latter, the title will pass, and the party injured by the irregular acts of the officer will be left to his remedy against him, for the injury: *Drane v. Gregory*, 3 B. Mon. 619. In *Williamson v. Farrow*, 1 Bailey, 611 [21 Am. Dec. 492], it is said to be the general rule, as to purchasers at sheriffs' sales, that where the defect in the proceedings is such a one as may be cured by consent, acquiescence, or amendment, it does not affect the title. But where it is a defect of substance, as a want of authority from the court, or where the authority is absolutely void, it vitiates and destroys the sale, and title under it.

It will be remembered that the act concerning executions in this state, does not direct the manner in which the return of the officer shall be made, or what facts shall be stated. It does not require the return to embrace all the proceedings of the sheriff; or that it shall be recorded in the registry of deeds; or that it shall constitute record evidence of the purchaser's title. He is subjected to a severe penalty, should he fail to make a return of the writ; or to make a levy, when in his power to do so; or to advertise, and offer for sale, any property levied on by him; and to shield himself from responsibility, he should comply strictly with the requisitions of the law: Acts of 1842, p. 71, sec. 23. But the statute nowhere declares the facts that shall be stated in his return; or that the sale shall be void, unless all the legal formalities have been pursued. Nor does the statute impose on the purchaser, the duty of proving, by the return in writing, or by parol evidence, that the officer has not deviated in his acts, from the mode prescribed by the statute, for the execution of his authority.

Having presented these observations, I will proceed to exam-

ine the objections that have been urged to the title of the defendant, but not in the order in which they were taken at the trial, nor in which they are arranged in the argument of counsel. It is objected that the levy is not signed by the sheriff. This does not appear to have been taken, in the court below, and is, therefore, not now entitled to consideration. But it is sufficiently answered by the fact, that the levy constitutes but a portion of the return of the sheriff, which was duly signed by him, under his official signature.

A second ground of exception to the evidence of defendant, was, that there was no proof of advertisement of the sale, as required by law. It is incumbent upon the officer, that due notice should be given of the sale, by publication; and if he failed to do so, the plaintiff in execution has his remedy against him, by statute; and the defendant, if he suffer injury, can, under the law, claim redress.

But under statutes similar to our own, it has not been considered that the omission to perform this duty, or its defective execution, would invalidate the title of the purchaser; or, at all events, that it is incumbent on him to show affirmatively that the duty had been performed. In *Turner v. McCrea*, 1 Nott & M. 12, the court say that the act imposed it, as a duty, on the sheriff, to advertise all his sales in the public gazette; but his failing to do so could not invalidate the sale. If any damage resulted to the defendant from his failure to comply with the requisites of the act, he would be entitled to his action for the recovery of damages; but it was not incumbent on the purchaser to see that this duty had been performed by the sheriff. The title of the purchaser could not depend on such perishable testimony. If it would be necessary to have proved compliance with the requisites of the act, in any suit, it would be equally so in a suit which the purchaser may be compelled to bring fifty years after the sale. In *Maddox v. Sullivan et al.*, 2 Rich. Eq. 4 [44 Am. Dec. 234], the property had not been advertised the length of time directed by the statute; nor at but one place instead of three, as provided by law; the court held, that these were but irregularities or omissions of the sheriff, in the discharge of the duties of his office; and that they do not vitiate a sale made by him, had been so long and fully settled, and on such well-defined principles, as to render all commentary upon them unnecessary. In *Lawrence v. Speed*, 2 Bibb, 401, it was held, that if a sheriff fails to advertise a sale of property under execution, according to law, he may subject himself to damages;

but it does not affect the right of a purchaser, unless, through fraud, the sheriff has omitted to advertise, and the purchaser had knowledge of the fraud. The statute of Kentucky had not declared the consequences of a failure to advertise; and the court held, on solid grounds of argument, that the rule, as above laid down, was dictated by sound policy, and was equally expedient, whether the interest of the owner or purchaser of the property was regarded. In *Hayden v. Dunlap*, 3 Id. 217, the same doctrine was held; but it was also ruled, that if the sheriff declares he has not advertised, and refuses to sell, and the purchaser indemnifies the sheriff, the sale will be regarded as fraudulent and be set aside. See also *Kilby v. Haggin*, 3 J. J. Marsh. 208.

In *Natchez v. Minor*, 10 Smed. & M. 246, the rules of law, as to the legal effect of irregularities in the proceedings of the officer, in making sales under execution, were elaborately discussed by the counsel and the court; and it was held, that the irregularities of the sheriff, in giving notice of the sale of real property under execution, will not vitiate the title of a *bona fide* purchaser at such sale; nor will a total omission by the sheriff, to give the notice, or his giving it in a mode entirely different from that prescribed by law, affect the title of the *bona fide* purchaser who has no knowledge of the misconduct of the sheriff. These cases are sufficient to show, that it may be regarded as a settled rule that a defective notice, or want of publication, of the sale of property under execution, will not vitiate the title of the purchaser. The fact of due notice having been given could but seldom be ascertained by those desirous of purchasing at public sale; and as sound policy requires that property, under a forced alienation, should bring a fair price, this will be best promoted by protecting the rights of the purchaser from being vitiated by the irregular acts of an officer, or from his being subjected to the peril of sustaining, at perhaps a distant period, their legality, by perishable parol evidence.

It is further objected, that there was no proof, by the defendant, that the sale under the execution was made at the time and place required by law. The defendant in execution appeared at the sale and appointed an appraiser; and it might be plausibly urged, that he consented to the sale, and that this cured the defect, if it had been even the fact that the sale was made at a time and place not directed by the statute. But however that may be, it is sufficient to say that the *prima facie* presumption is, that the officer discharged his duty, and that the sale

was made at the court-house of the county, and on the first Tuesday of the month, according to the requisitions of the law. The presumption is in favor of the title, and will support it unless rebutted by proof to the contrary.

Were the return required to embody all the facts, and made evidence of title, the objection that the time and place had not been established, would have been a fatal defect. But such is not the law; and where the return does not state facts to the contrary, the presumption would be, that the officer had not exceeded his authority. The return is, in this case, defective, in not stating the place, nor with sufficient certainty the time of the sale; but it states a fact which would have enabled the plaintiffs to prove with facility, that the sale did not take place on the first Tuesday of a month, if such had been the truth. The sheriff certifies that the sale took place on the third of June, 1845. If this be not the first Tuesday of that month, the fact should have been proved by the plaintiffs; and if established, it would have invalidated the title of the purchaser. This objection is of a different character from that of a want of notice of sale. The former is an objection to a want of power in the officer; the latter to an irregular exercise of legitimate authority. For the latter, the officer may be punished; but the title of the purchaser can not be affected. But where the time and place of a public sale are prescribed, the sheriff has no authority to sell at any other time or place; and should he do so, his acts are not merely irregular, but void, and can confer no title. This distinction can operate no hardship on purchasers, or destruction of the rights of innocent parties. A purchaser may not be apprised of the want of due notice of a sale, and would, in most cases, be ignorant whether it had been duly made or not; but he must be presumed to know the law, and consequently, whether a public sale is made at a time and place prescribed by the law or not: *Williamson v. Farrow*, 1 Bailey, 618 [21 Am. Dec. 492]; *Enloe v. Miles*, 12 Smed. & M. 147. But it was not proved that the sheriff had, in the particulars referred to, acted beyond the pale of his authority; and this objection to the judgment can not, therefore, be supported.

Several exceptions were taken to the admissibility of the deed of conveyance, in evidence. One is, that it purports to be founded upon an execution issued and tested March 18, 1845; whereas, the execution, in the record, is issued and tested May 5th. The statute directs the sheriff, after sale has been made and the terms complied with, to execute and deliver a conveyance

to the purchaser; but does not prescribe the facts which shall be stated in the deed, or that the authority under which the sheriff acted, shall be recited. The recital in the deed, is not made by the statute, nor is it on general principles of law, a substantial and efficient part of it; nor is it evidence of the facts recited in it, except between the immediate parties to it: Phil. on Ev. 356. In *Harrison v. Maxwell*, 2 Nott & M. 347 [10 Am. Dec. 611], the deed from the sheriff recited that the execution had issued from the court of one district, when, in fact, it had issued from the court of another. It was held, that this misrecital was not fatal to the title. The legal effect and advantages of recitals in deeds, were stated in the opinion of the court. The usage of incorporating in the sheriff's deed, a recital of the authority under which he sold, was commended as productive of great convenience, as well to the sheriff as to the purchaser. It would point the former to his authority to sell, and would facilitate the latter, in deriving his title; but it was held to be not indispensable. The recital of the power to sell and convey, did not give the right; nor was it evidence of the right. It is sufficient, if the right did exist, and the seller acted upon it.

The misrecital of a judgment in a sheriff's deed is not material, if it, in fact, appear that the sale was under a subsisting judgment and execution: a recital not being a material part of a deed: *Jackson v. Streeter*, 5 Cow. 529; *Craig v. Vance*, 1 Overt. 209; *Sumner v. Moore*, 2 McLean, 59; *Cherry v. Woolard*, 1 Ired. L. 438. An execution need not be recited in the sheriff's deed, and if recited inaccurately, it will not vitiate the deed: *Jackson v. Jones*, 9 Cow. 182; *Jackson v. Pratt*, 10 Johns. 381. A variance between the sheriff's deed and the levy indorsed on the execution, is not a valid objection to the admission of the execution, or deed, in evidence; nor is the mere recital of a wrong date of the execution any objection to the admission of the execution in evidence: *Driver v. Spence*, 1 Ala. 540.

These authorities establish the rule, that a recital in the deed, of the authority of the officer, being an immaterial part of the conveyance, no mistake or misrecital can impair its legal validity or effect. There must be a subsisting judgment and execution under which the sale is to be made; but as the recital of either is not material, so a mistake will not affect the title: *Boggs v. Chichester*, 13 N. J. L. 209.

Another objection to the deed is its vagueness in description of the premises. When the description of land in a deed is so

indefinite that it can not be identified with certainty, the deed becomes necessarily void, and conveys no title. But the objection, here, may be disposed of with the single remark that the description of the land sued for, as set forth in the plaintiff's petition, is almost identical with the description of the land in the sheriff's deed. No one can doubt that the premises described in the former are conveyed by the latter.

There is an objection, also, that the product of the sale is erroneous. This can not affect the validity of the title. The sheriff computes the principal, interest, and costs, at six hundred and eighty-six dollars and seventy-one cents; and the counsel, at six hundred and eighty-two dollars and sixty-one cents. This is an unimportant difference; and if there were any mistake, the sheriff could have been compelled to refund the surplus to the defendants in the execution.

The next exception to the admissibility of the deed is more important, and is based on the fact that it did not convey the land as levied on or appraised, but a part thereof, including, as it was said, though not proved, the whole of the river front. The sheriff in his return certifies that he levied upon one quarter of a league of land; that this was appraised at one dollar per acre; that he offered the lands, or so much of them as would satisfy debt, interest, and costs, amounting to six hundred and eighty-six dollars and seventy-one cents. The deed conveys ten hundred and thirty acres, the quantity of land sufficient at two thirds of its appraised value to satisfy the execution, and about seventy-seven acres less than the quarter of the league which had been levied on and appraised. The statute directs the property levied upon to be appraised at its fair cash value; that the appraisement shall be reduced to writing; and the officer shall then proceed to offer the property so levied on and appraised, for sale to the highest bidder for cash; and if the highest sum bid does not amount to two thirds of the valuation made by the appraisers, there shall be no sale. It is manifest from the terms of the statute that the sheriff has no authority to expose to sale any part less than the whole amount of the property levied on and appraised. The instruction to sell the property levied on and appraised carries with it the force of an affirmative mandate repelling or forbidding any conclusion to the contrary, or any inference that it was discretionary with the officer to sell the whole or only a portion of the property.

The policy of the provision is not a question for consideration. Whatever may have been the object of the legislature, it

is clear that this provision was not sanctioned hastily, or without deliberation. The previous statute on the subject of executions, had required, in case the land should be more than sufficient to pay the execution and costs, at two thirds of its appraised value, that the appraisers should take off, at one corner of the survey, so much as would, at the valuation, be sufficient to satisfy the execution and costs; and, thereupon, the sheriff should offer the land for sale, etc.; and whoever would pay the said execution, etc., for the fewest number of acres, should be the purchaser: Acts of 1839, p. 155, sec. 15.

These instructions, directing, in effect, that no more land than would be sufficient to pay the debt, should be sold, were entirely omitted, in the act under which the sale in question was had. It will not be questioned, that if the sheriff had, under the former statute, sold all the land levied upon, notwithstanding two thirds of its appraised value exceeded the debt, and a portion sufficient for that purpose had been set off at one corner of the survey, or if he had sold more than the number of acres necessary, at the highest bid, to discharge the execution, the sale would have been radically defective and totally void; and this, upon the ground that the officer had transcended his authority, and his acts, consequently, could have no more validity in transferring the property of one person to another, than if, as a private citizen, he had sold property to which he had no right, title, or interest.

Though the soundness of the policy of the provisions of the latter statute may not be very clear, yet the acts of the officer, in contravention of them, are void, and without effect. His act, in selling less land, can not be classed with irregularities in the discharge of his authority, which do not affect the title of the purchaser, provided they take place without his knowledge or participation. A purchaser is not bound to know whether the sheriff had advertised or not; nor is he affected by mistakes of the officer in immaterial acts; but he must know that all the property which is levied upon and appraised must be sold. The property levied upon is to be appraised, and then exposed to sale; and unless two thirds of the appraised valuation be bid, there shall be no sale. These limitations upon the authority of the officer in the sale of property every purchaser is required to know. They are clearly pointed out by the statute, and are not difficult of comprehension. The law declares that unless two thirds of the appraised valuation be offered, there shall be no sale. The amount of appraisement must be pre-

tionally ascertained by the purchaser, in order that he may make an available bid. In this case, two thirds of the appraised value of the quarter of a league would amount to seven hundred and thirty-eight dollars; and this should have been offered, otherwise, by law, there could have been no sale. The amount of property levied upon, its appraisement, and the sum to be offered, are facts which must be necessarily known to the purchaser. The duties of the sheriff, in these particulars, are not positively prescribed; but they can neither be mistaken by him nor the purchaser; and whether his performance of them is in accordance with law is as well known to the purchaser as to the officer. The distinction between acts done by an officer without authority, and those done, or omitted, in its irregular exercise, has been previously stated. The former are nullities, and confer no right; the latter do not affect titles acquired under the acts of the officer, unless the purchaser be implicated.

By statute, in Kentucky, the sheriff is directed to sell no more land than may be necessary to satisfy an execution; and sales have been frequently set aside on the ground that the sheriff, in selling too much land, has exceeded his authority; and the distinction between the unauthorized and the irregular acts of an officer is taken and clearly defined: *Patterson v. Carneal*, 3 A. K. Marsh. 620 [13 Am. Dec. 208]; *Pepper v. Commonwealth*, 6 T. B. Mon. 33; *Addison v. Crow*, 5 Dana, 278.

We are of opinion, on the principles above stated, that the sale and deed of the sheriff are void, and can not support the title of the defendant.

But here an important question arises as to the effect which this decision, avoiding the sale and conveyance, should in law, and according to the course of our system of procedure, have on the rights of the parties. We have repeatedly determined that the legal and equitable rights of parties litigant, in relation to the subject-matter of a controversy, should, as far as practicable, be set up and determined in a single suit. In the due order of pleading, under our blended system, the plaintiffs should have averred their willingness to pay the amount of the execution, with interest thereon; or the defendant should have claimed, provided his title were declared invalid, that he should not be compelled to restore possession until the purchase money which he had paid for the benefit of the plaintiffs, and by which the judgment against them had been discharged, should be reimbursed, and he indemnified. There is no charge, nor any pretense or evidence, that the defendant has been guilty of any fraud

in the transaction, or that there was any fraudulent combination between the defendant and the public officer to the injury of the plaintiffs. Had the proceedings contained the necessary allegations for the adjudication of the equitable as well as legal rights of the parties, as should under our system have been the case, the court, under the facts of the case, must necessarily have decreed that the execution should be discharged before the sale be set aside; or, if the purchaser had been a third party, and not the creditor in the execution, that the amount paid by him towards the discharge of the execution should be refunded before a restoration of the property would be decreed.

This principle of equity has been repeatedly recognized by the courts of chancery. It was a well-established rule under the Spanish system of jurisprudence; and its justice should commend its adoption and recognition in all codes, and by all courts. In *Dufour v. Camfranc*, 11 Mart. 610 [13 Am. Dec. 360], the court, having declared a sale by the sheriff void, proceed to say: "Another question presents itself. It has been proved that proceeds arising from the sale of the slaves were applied to the discharge of the judgment debts of the plaintiff; and the court is of opinion, that he can not recover in this suit, until he repay the money. This is the doctrine expressly laid down by Febrero, lib. 8, cap. 2, sec. 5, n. 357; and we readily adopt it; for nothing can be more unjust, than to permit a debtor to recover back his property, because the sale was irregular, and yet allow him to profit by that irregular sale, to discharge his debts."

This principle has been frequently recognized by the decisions in Kentucky. The proceedings in law, will, by courts of equity, be treated as valid, though they may be erroneous. But equity will relieve against their consequences; because the rights thereby acquired can not be retained, in conscience. The purchaser will be treated as a trustee; and he will not be compelled to surrender until equity is done him: *Blight v. Tbbin*, 7 T. B. Mon. 615 [18 Am. Dec. 219]; *McLaughlin v. Daniel*, 8 Dana, 183; *Forman v. Hunt*, 3 Id. 623.

The case of *McLaughlin v. Daniel*, *supra*, is analogous in principle. In that case, the property sold under execution had been recovered by a third person; and the action was brought, to compel the defendant in execution, to reimburse the amount of the purchase money. The court held, that the purchaser of property sold under execution, has a right in equity, when the property is recovered from him or his vendee, by virtue of a superior title, to

be substituted for the creditor, and have the amount of his purchase money refunded to him, by the defendant in execution. His equity rests, not upon the want of knowledge as to title in the property, but on the ground of his having discharged a judgment against the defendant, for which he stood chargeable, by a purchase, made under the coercive process of the law, and therefore has an equitable claim to reimbursement by the defendant in execution.

Other questions of importance are suggested by the position of the parties, in this cause, viz., whether the lien of the execution and levy is extinguished, or, whether they may be revived by quashing the return and sale, etc.

We are of opinion, that the rights of the parties, as indicated in this opinion, should be adjudicated without the necessity of resorting to a new proceeding for that purpose. A multiplicity of actions is repugnant to the simplicity of our system of procedure, and should not be tolerated.

It is ordered, adjudged, and decreed, that the judgment be reversed and the cause remanded for a new trial; that the parties have leave to amend their pleadings, and that such further proceedings be had, as may to law and justice appertain.

Judgment reversed.

FAILURE TO ADVERTISE EXECUTION SALE, EFFECT OF: See *Maddox v. Sullivan*, 44 Am. Dec. 234, and note 238-240, where the subject is discussed. See also note to *Lowry v. Erwin*, 39 Id. 573.

OFFICER IS RESPONSIBLE FOR NEGLECT OF DEPUTY IN NOT GIVING LEGAL NOTICE OF SALE: *Sexton v. Nevers*, 32 Am. Dec. 235.

RECITALS IN SHERIFF'S DEED AS EVIDENCE: *Leshey v. Gardner*, 38 Am. Dec. 764, and note collecting prior cases in this series. Parol evidence is inadmissible to contradict the recitals in a sheriff's deed in a collateral proceeding: *Reed v. Austin's Heirs*, 45 Id. 336.

VOID JUDICIAL SALE, RIGHT TO RECOVER PROPERTY SOLD AT: See note to *Dufour v. Camfranc*, 13 Am. Dec. 365; see also *Henderson v. Overton*, 24 Id. 493.

THE PRINCIPAL CASE IS CITED, and commented on as follows, in *Luter v. Rose*, 16 Tex. 55: "It is further contended that the sale was void, * * * because less land was sold than was levied on by the officer; and this objection to the validity of the sale is supposed to be supported by the decision of this court in the case of *Howard v. North*, 5 Tex. 290. But it is to be observed, the sale in that case was under the provision of the statute which required appraisement; and the opinion and judgment of the court were based upon the terms and requirements of that provision. Here the property was sold under a different provision of the statute, which did not require appraisement; and the reasoning and decision of the court upon that point, in the case of *Howard v. North*, has no application to the present case."

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ACCORD AND SATISFACTION.

ACCORD AND SATISFACTION EXECUTED, THOUGH IN PAROL, IS GOOD DEFENSE to an action on a covenant in a sealed instrument, which sounds altogether in damages, although secured by a penalty. *Cabe v. Jameson*, 286.

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See **TRUSTS AND TRUSTEES**, 4, 6; **WILLS**, 17.

ADVERSE POSSESSION.

1. **TWENTY YEARS' ADVERSE POSSESSION OF LAND UNDER ADMINISTRATOR'S DEED BARS HEIRS**, unless they were saved by infancy or coverture. *Stevenson v. McReary*, 102.
 2. **LAW PRESUMES GRANT TO ONE WHO HAS HAD FOR THIRTY YEARS continuous adverse possession of land up to known and visible boundaries, and the jury ought, under such circumstances, to presume a grant.** *Do ex dem. Wallace v. Maxwell*, 390.
- See **POSSESSION**, 6; **PUBLIC LANDS**, 1; **STATUTE OF LIMITATIONS**, 12-15.

AGENCY.

1. **IF AUTHORITY OF AGENT IS PARTICULAR AND SPECIAL**, it must be strictly pursued; and if the agent vary from it, his act is void as to his principal. *Brown v. Johnson*, 118.
2. **IF AGENT MISAPPLIES MONEY OF HIS PRINCIPAL**, it is a fraud upon him, and if this be known to the party who receives it, he, too, is a participant in the breach of faith, and can not hold the money. *Id.*
3. **WHERE AGENT'S AUTHORITY IS SPECIAL AND LIMITED**, the party dealing with the agent must look to the extent of his power; if he permits the authority to be transcended, the loss will not fall on the party who gave the authority. (*Per Clayton, J.*) *Id.*
4. **AGENT EMPLOYED TO BID FOR PARTICULAR PIECE OF LAND SOLD BY STATE** has no authority to bid for another tract; and upon disaffirmance of the act by the principal, and an application before confirmation of the

- sale, the principal has a right to have the sale rescinded and the money paid by the agent under the contract refunded. *Id.*
5. AGENT EXCEEDING HIS AUTHORITY IN MAKING PURCHASE is himself liable, but the opposite party should have the discretion either to affirm, or rescind for non-performance of the conditions of the sale. *Id.*
 6. CONDUCT OF AGENT ONLY BINDS EMPLOYER when he acts within the limits of the power granted to him, and with reference to the subject-matter of the agency. *Goodloe v. Godley*, 159.
 7. AGENT'S AUTHORITY TO MAKE A DEMAND IS ESTABLISHED by the principal founding a suit on the demand. *Ham v. Boody*, 235.
 8. AUTHORITY OF AGENT TO MAKE DEMAND CAN BE QUESTIONED only at the time demand is made. *Id.*
 9. ONE INDORSING BILL AS AGENT WHEN HE IS NOT SUCH is liable personally, although he do so *bona fide*. *Bank of Hamburg v. Wray*, 659.
 10. INNOCENT MISTAKE OF INDORSEER AS TO HIS BEING AGENT WILL NOT RELIEVE him from personal liability. *Id.*
 11. WILLFUL MISREPRESENTATION THAT ONE IS AGENT NEED NOT BE SHOWN, to bind him personally to a contract he had no authority to make. *Id.*
 12. RIGHT OF PARTY DEALING WITH AGENT WHOM HE SUPPOSES IS PRINCIPAL.—If a person sells goods, believing he is dealing with a principal, but finds the person is but an agent for a third party, he may recover the purchase money from either principal or agent. *Bacon v. Sondley*, 646.
 13. VENDOR SUING AGENT IS ASSENT TO PRINCIPAL'S RESCISSION OF AGENT'S PURCHASE.—If a principal rescind his agent's purchase, and the seller sue the agent in trover, that act is an assent to the rescission. *Id.*
 14. UPON AGENT'S DISCLAIMER OF PURCHASE ON HIS OWN ACCOUNT, made with the consent of the seller, the principal having also disclaimed, the goods sold will be in the possession of the agent on deposit for the seller, and trover may be maintained for them. *Id.*
 15. AGENT OF UNDISCLOSED PRINCIPAL MAY MAINTAIN AN ACTION in his own name against a carrier for damages for loss of property he has agreed to carry. *Elkins v. B. & M. R. R. Co.*, 184.
 16. POWER OF ATTORNEY TO COLLECT AND DISTRIBUTE MONEY IS NOT REVOCABLE after its execution by collection of the money. *Watson v. Bagaley*, 595.
- See ASSIGNMENT FOR BENEFIT OF CREDITORS; ASSIGNMENT OF CONTRACTS, 2; COMMON CARRIERS, 5; CORPORATIONS, 1, 2, 6-8, 14; FACTORS; INSURANCE—FIRE; MARRIAGE AND DIVORCE, 3; POSSESSION, 2; SALES, 4; STATUTE OF LIMITATIONS, 10, 13.

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See MARRIAGE AND DIVORCE, 5.

ANIMALS.

1. ONE HAS NO RIGHT TO KILL DOG ON OWNER'S PREMISES, on the pretence that he is a nuisance, because he has on former occasions bitten other persons. *Perry v. Phipps*, 387.

2. **PERSON IS LIABLE FOR KILLING DOG ON OWNER'S PREMISES**, after the owner has driven the dog away, so that there is no longer any danger of his biting him at that time. *Id.*

See CORPORATIONS, 10; TRESPASS, 6, 7.

APPEALS.

See EQUITY, 12; GUARDIAN AND WARD, 1; INJUNCTIONS; MARRIAGE AND DIVORCE, 9; PLEADING AND PRACTICE, 10, 17, 18, 21-24; WRITS OF ASSISTANCE.

ARBITRATION AND AWARD.

1. **FACT THAT ARBITRATOR WAS REQUESTED BY ONE OF THE PARTIES TO EXAMINE WITNESSES**, and that he did ask questions of the witnesses, and read to the other arbitrators a paper that was not evidence, and was objected to at the time, is not sufficient of itself to sustain a bill to set aside the award on the ground of corruption and partiality in one of the arbitrators. *Butler v. Boyles*, 697.
2. **ARBITRATORS MAY, BEFORE AWARD IS MADE UP AND DELIVERED, KEEP THE CASE OPEN** for consideration or further proof and investigation, but after they have made up and delivered their award, their power is at an end; they can not recall the case and reinstate it before them. *Id.*

See JUDGMENTS, 18.

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See EXECUTIONS, 4, 5; INDEMNITY; PLEADING AND PRACTICE, 4.

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See CRIMINAL LAW, 6, 32.

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See DEEDS, 3, 5; TRUST DEEDS, 6.

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See COVENANTS, 1, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. **STATUTES REGULATING TRANSFERS FOR BENEFIT OF CREDITORS EMBRACE WITHIN THEIR PURVIEW** an assignment, created by power of attorney, to collect money and pay it to creditors. *Watson v. Bagaley*, 595.
2. **ATTORNEY IN FACT OF ASSIGNEE FOR THE BENEFIT OF CREDITORS** may make a deed, although the assignment conveys no authority on the assignee to appoint an attorney. *Blight v. Schenck*, 478.

See EXECUTIONS, 22; TRUST DEEDS, 6.

ASSIGNMENT OF CONTRACTS.

1. **INSTRUMENT IS ASSIGNABLE** which, though very inartificially drawn, purports to give a mortgage on the defendant's half of a saw-mill to secure the payment of a certain sum of money payable in lumber; but the common-law action of debt can not be maintained on the instrument. *Knighton v. Tufli*, 174.

2. ASSIGNMENT OF MONEY MAY BE EFFECTED BY POWER OF ATTORNEY to collect and distribute the same to creditors. *Watson v. Bagaley*, 595.
 3. DRAFT DOES NOT OPERATE AS AN ASSIGNMENT UNTIL ACCEPTED, although drawn for a specific sum and against funds of the drawer in the hands of the drawee. The delivery of such draft unaccepted is, therefore, inoperative as a gift in view of death; and the draft can not be enforced against the personal representatives of the drawer. *Harris v. Clark*, 352.
- See COVENANTS, 1; JUDGMENTS, 21; LANDLORD AND TENANT, 1, 2, 5; MORTGAGES, 9-13.

ASSISTANCE.

See WRITS OF ASSISTANCE.

ASSUMPSIT.

1. COUNT FOR MONEY HAD AND RECEIVED LIES ON SPECIAL CONTRACT if nothing remains to be done but to pay a stipulated sum of money. Hence, such a count is good on a note given as collateral security for a debt which remains unpaid, if the note is due. *Tebbetts v. Pickering*, 48.
- See PAYMENT, 5; USAGE, 1.

ATTESTATION.

See WILLS, 5-7.

ATTORNEY AND CLIENT.

ATTORNEY AT LAW, IN THE ABSENCE OF FRAUD OR NEGLIGENCE, is not liable for failure to turn over money collected to his client, until demanded so to do. *Krause v. Dorrance*, 496.

See JUDGMENTS, 6.

ATTORNEY IN FACT.

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 2.

AUDITORS.

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See ARBITRATION AND AWARD.

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See COMMON CARRIERS, 3-7.

BAILMENTS.

1. EITHER BAILKE OR BAILOR MAY MAINTAIN AN ACTION against a carrier to whom the goods have been delivered for transportation, for the loss of the property. *Elkins v. B. & M. R. R. Co.*, 184.
2. SHARES OF CORPORATE STOCK MAY BE PLEDGED, and although their owner transfers them absolutely in form, yet if the intention of the parties is that the transferee shall hold them only as security for money lent, and that the owner may redeem them at any time (even after the loan falls

due) before the lender has exercised his power of sale, the transaction is a pledge, not a mortgage. *Wilson v. Little*, 307.

3. PLEDGEE CAN NOT SELL THE PAWN without demanding payment of the debt and giving notice to the pledgor of the time and place of sale. *Id.*
4. CONSENT THAT PLEDGEE MAY SELL without giving notice does not relieve him from the necessity of demanding payment of the debt before he sells. *Id.*
5. ACTION FOR SELLING STOCKS PLEDGED for a debt, without having first demanded payment of the debt, may be maintained without making tender of the sum due. *Id.*
6. MEASURE OF DAMAGES IN ACTION FOR WRONGFULLY SELLING PLEDGE, discussed in a case where there had been negotiation between pledgor and pledgee of stocks for a payment of the debt and a return of similar stocks to those which the pledgee had received and sold, pending which, such stocks had risen in value; and *held*, that the pledgor was entitled, under such circumstances, to recover the highest value down to the time when the negotiations were broken off. *Id.*

BANKRUPTCY AND INSOLVENCY.

1. DISCHARGE IN INSOLVENCY AFTER PRIOR INSOLVENCY IS INVALID, under the Massachusetts statute, without the written assent of three fourths of the creditors, unless the estate pays fifty per cent. of the debts. *Tebbetts v. Pickering*, 48.
2. DISCHARGE IN INSOLVENCY DOES NOT AFFECT NOTE TO CITIZEN OF ANOTHER STATE who was such when the note was made and until the discharge. *Id.*
3. PROMISE BY BANKRUPT AFTER DISCHARGE TO PAY DISCHARGED DEBT "as soon as he got able," and to pay "all his honest debts as fast as he could," except certain ones in the city, will not revive such debt. *Yortheimer v. Keyser*, 555.
4. DISCHARGE UNDER UNITED STATES BANKRUPT ACT IS NO BAR TO ACTION ON JUDGMENT against the bankrupt recovered after the filing of the petition in an action commenced before the filing. *Woodbury v. Perkins*, 51.

BANKS AND BANKING.

1. NOTICE TO AN OFFICER OF A BANK CAN NOT AFFECT BANK when in regard to a matter not pertaining to his duties. Consequently, notice to some of the officers of a bank for collection, of the residence of an indorser, does not prevent the bank from excusing want of notice of non-payment at the indorser's residence by the ignorance of the officers charged with the duty of collecting notes. *Goodloe v. Godley*, 159.
2. BANKING ASSOCIATION FORBIDDEN TO ISSUE BILLS OR NOTES, UNLESS PAYABLE ON DEMAND and without interest, can not give its notes, payable on time and bearing interest, to a creditor by way of evidence of or security for its indebtedness; such prohibition will not be limited by construction to paper intended for circulation. *Leavitt v. Palmer*, 333.

See NEGOTIABLE INSTRUMENTS, 13-17; TRUST DEEDS, 4.

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See NEGOTIABLE INSTRUMENTS.

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See AGENCY, 9, 10.

BILLS OF PARTICULARS.

See PLEADING AND PRACTICE, 19, 20.

BONA FIDE PURCHASERS.

1. PROTECTION OF PURCHASER FOR VALUABLE CONSIDERATION STANDS ON THIS: that he has *bona fide* acquired the legal title and paid the purchase money before notice of the plaintiff's equity. If he has acquired the legal title but has not paid the purchase money before notice, his plea fails. If he has paid the purchase money and receives notice of plaintiff's equity before acquiring the legal title, he can not defeat that equity by procuring the legal title. *Bush v. Bush*, 675.
 2. PURCHASER OF PERSONAL PROPERTY ACQUIRES NO BETTER TITLE, in general, than that of his vendor. *McMahon v. Sloan*, 601.
 3. ACTS OF OWNERSHIP BY POSSESSOR OF CHATTEL, INCONSISTENT WITH ANOTHER'S OWNERSHIP, must be brought to the knowledge of the true owner to divest him of title. *Id.*
- See DEEDS, 7, 10, 11; EQUITY, 2, 3; ESTOPPEL, 3; JUDGMENTS, 6; NEGOTIABLE INSTRUMENTS, 2.

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See COMMON CARRIERS.

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In ACTION ON THE CASE ALMOST EVERYTHING MAY BE GIVEN IN EVIDENCE under the general issue, and evidence of former recovery is properly received in such action. *Jones v. Weatherbee*, 653.

See HUSBAND AND WIFE, 10; PROCESS.

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See EXECUTORS AND ADMINISTRATORS, 2, 12; FRAUD, 4.

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PLEADING AND PRACTICE, 5.

COLLISIONS.

See COMMON CARRIERS, 2.

COMMON CARRIERS.

1. BY COMMON LAW, A CARRIER OF GOODS IS REGARDED AS AN INSURER, and is held accountable for any damage or loss to them, unless from inevitable accident, which is the same thing with the act of God, or of the public enemy; but the party may limit this common-law liability by express stipulation in his contract. *Whitesides v. Thurlkill*, 128.
2. LOSS BY COLLISION COMES WITHIN EXCEPTION OF "DANGERS OF THE RIVER," if the loss arose without any fault on the defendant's part, or that of the hands upon his boat; but if they had been guilty of negligence, or might have prevented the loss by the exercise of reasonable skill and diligence, then the defendant would be liable. *Id.*
3. PROPRIETORS OF STAGE-COACHES CARRYING PASSENGERS WITH THEIR BAGGAGE are responsible in all respects as common carriers so far as regards the baggage. *Bomar v. Maxwell*, 682.
4. BAGGAGE INCLUDES SUCH ARTICLES OF NECESSITY OR PERSONAL CONVENIENCE as are usually carried by passengers for their personal use; it does not include medicines, handcuffs, a watch, etc., nor money, except just sufficient to pay traveling expenses. *Id.*
5. RAILROAD COMPANY IS RESPONSIBLE FOR BAGGAGE DELIVERED TO AGENT OF ANOTHER LINE on whose road it is running, by one taking passage at a station, where such agent has been in the habit of receiving baggage for such company, and it has no agent of its own present at the station. *Jordan v. Fall River R. R. Co.*, 44.
6. MONEY CARRIED IN PASSENGER'S TRUNK IS PART OF BAGGAGE for which a passenger carrier is responsible, if intended *bona fide* for traveling ex-

penses and personal use and if reasonable in amount, but not where it is intended for any other purpose, as for trade, investment, transportation, or the like. *Id.*

7. BAGGAGE OF PASSENGER INCLUDES ARTICLES NECESSARY or convenient for his personal use, and such as it is usual for travelers to take with them. *Id.*
8. COMMON CARRIER HAS NO LIEN FOR FREIGHT ON GOODS RECEIVED FROM WRONG-DOER without the owner's consent, express or implied, as against such owner, although they were innocently received. *Robinson v. Baker*, 54.

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LEGISLATURE CAN NOT EXERCISE JUDICIAL POWERS. *Greenough v. Greenough*, 567.

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CONSTRUCTION.

See PLEADING AND PRACTICE, 23; STATUTES.

CONTINUANCE.

See EVIDENCE, 7; PLEADING AND PRACTICE, 6.

CONTRACTS.

1. CONSIDERATION FOR PROMISE MAY BE GOOD THOUGH NO BENEFIT BE RECEIVED or expected by the party making the promise; it is sufficient that the other party be subjected to loss or inconvenience. *Brown v. Ray*, 379.
 2. TRUST REPOSED BY REASON OF UNDERTAKING TO DO AN ACT is a sufficient consideration to support an action on the promise. *Id.*
 3. AGREEMENT THAT ONE SHALL BID FOR SEVERAL FOR MAIL CONTRACT is not void unless made for some illegal purpose, affecting public policy. *Bellows v. Russell*, 238.
 4. WHETHER CONTRACT WAS MADE FOR ILLEGAL PURPOSE is a question of fact for the jury. *Id.*
 5. WRITTEN AGREEMENT IS ENTIRE when for the sale of certain land and a cottage thereon, and to finish the cottage by a certain time. *Ladd v. King*, 624.
- See ACCORD AND SATISFACTION; ACCOUNT STATED; AGENCY; ASSUMPSIT; BAILMENTS; COMMON CARRIERS, 1; CORPORATIONS; EVIDENCE, 4-6, 9, 10; FRAUD; GUARANTY; HUSBAND AND WIFE; INFANCY; MARRIED WOMEN; RESCISSION OF CONTRACTS; SALES, 7; SPECIFIC PERFORMANCE; STATUTE OF FRAUDS; STATUTE OF LIMITATIONS; TRUST DEEDS, 4.

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CORAM NOBIS.

See PLEADING AND PRACTICE, 21.

CORPORATIONS.

1. NOTE NOT IN CORPORATE NAME, and not disclosing any agency from the corporation to make it, is *prima facie* not the note of the corporation, but the presumption may be rebutted by evidence *aliunde*. *Melledge v. Boston Iron Co.*, 59.
2. NOTE IN NAME ADOPTED AND SANCTIONED BY CORPORATION as indicative of its contracts, though not its corporate name, and given by its authorized agent for a corporate liability, is the note of the corporation, and these facts may be proved to rebut the presumption arising from the face of the note; as where a note is made in the name of a firm who are the general agents of the corporation. *Id.*
3. CORPORATION MAY HAVE SEVERAL NAMES for the purpose of transacting its business. *Id.*

4. **MIENOMER OF CORPORATION IN CONTRACT** does not prevent a recovery thereon against the corporation, if its identity with the corporation intended is pleaded and proved. *Id.*
5. **TRADING CORPORATION IS BOUND BY IMPLIED CONTRACT**, constructive notice, implied assent, tacit acquiescence, ratification of contracts by acts or silence, etc., in the same way as a natural person. *Id.*
6. **AUTHORITY OF AGENT OF CORPORATION MAY BE PROVED** by corporate acts, and by the acts of the person professing to be agent acquiesced in or ratified by the corporation. *Id.*
7. **CORPORATION LIABLE FOR ACTS OF ITS CONTRACTORS.**—Where a railroad corporation contracted with other parties to build part of its road, and while they were blasting rocks a fragment struck plaintiff, injuring him; held, that the corporation was liable for the injury. *Stone v. C. R. R. Co.*, 192.
8. **CORPORATION IS NOT LIABLE FOR A TORTIOUS ACT** committed willfully and maliciously by its servant, without authority from the directors or other governing body, even though it was done under orders from the president and general manager. *Vanderbilt v. R. T. Co.*, 315.
9. **MUNICIPAL CORPORATION CAN ONLY EXERCISE POWERS EXPRESSLY GRANTED**, and such others as may be necessary to carry the powers expressly granted into execution. *Collins v. Hatch*, 465.
10. **POWER CONFERRED ON MUNICIPAL CORPORATION TO ENACT** such ordinances as it shall deem necessary for "the well regulation, interest, health, cleanliness, convenience, and advantage" of the corporation, and "to require and compel the abatement of nuisances," does not authorize the municipality to pass an ordinance prohibiting swine, cattle, horses, and so forth, from running at large, in contravention of the general law of the state, which allows such animals to run at large. *Id.*
11. **OFFICERS OF MUNICIPAL CORPORATION ACTING IN GOOD FAITH**, under an express authorization of the corporation, are not personally liable for injuries resulting from such acts, if the corporation, under its charter, had power to order them. *Town Council v. McComb*, 453.
12. **MUNICIPAL CORPORATION IS LIABLE FOR INJURY** resulting to the property of a private individual, caused by lowering the grade of the street in front of his land, although such act was strictly within its corporate powers, and was done without negligence or malice. *Id.*
13. **PRIVATE INDIVIDUALS, BY DEEDS BETWEEN THEMSELVES**, can not reserve the right to regulate the grade of streets adjoining the land conveyed, so as to deprive the municipality of such right. *Id.*
14. **AUTHORIZATION OF MUNICIPAL CORPORATION TO ITS AGENTS** to do certain acts may be proved by parol. *Id.*

See **BANKS AND BANKING**, 2; **MANDAMUS**, 2.

COSTS.

COSTS, WHERE CONDUCT IS UNCONSCIENTIOUS AND OFFENSIVE, will be awarded to the party injured. *McNeil v. Call*, 188.

CO-TENANCY.

1. **JOINT TENANT CAN NOT SUE HIS CO-TENANT** except he be ousted of the joint possession. *Jones v. Weathersbee*, 653.

2. JOINT TENANT MAY OUST HIS CO-TENANT by overflowing land and thus appropriating it to his own exclusive use. *Id.*

See HUSBAND AND WIFE, 2-4; LANDLORD AND TENANT, 2, 3; SPECIFIC PERFORMANCE, 1.

COVENANT.

See ACCORD AND SATISFACTION.

COVENANTS.

1. COVENANT IN LEASE THAT LESSEE SHALL PAY ASSESSMENTS runs with the land, and may be enforced against the assignee. *Post v. Kearney*, 303.
2. COVENANT IN LEASE THAT LESSEE SHALL PAY ALL RATES, TAXES, AND ASSESSMENTS for which the premises shall be liable, includes not only such charges as may be imposed by laws then in force, but also such as may be authorized by laws afterwards enacted. *Id.*
3. CLAUSE IN LEASE RESERVING RIGHT OF RE-ENTRY if the lessee shall "neglect or fail to perform and observe any or either of the covenants" contained therein, applies to a breach of a negative covenant not to "occupy or in any manner suffer the buildings, etc., to be occupied * * for any unlawful purpose." *Wheeler v. Earle*, 41.
4. SUBTENANT'S OCCUPANCY FOR UNLAWFUL PURPOSE IS BREACH OF LESSEE'S COVENANT not to occupy or suffer the premises to be occupied for such purpose, and gives the original lessor a right of re-entry under a lease reserving such right for a breach of any of the lessee's covenants, for such covenant runs with the land. *Id.*
5. UNDER PLEA OF COVENANTS PERFORMED, upon notice to the plaintiff, the defendant may give any matter in evidence which he might have pleaded. *Rearick v. Swinehart*, 540.

See DOWER, 1; EXECUTORS AND ADMINISTRATORS, 2, 3; LANDLORD AND TENANT, 1; SPECIFIC PERFORMANCE, 1, 2.

COVENANT TO STAND SEIZED.

See DEEDS, 15.

COVERTURE.

See ADVERSE POSSESSION.

CREDITOR'S SUIT.

See JUDGMENTS, 8, 9.

CRIMINAL LAW.

1. LEGISLATURE MAY PUNISH OFFENSE OF BRINGING STOLEN GOODS INTO THE STATE, and in doing so they merely codify a settled principle of the common law applicable to different countries, and extend it to neighboring states and foreign countries; consequently, the legislature can pass a statute making such an offense punishable the same as if committed in this state, and further providing that the larceny may be charged to have been committed and may be indicted and punished in any county into which the property was brought. *Hemmaker v. State*, 172.

2. **ONE IS NOT GUILTY OF AIDING AND ABETTING** in the commission of a felony merely because he is present and sees that it is about to be committed and does not in any manner interfere. To make him an aider and abettor, he must do or say something showing his consent to the felonious purpose, and contributing to its execution. *State v. Hildreth*, 369.
3. **DECLARATIONS OF ACCUSED IN HIS OWN FAVOR**, made after the commission of the crime with which he is charged, are generally not admissible evidence in his favor. *Id.*
4. **PROCURING ABORTION WITH CONSENT OF THE MOTHER** of the child is not an indictable offense at the common law, unless at the time the mother is quick with child. *State v. Cooper*, 248.
5. **ATTEMPT TO PROCURE ABORTION**, where the woman is not quick with child, is not indictable if made with her consent. *Id.*
6. **ATTEMPT TO PROCURE ABORTION, MADE WITHOUT CONSENT** of the woman, is indictable as an aggravated assault, although she be not at the time quick with child. The assault is against the person of the mother, and is presumed to be without her consent. *Id.*
7. **EXPRESSIONS "QUICK WITH CHILD" AND "WITH QUICK CHILD"** ARE SYNONYMOUS, and there is no foundation in law for any distinction between them. *Id.*
8. **FOR PURPOSE OF PUNISHING DESTRUCTION OF CHILD**, the law recognizes it as a living being only after it quickens or stirs in the womb. *Id.*
9. **INDICTMENT FOR CONSPIRACY TO CHEAT AN INDIVIDUAL** will lie. *People v. Richards*, 75.
10. **CRIME OF CONSPIRACY DOES NOT DEPEND UPON KIND OF PROPERTY** which it was the object of the conspiracy to obtain; and an indictment for conspiracy to cheat an individual out of lands lies. *Id.*
11. **CONSPIRACY MAY BE INDICTABLE** although the act to be done, if done by an individual, or the means made use of, would not be indictable; the doctrine that an indictment only lies for conspiracy to commit a crime or to do a lawful act by criminal means denied. *Id.*
12. **CONSPIRACY TO COMMIT MINDEMEANOR IS NOT MERGED** in the misdemeanor, *semble*. *Id.*
13. **INDICTMENT DOES NOT CHARGE CONSPIRACY TO CHEAT BY FALSE PRETENSES** where the acts charged as done were, that one F. was about to prosecute the defrauded person for an attempt to commit a rape upon his daughter, and that by the testimony of the daughter he would be convicted and sent to the state prison, and must leave the state; the charges are not of existing facts, but of things which a third person has threatened to do—upon which no indictment for false pretenses can be predicated. *Id.*
14. **AGREEMENT OR COMBINATION MUST BE SET OUT IN INDICTMENT FOR CONSPIRACY**; the crime does not consist in the mere combination, but where to this is added an illegal object, then it becomes criminal; and where neither the conspiracy nor the object to be attained is unlawful, but the means by which it is to be executed are criminal, then it is necessary to set out the means intended to be used, as a component part of the offense. *Id.*
15. **OFFENSE OF CONSPIRACY DEPENDS UPON THE UNLAWFUL AGREEMENT**, and not on the act which follows it; the acts are but evidence of the agreement. *Id.*

16. **INDICTMENT FOR CONSPIRACY USUALLY SETS OUT OVERT ACTS**, such as may have been done by any one or more of the conspirators in order to effect the common purpose of the conspiracy, but this is not essentially necessary. *Id.*
17. **GENERAL CHARGE OF CONSPIRACY IN INDICTMENT**, stating the object and intent, is sufficient. *Id.*
18. **WHERE CONFEDERACY TO DO UNLAWFUL ACT IS INDICTABLE**, although no means have been agreed upon, an indictment for such an offense, where the means were agreed upon, need not state them, as they form no part of the offense, and it is complete without them. *Id.*
19. **PERSONS ARE INDICTABLE FOR CONSPIRACY** where they agree to cheat a third person out of his lands and goods, and in pursuance of the agreement falsely pretend that one F. is about to prosecute him for an attempt to commit a rape upon his daughter, and that by the testimony of the daughter he will be convicted and sent to the state prison, and must leave the state. *Id.*
20. **DESCRIPTION OF MONEY STOLEN**.—"Three dollars in divers pieces of silver current in this state" is not a sufficient description of the money in an indictment for larceny. *Lord v. State*, 231.
21. **UPON THE SUPPOSITION OF THE TRUTH OF THE FACTS AS BEING AGREED OR FOUND** by the jury, in a prosecution for homicide, it is the province and the duty of the court to inform the jury what the degree of the homicide is. *State v. Hildreth*, 364.
22. **WHETHER THERE WAS EXPRESS MALICE ON PART OF ACCUSED**, in case of a homicide, is a question of fact to be determined by the jury. And whether or not previous malice on his part continued up to the time of the killing is not a fact to be proved by witnesses, but an inference to be drawn by the jury. *Id.*
23. **LAW PRESUMES MALICE FROM FACT OF HOMICIDE**, and matter of extenuation must arise out of the evidence of the killing itself, or must be otherwise proved by the accused. *Id.*
24. **WHERE TWO PERSONS ENGAGE IN SUDDEN COMBAT**, and after they become heated thereby, one of them seizes a deadly weapon, or uses one in his hands, having no intention to use it when the combat commenced, and slays his adversary, his offense is manslaughter only. But where an armed man attacks a feeble unarmed man, who seeks to avoid the conflict, and gives a mortal blow with a weapon prepared beforehand, he is guilty of murder. *Id.*
25. **HOMICIDE IS JUSTIFIABLE** (both at common law and under 2 N. Y. R. S. 660, sec. 3), when committed in self-defense by one who, being attacked without his fault, believes, with good reason, that his assailant means to kill him or do him great bodily harm, even though he was mistaken in such belief. *Shorter v. People*, 236.
26. **USING DANGEROUS WEAPON TO RETURN BLOW WITH NAKED HAND**, where there is no reason to apprehend a design to do great bodily harm, is unjustifiable. *Id.*
27. **PURSUEING RETREATING ADVERSARY AND KILLING HIM** is unjustifiable homicide, even though the deceased was the first assailant. *Id.*
28. **JUDGMENT WILL NOT BE REVERSED, ON ERROR, FOR INCORRECT INSTRUCTIONS**, even in a capital case, if they can not have prejudiced the prisoner; as where, on a trial for murder, the explanations given to the jury

as to the right of self-defense were narrower than the true rule, but the facts proved were such that no question of justifiable homicide could properly arise. *Id.*

29. LAW OF BILLS OF EXCEPTION IN CRIMINAL CASES is the same as in civil. *Id.*
30. MANSLAUGHTER AT COMMON LAW AND BY THE OHIO STATUTES CONSISTS in the unlawful killing of another, without malice, either express or implied. It may be either voluntarily committed, upon a sudden heat, or inadvertently, but in the commission of some unlawful act. *Sutcliffe v. State*, 459.
31. INDICTMENT UNDER THE OHIO STATUTE FOR MANSLAUGHTER NEED NOT ALLEGE that the killing was done without malice. *Id.*
32. INDICTMENT FOR MANSLAUGHTER WHICH CHARGES THE PRISONER WITH AN ASSAULT upon the person killed, and unlawfully discharging and shooting off at him a loaded gun, sufficiently shows that the prisoner was engaged in the commission of an unlawful act. *Id.*
33. VERDICT MAY BE RETURNED FOR MANSLAUGHTER, and a valid judgment rendered upon such verdict, under an indictment charging the prisoner with murder in the first degree. *Id.*
34. PLEA OF ONCE IN JEOPARDY CAN NOT AVAIL PRISONER, upon proof of a former conviction before a lawful jury, upon a good indictment, when such conviction has been set aside by the appellate court, on the prisoner's motion, for errors occurring on the trial. *Id.*
35. UPON TRIAL OF THE QUESTION OF FORMER CONVICTION, the original papers, and transcripts of the journals of the supreme court and of the common pleas, are admissible in evidence, instead of the record, when no formal record has been made. *Id.*
36. REVERSAL OF JUDGMENT AND VERDICT WHICH FINDS PRISONER GUILTY of manslaughter does not reverse his plea of not guilty. *Id.*
37. COURT HAS AUTHORITY TO IMPANEL A JURY to try whether a prisoner was standing mute obstinately, and if they should so find, to direct the plea of not guilty to be entered, and to proceed with the trial. *Id.*
38. VERDICT OF JURY MAY BE RECEIVED IN PRESENCE of the prisoner, although in the absence of, and without notice to, his counsel. *Id.*
39. DECLARATIONS OF THE INJURED FEMALE IN A PROSECUTION FOR RAPE, made immediately after the offense was committed, are admissible in evidence for the purpose of corroboration, but not as substantive testimony, to prove the commission of the offense. *Laughlin v. State*, 444.

CROPPERS.

See LANDLORD AND TENANT, 2, 3.

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See NEGOTIABLE INSTRUMENTS, 16, 17; USAGE.

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DEEDS.

1. DELIVERY IS NECESSARY TO VALIDITY OF DEED, and this may be made formally or may be inferred from circumstances. *Wood v. Ingraham*, 671.
2. ACTIONS NOT CONSTITUTING DELIVERY OF DEED.—Mere execution of a voluntary deed, with neither the trustee nor beneficiary present, where no publication of its contents was made, and there was no declaration of intention of delivering it, and where the donor retained entire possession of it, will not be construed to be a delivery of it. *Id.*
3. DELIVERY OF DEED, WHAT CONSTITUTES.—Where a grantor executes a deed, delivers it to be recorded with the intent that title shall pass to grantee, and the grantee assents, the delivery is sufficient. *Boody v. Davis*, 210.
4. GRANTEE'S POSSESSION OF DEED IS EVIDENCE OF DELIVERY, for things shall be presumed legally and properly in their present state unless the contrary be shown. *Id.*
5. GRANTEE IS PRESUMED TO ASSENT TO DEED MADE FOR HIS BENEFIT. *Id.*
6. GRANTOR CAN NOT, BY SUBSEQUENT CONDUCT, AFFECT OR DIVEST TITLE, if, at the time of the acknowledgment and execution of his deed, he has performed acts amounting to a delivery. *Blight v. Schenck*, 478.
7. RECORDING OF DEED, ALTHOUGH NOT CONCLUSIVE AS TO ITS DELIVERY, is strong evidence thereof in the hands of an innocent purchaser. *Id.*
8. LEAVING DEED, PROPERLY ACKNOWLEDGED, SIGNED, AND SEALED, in the possession of the officer who takes the acknowledgment, without the grantor's doing or saying anything to qualify the delivery, is sufficient to vest the title in the grantee, although he be not present; and the grantor can not, by subsequent instructions, limit the effect of such acts to a mere delivery in escrow. *Id.*
9. ACCEPTANCE OF A DEED, IF FOR THE BENEFIT OF THE GRANTEE, will be presumed, unless the contrary appears. *Id.*
10. BURDEN OF PROOF TO SHOW THAT DEED DULY RECORDED WAS NEVER delivered is on the grantor, in an action of ejectment against an innocent purchaser. *Id.*
11. DEED DELIVERED BY ONE WITH WHOM IT HAS BEEN LEFT IN ESCROW, before the performance of the condition on which the delivery was authorized, is not void in the hands of an innocent purchaser. *Id.*
12. FAIR ARGUMENT AND PERSUASION MAY BE USED to obtain the execution of a deed or will, and do not constitute undue influence. *Taylor v. Taylor*, 412.

13. WHEN DESCRIPTION OF LAND IN DEED IS SO INDEFINITE that it can not be identified with certainty, the deed becomes necessarily void, and confers no title. *Howard v. North*, 769.
 14. WHERE CORNER OF TRACT OF LAND IS, BY MISTAKE, DESCRIBED in the deed as on the east side of a creek, competent testimony is admissible to show that the corner is in fact on the west side of the creek; and if the proof shows the corner tree to be on the west side, the marked tree must control the word in the deed. *Den ex dem. Houser v. Belton*, 391.
 15. AGREEMENT BETWEEN TWO BROTHERS TO THE EFFECT THAT UPON THE DEATH OF EITHER the one who survived should be his heir, is a covenant to stand seised to uses, and is not in conflict with the law of Pennsylvania, either as affecting the collateral inheritance tax or the dower of any future wife. *Fisher v. Strickler*, 488.
- See ADVERSE POSSESSION, 1; ASSIGNMENT FOR BENEFIT OF CREDITORS, 2; ESTOPPEL, 4, 5; EXECUTORS AND ADMINISTRATORS, 5, 8, 13; FRAUDULENT CONVEYANCES; GIFTS, 3, 4; HUSBAND AND WIFE, 5-8; INFANCY, 2; TENDER; TRUST DEEDS.

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DOWER.

1. WIDOW'S RIGHT OF DOWER IN LANDS ALIENED BY HER HUSBAND during his life-time, without her co-operation, is not barred under section 10 of the act of 1797, by the acceptance of a devise to her; nor is the statute prevented from operating by the fact that the husband conveyed with covenant of warranty. *Borland v. Nichols*, 576.
2. SALE OF LAND UNDER JUDGMENT AGAINST HUSBAND does not bar the widow of her right of dower, although the court directs the proceeds of the sale to be first applied in satisfaction of a prior mortgage, in which the wife joined and released her dower. *Taylor v. Fowler*, 469.

See DEEDS, 15; ESTOPPEL, 4; MARRIED WOMEN, 12.

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GRANT OF PRIVILEGE TO GRIND CORN DOES NOT BIND THE GRANTOR to keep the mill in repair to enable the grantee to do so, but the grantor can not destroy the mill. *Bartlett v. Peaslee*, 242.

EJECTMENT.

1. PARTY WHO HAS RECOVERED IN EJECTMENT CAN NOT SUE IN TROVER or detinue for the produce of the land, which has been severed therefrom before the writ of possession was executed. His remedy is an action for damages by way of mesne profits. *Brothers v. Hurdle*, 400.
2. IN ACTION FOR MESNE PROFITS, THE JUDGMENT IN EJECTMENT IS CONCLUSIVE as to the title. *Id.*
3. PLAINTIFF IN EJECTMENT CAN ONLY RECOVER UPON STRENGTH OF TITLE OWNED.

TITLE, as being good against the world, or as being good against the defendant by estoppel. *Wolfe v. Doe ex dem. Dowell*, 147.

4. WHERE BOTH PLAINTIFF AND DEFENDANT IN EJECTMENT CLAIM UNDER COMMON SOURCE of title, the plaintiff, in the first instance, need go no further than the title of the person under whom they both claim; but the defendant may set up a title adverse to that of such person, and if he does, the plaintiff must show such title to be invalid or produce some superior title, or fail. *Id.*
 5. IN TEXAS, EQUITABLE TITLE MAY BE SET UP AS DEFENSE TO ACTION OF EJECTMENT. *Neill v. Keese*, 746.
- See DEEDS, 10; ESTOPPEL, 3; EXECUTIONS, 8; MORTGAGES, 13; TRUST DEED, 2.

ELECTION.

EXECUTOR CAN NOT ALTER ELECTION OF DECEASED.—Where a person has a right to hold goods as consignee or to purchase them, and elects the former, and dies, his executor can not elect to take them as a purchase; and if he attempt to do so, and sell them, he is guilty of conversion. *Bacon v. Sondley*, 646.

See AGENCY, 5; EXECUTORS AND ADMINISTRATORS, 15; JUDGMENTS, 18.

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EQUITY.

1. WHEN BOTH PARTIES ARE EQUALLY ENTITLED TO CONSIDERATION, EQUITY DOES NOT AID EITHER, but leaves the matter to depend upon the legal title. *Crump v. Black*, 422.
2. WHERE PURCHASER GETS THE LEGAL TITLE FROM THE HUSBAND, a court of equity will not divest him of it at the instance of the wife or her heirs, unless he had notice of her rights. *Id.*
3. NO ONE HAS SUPERIOR CLAIMS IN A COURT OF EQUITY TO A PURCHASER WITHOUT NOTICE; and a court of equity will not interfere to deprive such a purchaser of a legal advantage. *Id.*
4. JURISDICTION OF EQUITY ATTACHING FROM NATURE OF ONE OF THE SUBJECTS OF CONTEST EMBRACES ALL OF THEM. *McGowan v. Remington*, 584.
5. MULTIPLICITY OF ACTIONS IS REPUGNANT TO SIMPLICITY OF TEXAS SYSTEM of procedure, and will not be tolerated there. *Howard v. North*, 769.
6. CONTROLLING PRINCIPLE WHICH PERVADES OUR ENTIRE SYSTEM OF CIVIL JURISPRUDENCE is that which forbids a multiplicity of suits, and requires the rights of the parties incident to the subject-matter of the

suit, whether they be of a legal or equitable character, to be determined in a single controversy. *Pitshugh v. Custer*, 728.

7. IN JURISPRUDENCE OF TEXAS THERE IS NO DIVISION OF JURISDICTION into common law and chancery; the same rule and measure of justice are applied to the same rights, whenever drawn into litigation, and are administered according to the principles of that forum by which they may be most effectually attained. *Neill v. Keese*, 746.
8. EQUITY HAS NO JURISDICTION OF SUIT TO RECOVER GENERAL BALANCE OF AN ACCOUNT for goods sold, where the demands sought to be recovered are all legal demands unconnected with any fraud, lien, or trust. *Garland v. Hull*, 140.
9. EQUITY WILL NOT REFORM CONTRACT FOR MISTAKE OF LAW where there is no mistake of fact. *Leavitt v. Palmer*, 333.
10. COURT OF EQUITY WILL COMPEL DISCOVERY OF A SECRET TRUST to enforce it if lawful, or declare it void if unlawful, whenever the fact of its not being declared in the conveyance, creating the legal estate, is caused by fraud or circumvention, or is the result of accident or mistake, or the omission is by design, the trust being unlawful, and the object of secrecy being to evade the policy of the law. In these cases the court proceeds upon the idea of preventing fraud. *Brown v. Clegg*, 413.
11. WHERE PLAINTIFF ALLEGES AN IMPORTANT EQUITY, HE IS AT LIBERTY to add a small item which would not be within the jurisdiction of equity if alone, but which is connected with and tends to elucidate the main subject. *Hart v. Roper*, 425.
12. ORDER GRANTING A FEIGNED ISSUE out of chancery is discretionary, and will not be reviewed on appeal, even where the appellate court is of opinion that no question of fact was in issue, calling for a jury trial. *Candee v. Lord*, 294.

See EJECTMENT, 5; EXECUTIONS, 25; EXECUTORS AND ADMINISTRATORS, 9; INJUNCTIONS; JUDICIAL SALES; LIENS, 3; MARRIED WOMEN, 5, 8, 9, 15; MISTAKE, 2; MORTGAGES, 4, 8; PARTNERSHIP, 7; RESCISSION OF CONTRACTS; SPECIFIC PERFORMANCE; STATUTE OF LIMITATIONS, 1, 2; TRUSTS AND TRUSTEES; VENDOR AND VENDEE, 1; WRITS OF ASSISTANCE.

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ESTATES OF DECEDENTS.

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ESTOPPEL.

1. DOCTRINE OF ESTOPPEL DOES NOT APPLY EITHER TO THE SOVEREIGN or to its assignee. *Doe ex dem. Wallace v. Maxwell*, 380.
2. CONTINUING TRESPASS.—Where one overflows land, and upon a verdict and judgment against him for the nuisance, the title being the issue, refuses to remove the water, he will be estopped to set up title in him-

self in another suit for the continuing trespass. *Jones v. Weathersbee*, 653.

3. LOSING PARTY AFTER ONE RECOVERY IN EJECTMENT STANDING BY AND ALLOWING IMPROVEMENTS upon the premises by a *bona fide* purchaser, upon the faith of the recovery, is estopped from afterwards recovering the land and improvements, on the ground of a mistake of himself and his counsel in not presenting all the legal aspects of his case on the former trial. *Irwin v. Nixon's Heirs*, 559.
 4. EXCEPTION IN ADMINISTRATOR'S DEED OF WIDOW'S DOWER DOES NOT ESTOP the purchaser from controverting the fact of the marriage, nor the legitimacy of the children. *Stevenson v. McReary*, 102.
 5. RECTALS IN DEEDS SOMETIMES OPERATE AS ESTOPPELS, but none but privies and parties shall have advantage of them. *Id.*
 6. ESTOPPEL IN PARS ARISES WHEREVER AN ACT IS DONE or a statement made by a party, the truth or efficacy of which it would be a fraud on his part to controvert or impair. *Commonwealth v. Moltz*, 499.
 7. DEFENDANT IS NOT ESTOPPED FROM DENYING THAT ANYTHING IS DUE from him to plaintiff by his declarations at the time of making his last payment that "he did not admit the justice of the claim, but would pay rather than go to law," and asked further time on the balance stipulated in the contract. *Mitchell v. Zimmerman*, 717.
 8. DECLARATIONS MADE BY OWNER OF CHATTEL, INCONSISTENT WITH HIS OWNERSHIP, WILL NOT DIVEST HIM OF TITLE, unless acted upon by the purchaser. *McMahon v. Sloan*, 601.
- See EJECTMENT, 3, 4; JUDGMENTS, 6, 7, 9; LANDLORD AND TENANT, 2, 4, 5; NEGOTIABLE INSTRUMENTS, 2.

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See VENDOR AND VENDEE, 2.

EVIDENCE.

1. COMPETENCY OF EVIDENCE IS TO BE DETERMINED BY ITS LEGAL EFFECT; it is immaterial how long or circuitous the chain may be by which the end is reached. *Pack v. Thomas*, 135.
2. EVIDENCE OFFERED, THOUGH NOT AMOUNTING TO PROOF OF FACT, but being a necessary ingredient, and constituting an indispensable link in the proof of that fact, should not be excluded, if otherwise unobjectionable. *Neill v. Keese*, 746.
3. STRICT PROOF MAY BE DISPENSED WITH AFTER GREAT LAPSE OF TIME, and its place may be supplied by presumption. *Stevenson v. McReary*, 102.
4. EVIDENCE OF VERBAL UNDERSTANDING CONTEMPORANEOUS WITH WRITTEN AGREEMENT, absolute on its face, is admissible to control or defeat it in Pennsylvania, when necessary to prevent fraud originally intended or subsequently attempted in the use of the instrument. Thus, in case of a written agreement between a father and son for the conveyance to the latter of certain land, to be paid for at a specified price one year after the father's death, where the father's executors attempt to enforce payment, evidence of an understanding at the time of the agreement that the land was to be the son's portion, and was not to be paid for unless the father should come to want, but that the title should remain in such

- a condition that the father could resort to the land for his support, if necessary, is admissible to defeat the action. *Rearick v. Swinehart*, 540.
5. EVIDENCE OF SUBSEQUENT DECLARATIONS OF PARTY TO WRITTEN AGREEMENT is admissible to corroborate proof of a contemporaneous verbal understanding controlling or defeating the written agreement. *Id.*
 6. WRITTEN AGREEMENT SHOULD NOT BE MODIFIED OR OVERTHROWN BY PAROL without clear and satisfactory proof, but of this the jury must judge. *Id.*
 7. DEPOSITION OF WITNESS RESIDING IN THE TOWN WHERE THE TRIAL takes place is admissible if taken to be used in a town more than ten miles distant; and the case is continued to the next term at the place where the witness resides. *Farnsworth v. Chase*, 206.
 8. PAROL EVIDENCE IS ADMISSIBLE TO PROVE CONDITION OF RECORDS of an office, and the manner in which they have been kept, as a means of accounting for that which is missing. *Stevenson v. McReary*, 102.
 9. PAROL EVIDENCE IS INADMISSIBLE, WHERE PART OF AN ENTIRE CONTRACT IS WITHIN THE STATUTE OF FRAUDS, to vary the part not otherwise within the statute, by enlarging time of performance. *Ladd v. King*, 624.
 10. RULE AS TO VARYING WRITTEN INSTRUMENT BY PAROL EVIDENCE is that where the law requires a written instrument, or where parties adopt that mode of contracting, it is a matter of principle and policy to prevent inferior evidence from being used, either as a substitute for, or an alteration of, the written contract. The operation of an instrument can not be varied by showing that a different intention existed at the time it was made. Its legal effect must be preserved, and all contemporaneous expressions or circumstances which tend to vary it must be excluded, unless established by proof of the same character. *Pack v. Thomas*, 135.
- See CASE; CORPORATIONS, 14; COVENANTS, 5; CRIMINAL LAW, 3, 15, 39; DEEDS, 4, 10, 14; EXECUTIONS, 5, 13; FACTORS, 2; JUDGMENTS, 7, 8, 10, 12, 20; MARRIAGE AND DIVORCE, 1-4; MARRIED WOMEN, 6; NEGOTIABLE INSTRUMENTS, 6, 15; SALES, 7; STATUTE OF LIMITATIONS, 6, 7; TRUSTS AND TRUSTEES, 3, 8, 9; WILLS, 7, 14, 15, 17, 19; WITNESSES.

EXCEPTIONS.

See CRIMINAL LAW, 29; JUDGMENTS, 9; PLEADING AND PRACTICE, 17; STATUTE OF LIMITATIONS, 6; STATUTES, 1.

EXECUTIONS.

1. LIEN OF EXECUTION WAS PRESERVED by the act of general assembly approved February 24, 1843 (session acts, page 51), and the act concerning courts (revised code 1835, page 160, section 52), and no *scire facias* was necessary to continue it, when the court did not hold any session at the return term of the writ on account of its postponement by the legislature. These acts were designed to make the writs as effectual to all intents and purposes as if executed at the term to which they were made returnable. *Bank of Mo. v. Wells*, 163.
2. EFFECT OF EXECUTION SUED OUT AND DELIVERED TO SHERIFF is to continue the lien of the judgment until the execution of the writ, although the time had elapsed during which the lien of the judgment continued. *Id.*
3. PRIOR LEVY OF EXECUTION UNDER JUNIOR JUDGMENT does not divest the priority of the older judgment. *Id.*

4. BODY HELD UNDER CA. SA. CONSTITUTES SATISFACTION AT COMMON LAW, and this not less where the body has been discharged without payment than where payment has been received. *Stover v. Duren*, 634.
5. ARREST IS PRIMA FACIE EVIDENCE OF SATISFACTION.—To rebut it the release from prison must appear to be an exception to the general inference. *Id.*
6. IT IS COMPETENT TO PROVE, ON DISTRIBUTION OF PROCEEDS OF AN EXECUTION SALE, that the property sold was partnership property, and that a mere joint judgment was given for a partnership debt. *Overholt's Appeal*, 598.
7. WHERE LAND IS SOLD UNDER VENDITIONI EXPOSAS, the levy becomes thereby *functus officio*, and a second *vend. ex.* issued thereupon is invalid, and the purchaser thereunder acquires no title. *Den ex dem. Smith v. Fore*, 376.
8. EXECUTION DEBTOR MAY RESIST RECOVERY IN EJECTMENT BY PURCHASER at the sheriff's sale, unless the purchaser can show a valid execution. *Id.*
9. PURCHASER OF WIFE'S PROPERTY SOLD UNDER EXECUTION FOR HUSBAND'S DEBTS acquires no right in the property if the husband had none, though the trust deed by which she holds is unrecorded. *Bush v. Bush*, 675.
10. SHERIFF'S SALE OF LAND AFTER EXPIRATION OF LIEN OF JUDGMENT as limited by statute, without a revival, can not be collaterally impeached by the debtor or those claiming under him. *Hinds' Heirs v. Scott*, 506.
11. LIEN IS INSEPARABLE INCIDENT OF SEIZURE ON EXECUTION at common law. *Id.*
12. SHERIFF'S DEED IS NOT INVALIDATED BY NON-RETURN OR MISRECITAL OF WRIT under which the sale was made. *Id.*
13. POSSESSION OF SHERIFF'S DEED BY REPRESENTATIVE OF DECEASED PURCHASER is *prima facie* evidence of its delivery and payment of the purchase money, though there is no receipt of payment at the foot of it. *Id.*
14. TITLE PASSES BY SHERIFF'S DEED WITHOUT PAYMENT, it seems. *Id.*
15. OFFICER LEVYING EXECUTION A SECOND TIME IS LIABLE, if he knew of its having been satisfied. *Breck v. Blanchard*, 222.
16. OFFICER LEVYING EXECUTION A SECOND TIME would be protected, if he had no knowledge of the first payment. *Id.*
17. CREDITOR TAKING OUT EXECUTION ON A SATISFIED JUDGMENT, though ignorant of the truth, does so at his peril, and is liable if he enforces a collection. *Id.*
18. SHERIFF CAN NOT APPROPRIATE MONEY REMAINING IN HIS HANDS, after payment to the execution creditor, in order to satisfy an individual debt due him by the execution debtor, as against the assignee of the latter. *Fitch's Appeal*, 495.
19. WHERE PLAINTIFF IN EXECUTION PURCHASES IN THE LAND SOLD, NOT ABSOLUTELY FOR HIMSELF, but to hold as a security for his judgment and whatever other sum may be found due him on a settlement with the defendant, if the land is subsequently sold under execution against the first plaintiff in execution, the purchasers at the second sale take subject to the equities existing between the first plaintiff and defendant in execution, and the latter may redeem from them. *Vannoy v. Martin*, 418.
20. WHERE PLAINTIFF IN EXECUTION PURCHASES IN THE LAND SOLD, NOT ABSOLUTELY FOR HIMSELF, but to hold as security for his judgment and whatever other sum may be found due him on a settlement with the de-

- defendant, the latter's suit for a redemption is not barred by the act making void parol contracts for the sale of land. *Id.*
21. LANDS IN STATE LEVIED UPON AND SOLD BY VIRTUE OF FINAL PROCESS issued upon a judgment of the federal court are, since the act of congress of 1828, c. 68, sec. 3, subject to redemption in the same manner as if sold under final process of the state courts. *Hepburn v. Kerr*, 685.
 22. ASSIGNMENT FOR BENEFIT OF CREDITORS BY JUDGMENT DEBTOR, AFTER A SALE OF HIS LAND under execution, passes his equity of redemption, and the assignee is entitled to redeem. *Id.*
 23. MISTAKE OF SHERIFF IN COMPUTATION OF AMOUNT to be collected on an execution can not affect the title of a purchaser at the sale. Where a statute requires that land levied upon shall be appraised and sold, if the officer sell less than the whole tract, although sufficient to satisfy the execution, the sale is void, and confers no title on the purchaser. *Howard v. North*, 769.
 24. WHERE EXECUTION SALE UNDER VALID JUDGMENT IS VOID, and the debtor brings suit to recover the property, if there be no fraud on the part of the purchaser, he will not be compelled to restore the property without being reimbursed the amount which he paid, and which went to satisfy the judgment. *Id.*
 25. PURCHASER OF PROPERTY SOLD UNDER EXECUTION has a right, in equity, when the property is recovered from him or his vendee by virtue of a superior title, to be substituted for the creditor, and have the amount of his purchase money refunded to him by the defendant in execution. *Id.*
 26. ACT CONCERNING EXECUTIONS IN TEXAS DOES NOT DIRECT MANNER IN WHICH RETURN of the officer shall be made, or what facts shall be stated. It does not require the return to embrace all the proceedings of the sheriff, or that it shall be recorded in the registry of deeds, or that it shall constitute record evidence of the purchaser's title. *Id.*
 27. ACT CONCERNING EXECUTIONS DOES NOT IMPOSE ON PURCHASER the duty of proving, by the return in writing, or by parol evidence, that the officer making the sale has not deviated in his acts from the mode prescribed by the statute for the execution of his authority. *Id.*
 28. LEVY CONSTITUTES BUT PORTION OF SHERIFF'S RETURN TO EXECUTION, and if the return is duly signed by the sheriff, it is no objection that his name was not signed to the levy itself. *Id.*
 29. IT IS NOT INCUMBENT ON PURCHASER AT EXECUTION SALE to see that the sheriff has properly advertised the sale. If any damage result to a defendant in execution, by the failure of the sheriff to comply with the law in this respect, he has his action for such damages against the sheriff. *Id.*
 30. DEFECTIVE NOTICE OR WANT OF PUBLICATION OF SALE OF PROPERTY UNDER EXECUTION will not vitiate the title of the purchaser. *Id.*
 31. PRIMA FACIE PRESUMPTION IS THAT OFFICER SELLING PROPERTY UNDER EXECUTION has discharged his duty according to the requisitions of the law. *Id.*
 32. WHERE TIME AND PLACE OF PUBLIC SALE ARE PRESCRIBED BY STATUTE, the sheriff has no authority to sell at any other time or place; and should he do so, his acts are not merely irregular but void, and can confer no title. *Id.*
 33. MISRECITAL OF JUDGMENT OR EXECUTION IN SHERIFF'S DEED is not fatal to the title of the purchaser. *Id.*

34. EXECUTION ON JUDGMENT REVIVED BY SCIRE FACIAS should be on the original judgment. *Irwin v. Nixon's Heirs*, 559.

See HUSBAND AND WIFE, 13, 14; JUDGMENTS, 11, 13, 16; MORTGAGES, 6, 8; NEGOTIABLE INSTRUMENTS, 19; PARTNERSHIP, 6; REPLEVIN, 4; SURETYSHIP, 1, 2.

EXECUTORS AND ADMINISTRATORS.

1. BY SECTION 29 OF ACT OF 1840, ADMINISTRATOR MUST APPLY FOR ORDER FOR SALE of the slaves and real estate as soon as the facts of the insufficiency of the proceeds of the perishable and other personal property to pay the debts of the estate is apparent; hence, if this fact should satisfactorily appear to the court before the order for the sale of the perishable and other personal property is made, there would be no error in its decreeing the sale of both the real and personal property in the same order. *Lynch v. Baxter*, 735.
2. SALE OF LAND BY ADMINISTRATOR IS JUDICIAL SALE, and operates *in rem*. In such case it is a general rule that *caveat emptor* applies, and the purchaser takes his purchase without warranty, express or implied. *Id.*
3. WHERE ADMINISTRATOR EXECUTING ORDER OF COURT TO SELL LANDS gives the purchaser a bond for a warranty title, it is not in his character as administrator, and he can not bind the estate of his intestate by such a covenant. Whether he would be bound personally, left undecided. *Id.*
4. ADMINISTRATOR, IN SELLING DECEDENT'S REALTY, MUST COMPLY STRICTLY with every requirement of the law, and probate courts can not order a sale unless everything necessary to give them jurisdiction of the person and of the subject-matter appears upon their records. *Stevenson v. McReary*, 102.
5. LONG AND UNINTERRUPTED POSSESSION UNDER ADMINISTRATOR'S DEED is sufficient, when taken in connection with his deed and other evidences, and the fact that the probate judge acted irregularly and without any uniformity, to justify the presumption that the title in its inception was perfect, and that the administrator proceeded according to the requirements of the law, although all the steps are not shown to have been taken; in such a case, the burden of proving that he did not sell according to law is on those questioning the validity of the sale. *Id.*
6. ADMINISTRATOR'S REPORT CAN NOT BE IMPEACHED COLLATERALLY, after a great lapse of time, because it was not sufficiently explicit. *Id.*
7. ABSENCE OF EVIDENCE THAT CITATIONS WERE POSTED IN PUBLIC PLACES ON ADMINISTRATOR'S SALE of realty, is cured by an uninterrupted possession of the purchaser for thirty-four years. *Id.*
8. IN ADMINISTRATOR'S SALE, ABSENCE OF RECORD PROOF that he gave the required bond, or the requisite notice of the time and place of sale, or that he made a report of the sale to the court, is supplied by the presumption arising from the undisturbed possession of the purchaser for thirty-four years, where the recitals in the deeds show a full compliance, and there is evidence that the records were loosely and irregularly kept. *Id.*
9. PURCHASER AT ADMINISTRATOR'S SALE IS DEEMED OWNER OF PREMISES BEFORE CONFIRMATION and delivery of possession, in equity, and must bear any loss that may happen to the premises. *Robb v. Mann*, 551.

10. REMOVAL OF FIXTURES FROM LAND PURCHASED AT ADMINISTRATOR'S SALE BEFORE CONFIRMATION and delivery of possession, by a stranger under claim of right, is no defense to an action for the purchase money, and the purchaser's remedy is by an action on the case against the person committing the injury. *Id.*
 11. ADMINISTRATOR MAKING SALE OF LAND IS MERE OFFICER OF COURT, and has no possession, actual or legal, of the premises, which is in the heirs. *Id.*
 12. CAVEAT EMITOR IS THE RULE OF ADMINISTRATION SALES as well as other judicial sales. *Id.*
 13. ADMINISTRATOR FAILING TO EXECUTE DEED ON DAY SPECIFIED in the conditions of an administration sale, owing to objections interposed by creditors, affords the purchaser no ground of rescission, for time is not of the essence of the contract. *Id.*
 14. PROMISE BY ADMINISTRATOR TO PURCHASER TO HAVE FIXTURES RETURNED which have been removed by a stranger from land purchased at an administration sale, after the sale and before conveyance, does not bind the estate, nor does it bind the administrator, where the only consideration for it is a payment of part of the purchase money. *Id.*
 15. PURCHASE BY ADMINISTRATOR AT HIS OWN SALE is voidable only by the beneficiaries or their heirs, who may elect, within a reasonable time after arriving at majority, whether to affirm or disaffirm such sale. Such purchase can not be disaffirmed by the beneficiaries twenty-one years after the sale, and ten years after the youngest child of the intestate has attained majority. *Musselman v. Esleman, 493.*
 16. ADMINISTRATOR OR EXECUTOR CAN NOT LAWFULLY RETAIN DEBT DUE HIM from the estate which he represents, which was barred by the statute of limitations before he administered. *Batson v. Murrell, 707.*
 17. NON-PAYMENT OF DEBT BY ADMINISTRATOR is not such a breach of the condition of his administration bond as will enable the creditor to sue on it before any steps have been taken to charge the administrators with a *devastavit*. *Commonwealth v. Moltz, 499.*
 18. SURETY ON EXECUTOR'S BOND IS NOT LIABLE UNTIL EXECUTOR IS FIXED personally for the debt by a proper proceeding against him, whether the debt be due a creditor, legatee, or distributee. *Commonwealth use of Stub v. Stub, 515.*
 19. SETTLEMENT OF EXECUTOR'S ACCOUNT showing a general balance due the estate, without any decree ascertaining the amounts due the distributees, is not sufficient to render the executor's sureties liable on their bond to a distributee. *Id.*
 20. SURETIES ON BOND OF ONE JOINT EXECUTOR taken long after administration granted for the faithful performance of his duties stand on the same footing as sureties on original administration bonds, and are not liable until the principal is fixed. *Id.*
 21. JUDGMENT OR DECREE OF ORPHANS' COURT FIXING EXECUTOR'S LIABILITY is sufficient to sustain a suit against the sureties on his bond. *Id.*
- See ADVERSE POSSESSION, 1; ASSIGNMENT OF CONTRACTS, 3; ELECTION; ESTOPPEL, 4; EXECUTIONS, 13; GUARDIAN AND WARD, 4; HUSBAND AND WIFE, 15; JUDGMENTS, 16; PROBATE COURTS, 2; STATUTE OF LIMITATIONS, 4; TENDER.

EXEMPLARY DAMAGES.

See REPLEVIN, 3.

EXPERTS.

See WITNESSES, 1, 2.

FACTORS.

1. FACTOR WHO RECEIVES GOODS UNDER INSTRUCTIONS to sell for not less than a specified price can not sell below that price because he has made advances, until he has demanded repayment of them from his principal. *Blot v. Boiceau*, 345.
2. FACTOR WHO WRONGFULLY SELLS GOODS of his principal below the price limited in his instructions is presumptively liable for damages as if the limited price were the true value of the goods; but evidence that the limited price could not have been realized, and that the market value at the time of sale and after was less than that price, is competent to reduce the recovery to such market value with interest. *Id.*
3. WHETHER PRINCIPAL IS ENTITLED TO HIGHEST MARKET VALUE down to the time of the trial, or only to the commencement of the action for a wrongful sale of goods by his factor, *quære. Id.*

FALSE PRETENSES.

See CRIMINAL LAW, 13, 19.

FALSE REPRESENTATIONS.

See FRAUD.

FEDERAL COURTS.

See EXECUTIONS, 21.

FEIGNED ISSUE.

See EQUITY, 12.

FEMES COVERT.

See MARRIED WOMEN.

FIXTURES.

WHERE MORTGAGOR OF MILL DRIVEN BY WATER PLACES STEAM-ENGINE in the basement thereof, on a stone and brick foundation, into which it is fastened by iron rods, and uses it for the purpose of propelling the machinery at such times only as the water proves insufficient for that purpose, the power of the engine being applied to run the machinery in the same manner as when the wheel is driven by water, such engine does not become subject to the mortgage, but may be removed from the premises. *Randolph v. Gwynne*, 285.

See EXECUTORS AND ADMINISTRATORS, 10, 14.

FORECLOSURE.

See MORTGAGES, 9-11, 14.

FORFEITURE.

See MORTGAGES, 14.

FORMER CONVICTION.

See CRIMINAL LAW, 35.

FORMER JEOPARDY.

See CRIMINAL LAW, 34.

FORTHCOMING BONDS.

See SURETYSHIP, 2.

FRAUD.

1. IF PARTY INTENTIONALLY MISREPRESENTS MATERIAL FACT, or produces a false impression by words or acts, in order to mislead or obtain an undue advantage, it is a case of manifest fraud. *Mitchell v. Zimmerman*, 717.
2. ANY INTENTIONAL MISREPRESENTATION OR CONCEALMENT OF MATERIAL FACTS in the making of a contract, in cases in which the parties have not equal access to the means of information, will vitiate and avoid the contract, and it is immaterial whether the misrepresentation be made on the sale of real or personal property, or whether it relates to the title to land or some collateral thing attached to it. *Id.*
3. WHERE PARTY MAKES MISREPRESENTATION OF FACT, supposed to be peculiarly within his knowledge, whether he knew it to be false or made the assertion without knowing whether it was true or false, is wholly immaterial. *Id.*
4. RULE OF CAVEAT EMPTOR DOES NOT APPLY where one party to the contract entered into it by reason of the false and fraudulent representations of another who is supposed to possess superior means of information. *Id.*
5. EVERY PERSON REPOSES, AT HIS PERIL, IN THE OPINION OF OTHERS, when he has equal opportunity to form and exercise a correct judgment of his own. *Id.*

See AGENCY, 2, 11; ARBITRATION AND AWARD; ATTORNEY AND CLIENT; DEEDS, 12; EQUITY, 10; ESTOPPEL, 6; EVIDENCE, 4; EXECUTIONS, 24; INFANCY, 1; JUDGMENTS, 8, 17; LANDLORD AND TENANT, 5; MARRIAGE AND DIVORCE, 8, 9; MARRIED WOMEN, 5, 6; PARTNERSHIP, 2; PROBATE COURTS, 2; SALES, 9; STATUTE OF FRAUDS, 2, 3; STATUTE OF LIMITATIONS, 1-3; VENDOR AND VENDEE, 2, 3, 5; WILLS, 12.

FRAUDULENT CONVEYANCES.

EFFECT OF SETTING ASIDE DEED AS INTERFERING WITH CREDITORS' RIGHTS is to place the creditors as if the deed had never existed, and to leave them to enforce their claims and obtain satisfaction according to their legal priorities. *Gracey v. Davis* 663.

See TRUSTS AND TRUSTEES, 5.

FREIGHT.

See COMMON CARRIERS, 8.

GAMING.

ACTION WILL NOT LIE AGAINST A STAKEHOLDER OF AN ELECTION BET by the losing party, if the stakeholder has paid over the money after the election in good faith to the winner. *Bates v. Lancaster*, 696.

GENERAL ISSUE.

See CASE.

GIFTS.

1. **GIFTS CAUSA MORTIS ARE NOT FAVORED**, but are against the policy of the law. *Harris v. Clark*, 352.
2. **GIFT IN VIEW OF DEATH**, equally with a gift between the living, requires for validity that either the thing to be given, or some sufficient means of reducing it to possession, should be delivered to the donee. *Id.*
3. **DEED OF GIFT TO "THE JOINT HEIRS"** of a son-in-law and daughter, where two children are living at its delivery and others are born afterwards, operates to vest title in the children living at the time of its delivery. *Holeman v. Fort*, 665.
4. **DEED OF GIFT WITHOUT GRANTEE'S NAMES IS NOT VOID** for want of a proper party to take under it, if the donees can be identified by the description. *Id.*
5. **DONEES DESCRIBED AS "HEIRS" WHILE ANCESTORS ARE LIVING** may take personally under a deed of gift, the word "heirs" when relating to personal property being synonymous with "children." *Id.*

See ASSIGNMENT OF CONTRACTS, 3.

GRAND JURY.

See JURY AND JURORS, 1, 2; SLANDER, 1.

GRANTS.

See ADVERSE POSSESSION, 2; POSSESSION, 7; PUBLIC LANDS.

GUARANTY.

1. **GUARANTY, DEFINITION OF.**—A guaranty, in its enlarged sense, is a promise to answer for the payment of some debt, or the performance of some duty, in the case of the failure of another person, who is in the first instance liable. *Mathews v. Chrisman*, 124.
2. **CONTRACT IS NOT A GUARANTY WHEN ONE GUARANTEES TO PAY A CERTAIN SUM**, and at a certain day, for and on account of a third person, as it is an original and primary undertaking to pay a certain sum on a certain day. It is not a collateral undertaking, but a contract with the payee, and no notice of any kind is necessary. *Id.*
3. **NOTICE OF ACCEPTANCE OF GUARANTY AND OF NON-PAYMENT** by the debtor is not necessary where the guaranty was to pay a particular sum at a particular time. *Id.*
4. **IN CONDITION TO SAVE HARMLESS AGAINST NOTE OWED**, any description identifying the note is sufficient. *Boody v. Davis*, 210.

GUARDIAN AND WARD.

1. **CONFIRMATION OF REPORT OF AUDITORS APPOINTED TO EXAMINE A GUARDIAN'S ACCOUNT** is equivalent to a decree that the sum ascertained by the

auditor was due and payable to the ward by her guardian, and conclusive and unimpeachable until reversed or modified on appeal. *Commonwealth v. Moltz*, 499.

2. ALL BONDS GIVEN BY GUARDIAN are but securities for the same thing, but where the several bonds differ in amount, the liabilities of the sureties are not equal, but in proportion to the penalties of the different bonds. *Jones v. Blanton*, 415.
3. GIVING OF SECOND BOND BY GUARDIAN DOES NOT RELEASE HIS SURETIES on the first bond. *Id.*
4. WHERE AN EXECUTOR IS APPOINTED GUARDIAN OF HEIRS to whom a debt from the estate is due, the latter can not maintain any suit to compel the executor to pay it over, as the obligation of paying and the duty of receiving are in the same person; but as no suit can be brought, the law will *eo instanti* the money becomes payable transfer it from one character to the other. *State v. Hearst*, 167.

See JUDICIAL SALES; SURETYSHIP, 5.

HEIRS.

See GIFTS, 3, 5; GUARDIAN AND WARD,

HOMICIDE.

See CRIMINAL LAW, 21-23, 32.

HIGHWAYS.

See CORPORATIONS, 12-14; MANDAMUS, 2; NUISANCE, 1; RAILROADS.

HUSBAND AND WIFE.

1. HUSBAND IS BOUND TO SUPPORT HIS WIFE OUT OF HIS OWN PROPERTY, if able to do so, without resorting to her separate property. *Callahan v. Patterson*, 712.
2. AT COMMON LAW, A CONVEYANCE TO HUSBAND AND WIFE IN FEE vests the estate in them as one person, the whole of which remains in the survivor of them. The statutes of this state have not altered or modified the common law in this respect. *Gibson v. Zimmerman*, 168.
3. HUSBAND AND WIFE ARE THE ONLY PERSONS WHO CAN BE TENANTS BY ENTIRETIES. This tenancy must be created or take effect during coverture, and owes its qualities to the unity of the persons of husband and wife. *Id.*
4. CONVEYANCE TO HUSBAND AND WIFE CREATES ESTATE IN ENTIRETY; and as such the survivor will own the whole upon the death of the other. *Id.*
5. CONVEYANCE BY HUSBAND AND WIFE OF WIFE'S LAND, during the minority of the wife, is voidable. *Youse v. Norcoms*, 175.
6. COMMON LAW, AND NOT SPANISH LAW, GOVERNS rights of parties, when, in 1816, a husband and wife convey land belonging to the wife while she is an infant, and afterwards seek to disaffirm the conveyance. *Id.*
7. MERE SILENCE AND INACTION WILL NOT AMOUNT TO A RATIFICATION of a deed made by a husband and wife of the wife's land while she was an infant, eighteen and a half years of age; and the deed may be avoided by a subsequent deed made thirty years afterwards, although valuable improvements were made, and she was probably aware of it, and made no objection or claim. *Id.*

8. WIFE CAN NOT MAKE VALID CONTRACT WITH HER HUSBAND except through the intervention of a third person, whose duty it becomes to enforce it in her behalf; and such contract must be by deed, and signed by her. *Barbee v. Armistead*, 404.
 9. WHERE HUSBAND ENTERS INTO WRITTEN CONTRACT WITH ONE WHO HAS ENTICED away his wife, by which it is agreed that the latter may retain and support her, such contract amounts to a mere parol license, which either party may revoke at pleasure, and which is revoked by a demand for her restoration. *Id.*
 10. HUSBAND MAY MAINTAIN ACTION ON THE CASE FOR ENTICING away his wife. *Id.*
 11. HUSBAND MAY JOIN WIFE AS CO-PLAINTIFF in an action on a contract made by her. *Ham v. Boody*, 235.
 12. HUSBAND HAS BY LAW MANAGEMENT OF SEPARATE ESTATE OF WIFE, and the incidents essential to the due exercise of such authority, not for his own benefit, but for that of the community, or of the estate which he controls. *Howard v. North*, 769.
 13. HUSBAND HAS NO SUCH INTEREST IN SEPARATE ESTATE OF WIFE as could be disposed of under execution in satisfaction of his debts. *Id.*
 14. WHERE JUDGMENT IS RECOVERED AGAINST HUSBAND AND WIFE, JOINTLY, without any specific directions in the decree as to the estate out of which it is to be satisfied, it would seem that, as a general rule, it may be levied upon and be satisfied out of the property of either the husband or wife, or of the community. *Id.*
 15. WHERE WIFE JOINS HER HUSBAND, IN MORTGAGE OF HER ESTATE, FOR BENEFIT OF HUSBAND, as between the husband and wife, the mortgage will be considered the debt of the husband; and after his death, the wife or her representatives will be entitled to stand in the place of the mortgagee, and have the mortgage satisfied out of his assets. *Hollis v. Francois*, 760.
 16. IN ACTION TO FORECLOSE MORTGAGE GIVEN BY WIFE FOR HUSBAND'S DEBTS, if the husband has separate property, or there is community property, the court would doubtless have authority to decree payment out of such property, if sufficient, and if not, the balance to be satisfied out of the separate property of the wife, incumbered with the charge. *Id.*
- See DOWER; EQUITY, 2; EXECUTIONS, 9; MARRIAGE AND DIVORCE; MARRIED WOMEN.

IGNORANTIA LEGIS.

See MISTAKE, 1.

ILLEGAL CONTRACTS.

See CONTRACTS, 3, 4; TRUST DEEDS, 4,

IMPANELING JURY.

See CRIMINAL LAW, 37.

IMPLIED CONTRACTS.

See CORPORATIONS, 5.

IMPLIED WARRANTY.

See SALES, 8, 9.

IMPROVEMENTS.

See ESTOPPEL, 3; HUSBAND AND WIFE, 7; NUISANCE, 2.

INDEMNITY.

1. AGREEMENT BY A JUSTICE OF THE PEACE to indemnify one whom he summons to assist him in making an arrest can not be recovered on, if such arrest was unlawful. *Cumpton v. Lambert*, 442.
2. AGREEMENTS TO PERFORM, OR INDEMNIFY FOR THE PERFORMANCE of, unlawful acts, are void. *Id.*

INDICTMENT.

See CRIMINAL LAW, 14, 16-18, 20, 31, 32; MANDAMUS, 2.

INDORSEMENTS.

See AGENCY, 9, 10; NEGOTIABLE INSTRUMENTS, 3-5, 13-18.

INFANCY.

1. EQUITY WILL NOT COMPEL AN INFANT TO EXECUTE A CONTRACT for sale of his land, where the contract was procured from him by fraud; neither will it require him to make compensation if he was not guilty of any fraud. *Griffis v. Younger*, 438.
2. ENTRY UPON LAND IS NOT NECESSARY TO AVOID DEED made during infancy, but it may be avoided by a deed executed to another for the same land after arriving at full age. *Youse v. Norcoms*, 175.

See ADVERSE POSSESSION, 1; HUSBAND AND WIFE, 6, 7; MARRIED WOMEN, 3; STATUTE OF LIMITATIONS, 6.

INJUNCTIONS.

WHERE, ON APPEAL FROM ORDER DISSOLVING INJUNCTION, THE CHANCER-
 LOR STAYS, until the next sitting of the court of errors and appeals, the
 proceedings which the injunction was issued to restrain, the court has
 power to extend such stay until the hearing on appeal; but this power
 should be exercised only upon the most imminent necessity. The grant-
 ing or refusing of such extension rests in the sound discretion of the court,
 and it should not be granted where a temporary injunction will work
 irreparable injury to the party enjoined. *Doughty v. S. & E. R. R. Co.*,
 267.

See PARTNERSHIP, 7.

INNS.

INNKEEPER IS LIABLE FOR LOSS OF GOODS of a boarder only where he has
 been guilty of culpable negligence. *Manning v. Wells*, 638.

INSANITY.

See WILLS, 10, 11.

INSOLVENCY.

See BANKRUPTCY AND INSOLVENCY.

INSTRUCTIONS.

See CRIMINAL LAW, 28; DEEDS, 8; FACTORS, 1, 2; PLEADING AND PRACTICE, 11-17; REPLEVIN, 1.

INSURANCE—FIRE.

APPLICATION FOR A POLICY OF INSURANCE MAY BE REFORMED, so as to make it conform to the representation of facts made to the insurer's agent, if the insured was misled into signing an application containing a wrong statement by the action of such agent. *Harrie v. C. C. M. I. Co.*, 448.

INTEREST.

1. INTEREST IS RECOVERABLE UPON RENT from the time when the rent became due by the lease; notwithstanding it was payable in produce or services instead of in money. *Van Rensselaer v. Jewett*, 275.
2. INTEREST SHOULD BE ALLOWED THOUGH DEMAND IS UNLIQUIDATED whenever a debtor is in default in paying money, delivering property, or rendering services pursuant to his contract, if the amount can be ascertained by an inquiry concerning the value. *Id.*
3. INTEREST, AFTER TENDER OF THE DEBT made pursuant to an agreement between the parties, should not be cast on such debt. *McNeil v. Coll*, 188.

See MORTGAGES, 6, 7; REPLEVIN, 2, 4.

JEOPARDY.

See CRIMINAL LAW, 34.

JOINT TENANCY.

See CO-TENANCY.

JUDGMENTS.

1. JUDGMENT OR ORDER OR DECREE OF COURT OF GENERAL JURISDICTION, on any subject to which jurisdiction has attached, however erroneous, defective, or irregular, can never be questioned or avoided in a collateral way. *Lynch v. Baxter*, 735.
2. PRO CONFESSO ORDER CAN NOT JUSTIFY A DECREE against one who has been directed to answer over, upon exceptions being sustained to his answer, and fails to do so, unless a state of facts is made out by the bill which rendered him liable in this mode of proceeding. *Garland v. Hull*, 140.
3. SCIRE FACIAS TO REVIVE DORMANT JUDGMENT IS MERE CONTINUATION of the former action. *Irwin v. Nixon's Heirs*, 559.
4. REVIVAL OF JUDGMENT BY SCIRE FACIAS CONTINUES ITS VITALITY, WITH LIEN and other incidents, from the time of its rendition. *Id.*
5. LIEN OF JUDGMENT AGAINST DECEDENT IS NOT LIMITED to seven years under the Pennsylvania act of 1797, but continues during the existence of the debt. *Id.*
6. JUDGMENT ON SCIRE FACIAS REVIVING JUDGMENT IS CONCLUSIVE as to the existence of the debt, as respects innocent purchasers, though the original judgment was in fact satisfied, and the judgment reviving it was confessed by an attorney without authority. *Id.*

7. **ESTOPPEL BY FORMER JUDGMENT.**—The judgment of a court of concurrent jurisdiction directly upon the point is, as a plea, a bar, or as evidence, conclusive between the same parties on the same matter. *Jones v. Weathersbee*, 653.
8. **JUDGMENT IS CONCLUSIVE EVIDENCE, IN CREDITOR'S SUIT** founded upon it, as against other creditors of the debtor, that the plaintiff is a creditor, and to the amount awarded him by such judgment, unless it is impeached for fraud or collusion. *Camdee v. Lord*, 294.
9. **GENERAL REPLICATION IN CREDITOR'S SUIT**, to an answer which alleges an immaterial objection to the judgment on which the suit is founded, is not a waiver of the complainant's right to rely on the judgment as an estoppel; he may in such a case except to the answer, but is not bound to do so. *Id.*
10. **JUDGMENT, VALID UPON ITS FACE, CAN NOT BE INVALIDATED UPON CERTIORARI and *supersedeas***, when it comes up collaterally, by parol or other proof *dehors* the proceedings. *Witt v. Russey*, 701.
11. **JUDGMENT DEFENDANT, ON CERTIORARI FOR A NEW TRIAL, MAY SHOW BY PAROL** that the judgment was rendered upon an indorsement of a note for an amount beyond the jurisdiction of the justice's court rendering it, but can not show this on *certiorari* and *supersedeas* to quash the execution issued on the judgment. *Id.*
12. **STATUTE LIMITING JUDGMENT LIEN TO FIVE YEARS IN PENNSYLVANIA** does not apply as against the debtor. *Hinds' Heirs v. Scott*, 506.
13. **JUDGMENT REVIVING LIEN OF PREVIOUS JUDGMENT CAN NOT RELATE BACK** and give the purchaser at the sheriff's sale a right which did not exist at the time of the purchase, where the judgment reviving the lien was not rendered until after a sale of the premises; although, if the sale did not satisfy the judgment, it might have had the effect of reviving the lien on any real estate owned by the defendant in the execution, or which he had disposed of while subject to it. *Bank of Missouri v. Wells*, 163.
14. **TERM "DEFENDANTS" IN A JUSTICE'S JUDGMENT "AGAINST THE DEFENDANTS"** means those defendants only on whom process was served, and who were before the court. *Winchester v. Bearlin*, 702.
15. **IF JUSTICE'S JUDGMENT IS ENTERED AGAINST ALL THE DEFENDANTS, WHERE SOME ARE NOT SERVED** with process and do not appear, the judgment will not be void as to those served, but only erroneous or voidable, and can be reversed on writ of error. *Id.*
16. **JUDGMENT OF REVIVOR AGAINST EXECUTORS OF DECEASED PLAINTIFF** does not confer upon the defendant any right to give security for a stay of execution, but where no execution has issued before the death of the plaintiff, if the executors consent, the judgment of revivor may be stayed under the act of 1842, chapter 136, section 4. *Id.*
17. **DOCTRINE THAT JUDGMENT MUST STAND UNLESS REVERSED FOR ERROR, OR set aside for fraud**, does not apply where the want of jurisdiction is made a question; this may always be set up when a judgment is sought to be enforced, or any benefit is claimed under it. *Fitzhugh v. Custer*, 723.
18. **WHERE RECORDS OF COURT, IN CONTESTED ELECTION CASE, show that no quorum of judges was present**, that the contestants' attorneys submitted the case to arbitration, that the award of the arbitrators was made the judgment of the court, the whole proceedings are a nullity, because the award was not rendered as a judgment by a court, there being no quorum. *Id.*

19. COURT IN WHICH JUDGMENT IS RENDERED MAY VACATE IT, on motion, at any time, upon parol proof that it was entered irregularly and not according to the course of the court. *Keaton v. Banks*, 393.
 20. JUDGMENT RENDERED AGAINST PARTY NOT IN COURT IS VOID. *Id.*
 21. PARTY ASSIGNING JUDGMENT MUST BE HELD TO IMPLIED WARRANTY that there is such a judgment, and that the defendant is liable to pay it; and if the judgment has in fact been paid, the assignee can recover from the assignor the amount paid him. *Lile v. Hopkins*, 115.
- See BANKRUPTCY AND INSOLVENCY, 4; CRIMINAL LAW, 28, 33, 36; DOWER, 2; EJECTMENT, 2; ESTOPPEL, 2, 3; EXECUTIONS, 2, 3, 6, 10, 17, 21, 24, 33, 34; EXECUTORS AND ADMINISTRATORS, 19, 21; GUARDIAN AND WARD, 1; HUSBAND AND WIFE, 14; JUDICIAL SALES; MARRIAGE AND DIVORCE, 8, 9; MARRIED WOMEN, 4; MORTGAGES, 6; NEGOTIABLE INSTRUMENTS, 19; PLEADING AND PRACTICE, 21; PROBATE COURTS; REPLEVIN, 4; SURETYSHIP, 2.

JUDICIAL SALES.

1. PURCHASER AT MASTER'S SALE, UNDER ORDER OF A CHANCERY COURT, makes himself a party to the proceedings, for some purposes, and subjects himself to the jurisdiction of the court, but when the sale has been confirmed, the title vested in the purchaser, and his note delivered to the guardian of the infants entitled, and the court has divested itself of all control over the cause and the parties, it has no jurisdiction to entertain a motion by the guardian for a *scire facias* against the purchaser to appear and show cause why judgment on the note should not be rendered against him. *Vasbinder v. Sawyers*, 694.

See EXECUTORS AND ADMINISTRATORS, 2, 12.

JURISDICTION.

- See EQUITY, 4, 7, 8, 11; EXECUTORS AND ADMINISTRATORS, 4; JUDGMENTS, 1, 7, 11, 17; JUDICIAL SALES; MARRIAGE AND DIVORCE; PLEADING AND PRACTICE, 21; PROBATE COURTS; SURETYSHIP, 3, 4.

JURY AND JURORS.

1. NO OATH OF SECRECY IS REQUIRED FROM GRAND JURORS as to what transpires among them in the discharge of their office. *Sands v. Robison*, 132.
2. COMPETENCY OF GRAND JURORS TO TESTIFY is peculiarly a matter of discretion with the court to discriminate as to it; and in an action of slander, grand jurors are competent to testify to the uttering of the supposed slanderous words before them, while officiating as grand jurors. *Id.*
3. VERDICT OF JURY CLEARLY AGAINST EVIDENCE, though prompted by most honorable and praiseworthy feelings, will not be permitted to stand. *Woodward v. James*, 649.
4. WHERE JURY HAS BEEN WAIVED, THE JUDGE IS SUBSTITUTED to the same attributes that would have been vested in a jury. *Callahan v. Patterson*, 712.

See CONTRACTS, 4; CRIMINAL LAW, 21, 22, 33, 37, 38; EVIDENCE, 5; NEGLIGENCE, 1; NEGOTIABLE INSTRUMENTS, 10; PLEADING AND PRACTICE, 13-17; PUBLIC LANDS, 1; REPLEVIN, 1; SLANDER, 1; STATUTE OF LIMITATIONS, 7; UNBORN, 2.

JUSTICES OF THE PEACE.

See INDEMNITY, 1; JUDGMENTS, 11, 14, 15; PLEADING AND PRACTICE, 3; SLANDER, 1.

JUSTIFICATION.

See CRIMINAL LAW, 25-27; TRESPASS, 2.

LANDLORD AND TENANT.

1. TRANSFER OF LESSEE'S INTEREST, which contains a covenant that the transferee will surrender the premises to the lessee at the expiration of the term, is a sublease, not an assignment. *Post v. Kearney*, 303.
2. ONE WHO CULTIVATES ANOTHER'S LAND FOR SHARE OF CROP CAN NOT TRANSFER his share to a third person, before a division of the crop is made. Nor is the owner of the land estopped from denying such assignee's right. *McNeeley v. Hart*, 377.
3. CROPPER HAS NO SUCH INTEREST IN THE CROP as can be subjected to the payment of his debts while it remains *en masse*; until a division, the whole is the property of the landlord. *Brazier v. Ansley*, 408.
4. TENANT CAN NOT DISPUTE LANDLORD'S RIGHT TO MAKE LEASE to him, but he is allowed to prove the nature of his landlord's title, and to show that, though originally a valid one, it expired before the commencement of the action, and that the land then belonged to another. *Niles v. Ransford*, 95.
5. LESSEE OF MORTGAGOR IS NOT ESTOPPED by the lease from disputing the lessor's title, where subsequent to the lease he becomes assignee of the mortgage. *Id.*
6. LESSEE OF LAND HAS RIGHT TO ABANDON AND AVOID THE LEASE altogether, or remain upon and cultivate the land actually conveyed and have an abatement of the price *pro tanto* the deficiency, where the lessor fraudulently misrepresented the quantity. *Mitchell v. Zimmerman*, 717.

See COVENANTS; INTEREST, 1; POSSESSION, 1.

LARCENY.

See CRIMINAL LAW, 20.

LEASES.

See COVENANTS; LANDLORD AND TENANT.

LEGACIES.

See WILLS, 18.

LEGISLATURE.

See CONSTITUTIONAL LAW; CRIMINAL LAW, 1; MARRIAGE AND DIVORCE, 2, 3

LEGITIMACY.

See ESTOPPEL, 4.

LEVY.

See EXECUTIONS, 3, 7, 11, 28; HUSBAND AND WIFE, 14.

LICENSES.

See HUSBAND AND WIFE, 9; NUISANCE, 1.

LIENS.

1. COURT WILL NOT DISTURB LEGAL LIENS. *Gracey v. Davis*, 663.
 2. GOODS SOLD THE GRANTOR OF A PLANTATION CONSTITUTE NO CHARGE upon the plantation, although bought for its use, and a grantee could not be rendered liable for them unless by direct agreement in writing. *Garland v. Hull*, 140.
 3. MORTGAGEE WHOSE LIEN EXTENDS OVER TWO SEPARATE LOTS, each of which has been mortgaged at subsequent times to different individuals, can not be compelled to exhaust his security out of the lot last mortgaged. Equity will, however, compel him to satisfy his debt out of the proceeds of both lots, in proportion to the amount each lot may produce. *Green v. Ramage*, 458.
 4. CLAIM OF MECHANIC UNDER THE STATUTE OF 1836 is not insufficient for failing to contain the initial letter of the owner's name, and where the claim is a joint one, for omitting to state whether the claimants are partners or individual joint creditors. *Knabb's Appeal*, 472.
 5. NAME OF CONTRACTOR NEED BE STATED IN MECHANIC'S CLAIM only where the contract was made with a builder, distinct from the owner of the building. *Id.*
 6. MECHANIC'S CLAIM WHICH DESIGNATES LOCALITY OF BUILDING as in "Upper Providence township, Montgomery county, Pa., bounded by lands of Jacob Landis and others," is sufficient. *Id.*
 7. ITEMIZED ACCOUNT ANNEXED TO MECHANIC'S CLAIM is a part thereof, and if such account contains but one date, it will be presumed that all the materials were furnished on such date, unless the contrary appears. *Id.*
 8. SUBSEQUENT INCUMBRANCERS MAY OBJECT TO THE DEFICIENCIES appearing in mechanics' claims filed against their debtor. *Id.*
- See COMMON CARRIERS, 8; EXECUTIONS, 1, 2, 10, 11; JUDGMENTS, 4, 5, 12, 13; MORTGAGES, 5, 6; SURETSHIP, 2.

MAIL CONTRACTS.

See CONTRACTS, 3.

MALICE.

See CRIMINAL LAW, 22, 23, 30, 31; SLANDER, 1.

MANDAMUS.

1. MANDAMUS DOES NOT LIE WHERE OTHER EFFECTUAL REMEDY exists, but is to be invoked only in cases of the last necessity. *Reading v. Commonwealth*, 534.
2. MANDAMUS TO MUNICIPAL CORPORATION TO REMOVE OBSTRUCTIONS and keep open a public street will not lie where no special injury to the relators is alleged, because an indictment for nuisance is an effectual remedy. *Id.*
3. AT COMMON LAW IT WAS THE PRACTICE TO CONSIDER RETURN TO RULE TO SHOW CAUSE why a *mandamus* should not issue as conclusive, and to remit the prosecutor to an action on the case, or to a crim-

inal information, for a false return, before a peremptory *mandamus* would be awarded; but this is repugnant to our system of procedure, which repudiates two suits where the matters at issue can be properly tried and determined in one. *Fitzhugh v. Custer*, 723.

MANSLAUGHTER.

See CRIMINAL LAW, 24, 30-33, 36.

MARRIAGE AND DIVORCE.

1. COHABITATION AND HOLDING THEMSELVES OUT AS MAN AND WIFE are but presumptive evidence of marriage. *Stevenson v. McReary*, 102.
2. EVIDENCE TO SHOW THAT LEGISLATIVE DIVORCE WAS GRANTED FOR CAUSES OVER WHICH COURTS HAVE JURISDICTION, and that therefore the legislature had no power to grant it, under the constitution, is inadmissible. *Jones v. Jones*, 611.
3. EVIDENCE AS TO MANNER OF PROCEEDING OR AGENCIES EMPLOYED by any member of the legislature, in procuring an act of divorce, is admissible. *Id.*
4. PROOF OF ADULTERY AT A DIFFERENT PLACE FROM THE ONE ALLEGED IS INSUFFICIENT in an action for divorce. *Adams v. Adams*, 219.
5. LIBEL FOR DIVORCE MAY BE AMENDED SO AS TO MEET THE PROOF if the act charged is sufficiently proved but at a different place from the one alleged. *Id.*
6. CHARGE OF ADULTERY WITH PERSONS UNKNOWN to the libellant is sufficient to admit evidence concerning the act. *Id.*
7. FRESH ACTS OF ADULTERY MAY BE PLEADED SUPPLEMENTARILY, and sentence be obtained on facts not existing at the commencement of the suit. *Id.*
8. DECREE OF DIVORCE OBTAINED BY FRAUD MAY BE VACATED AT SUBSEQUENT TERM by court of common pleas, although a marriage was contracted on its faith, and issue born. *Allen v. Macdellan*, 608.
9. ORDER VACATING DECREE OF DIVORCE FOR FRAUD IS CONCLUSIVE AFTER EXPIRATION OF TIME FOR APPEAL, although the record does not show that proof of fraud was made. *Id.*

See ESTOPPEL; HUSBAND AND WIFE; WILLS, 18.

MARRIED WOMEN.

1. SEPARATE ESTATE IN MARRIED WOMAN IS NOT CREATED BY THESE WORDS in a bequest: "I give and bequeath to C. B. * * * all my property, * * * by her to be freely enjoyed, to every intent and purpose, as her own in every respect." *Wilson v. Bailer*, 678.
2. CONTRACT WITH FEME COVERT IS BINDING ON OPPOSITE PARTY where she has paid the consideration or performed her part of the agreement. *Ham v. Boody*, 235.
3. AT COMMON LAW, A MARRIED WOMAN COULD ALIENATE HER LAND by fine and recovery; but such alienation might be avoided on account of the infancy of the wife. If, however, it was not avoided during infancy, it could not be afterwards avoided; for this conveyance, being by matter of record, must be tried by inspection upon writ of error; but a feoffment or other alienation in *pais* might be avoided by an infant or her heir at

any time by entry, whether during nonage or after full age. *Youse v. Norcome*, 175.

4. ACTS OF FEMES COVERT IN PAIS MAY BE AND FREQUENTLY ARE VOID; but this does not impair the conclusive force of judgments to which they are parties; and if they be not reversed on error or appeal, their effect can not be gainsaid, where they are enforced by ultimate process, or where they are brought to bear on their rights, in any future controversy. *Howard v. North*, 769.
5. IT IS EQUITABLE THAT WIFE'S SEPARATE PROPERTY SHOULD RESPOND IN DAMAGES for the frauds in which she participates, in relation to her own property, and which inure to her exclusive benefit. *Id.*
6. COURTS WILL EXAMINE WITH VIGILANCE TRANSFERS AND INCUMBRANCES BY WIFE OF HER SEPARATE PROPERTY, even when the formalities of the statute have been complied with, and protect the wife from undue influence or fraud, or compulsion of her husband or others; but where such defenses are insisted on, they must be averred by the wife and sustained by proof, as it is not incumbent on the plaintiff to establish a negative. *Hollis v. Francois*, 760.
7. NOTES, BONDS, OR AGREEMENTS OF MARRIED WOMAN are absolutely void at common law. Her separate existence is merged in that of her husband, and she can make no contract to charge her estate or render herself liable to an action. *Id.*
8. IN EQUITY, MARRIED WOMAN HAS BEEN TREATED AS POSSESSING, IN A GREAT DEGREE, the powers of a *feme sole* over her separate property, and as possessing the necessary powers of charging, incumbering, or disposing of it at pleasure. *Id.*
9. DOCTRINES OF COURTS OF EQUITY AS TO POWERS OF FEMES COVERT OVER THEIR SEPARATE ESTATES are not recognized as rules by which the powers of *femes covert* over their separate estates, under the Texas statute, and their consequent liabilities, are to be determined. *Id.*
10. TEXAS STATUTE PRESCRIBES SPECIAL MODE FOR CONVEYANCE OR TRANSFER OF WIFE'S SEPARATE PROPERTY, and unless this mode be pursued, the wife has no power to charge her separate estate, except for necessities for herself and family and for expenses incurred for the benefit of her separate property; a note given for these alone, or jointly with the husband, would create a legal liability which can be enforced against either the common property or the separate property of the wife, at the plaintiff's discretion. *Id.*
11. UNDER FORMER LAWS OF TEXAS, WIFE COULD ALIEN HER SEPARATE PROPERTY with the consent of her husband, and in case of his refusal or absence, by authorization of the judge. *Id.*
12. PRESENT STATUTE HAS INTRODUCED, IN ADDITION TO ASSENT OF HUSBAND, the requisite of the privy examination of the wife, and, in fact, the customary mode for the transfer of the freehold and dower interests of the wife, under the strict rules of the common law. *Id.*
13. STATUTE PROVIDING THAT FEMES COVERT MAY DISPOSE OF THEIR SEPARATE PROPERTY in a particular mode applies to the transfer of the most insignificant articles of her movables; but the restriction has been so far removed as to authorize her separate estate to be charged with necessities for herself and family, and expenses incurred for the benefit of her separate property. *Id.*

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14. WIFE CAN, BY COMPLYING WITH FORMALITIES PRESCRIBED BY STATUTE, pass her whole estate for the payment of her husband's debts; and her competence, under the same sanction, to pass a less interest, or to incumber her estate, can not be questioned. *Id.*
 15. WIFE'S SEPARATE PROPERTY.—EQUITY WILL NOT DECREE SPECIFIC PERFORMANCE of a contract for the sale of the wife's separate property where the bond for title was not acknowledged by her in the manner prescribed by law, although this was owing to her sickness, and part of the consideration was a debt due from her before marriage. *Callahan v. Patterson*, 712.
 16. PRIVY EXAMINATION OF WIFE APART FROM HER HUSBAND is indispensable to the conveyance of her separate property. *Id.*
 17. SEPARATE PROPERTY OF WIFE IS LIABLE FOR HER DEBTS contracted before coverture. *Id.*
 18. TRANSFER BY WIFE OF HER SEPARATE PROPERTY, under the forms prescribed by law, will pass all her rights to the property, unsupported by a consideration, inuring to her benefit. *Per* *Humphill, C. J.*, and *Wheeler, J.* *Liscomb, J.*, doubted. *Id.*
 19. IF HUSBAND IS NOT ABLE TO SUPPORT HIS WIFE and her children, her separate property may be resorted to and made liable for that purpose. *Id.*
- See ADVERSE POSSESSION, 1; DOWER; EQUITY, 2; HUSBAND AND WIFE; MARRIAGE AND DIVORCE; STATUTE OF LIMITATIONS, 6.

MASTER'S SALE.

See JUDICIAL SALES.

MAXIMS.

REASON OF RULE FAILING, RULE ITSELF SHOULD BECOME WHOLLY INOPERATIVE. *Howard v. North*, 769.

See EQUITY, 1; MISTAKE, 1.

MECHANICS' LIENS.

See LIENS, 4-8.

MERGER.

See CRIMINAL LAW, 12; MARRIED WOMEN, 7.

MESNE PROFITS.

See EJECTMENT, 1, 2.

MILLS.

See EASEMENTS; FIXTURES.

MISDEMEANOR.

See CRIMINAL LAW, 13.

MISREPRESENTATIONS.

See AGENCY, 11; FRAUD; LANDLORD AND TENANT, 6; VENDOR AND VENUE, 6.

MISTAKE.

1. **MAXIM "IGNORANTIA LEGIS," ETC., IS FOUNDED UPON THE PRESUMPTION THAT EVERY ONE competent to act for himself knows the law, but the presumption that he knows it is not conclusive, but may be rebutted.** *Hart v. Roper*, 425.
2. **WHERE PLAINTIFF ALLEGES IGNORANCE OF THE LAW, IN HIS BILL, the defendant can not take advantage of it on demurrer.** *Id.*
See DEEDS, 14; EQUITY, 9, 10; ESTOPPEL, 3; EXECUTIONS, 23.

MONEY HAD AND RECEIVED.

See ASSUMPSIT.

MORTGAGES.

1. **SUFFICIENT DESCRIPTION OF NOTE SECURED BY MORTGAGE.**—The omission of the sum, date, or name of one of the signers of a note is not fatal if it can be identified. *Boody v. Davis*, 210.
2. **ACCIDENTAL OMISSION TO INSERT IN MORTGAGE THE AMOUNT** of the bond which it is given to secure does not invalidate the mortgage nor postpone its lien to that of a subsequent mortgage. *Hall v. Lambert*, 272.
3. **THIRD PERSON PAYING DEBT SECURED BY MORTGAGE, AT MORTGAGOR'S REQUEST,** is subrogated to the rights of the mortgagees as against a subsequent mortgage. *Id.*
4. **UPON PAYMENT OF DEBT SECURED BY MORTGAGE,** the mortgagee must, on the mortgagor's request, enter satisfaction, which will operate as a discharge of the mortgage. When this is done, the whole legal and equitable title reverts in the mortgagor, as if a formal reconveyance had been made; but until this is done, or some other mode pursued to vest him with the legal title, the mortgagor, even after payment of the debt, has but an equity. *Wolfe v. Doe ex dem. Dowell*, 147.
5. **MORTGAGEE DISCHARGING AN ELDER MORTGAGE IS SUBSTITUTED** in the place of the incumbrancer, and may treat the mortgage as if assigned to him, and enforce the lien. *Weld v. Sabin*, 240.
6. **MORTGAGE LIEN IS DIVESTED IN PENNSYLVANIA BY EXECUTION SALE** of the mortgaged premises upon a subsequent judgment for the interest of the mortgage debt, the principal being not yet due, and is transferred to the proceeds of the sale, taking priority over all liens subsequent to the mortgage and prior to such judgment. *West Branch Bank v. Chester*, 547.
7. **INTEREST STIPULATED FOR IN MORTGAGE IS PART OF THE DEBT.** *Id.*
8. **LIABILITY TO EXECUTION OF MORTGAGOR'S INTEREST.**—When the debt is fully paid, the mortgagee, or the trustee in a deed of trust, holds but a naked legal title for the debtor, who has the whole beneficial interest, which is subject to sale on execution; but until full payment, the debtor has no interest which can be sold; and if satisfaction has not been entered, the purchaser gets but an equity, which must be enforced in chancery. *Wolfe v. Doe ex dem. Dowell*, 147.
9. **ASSIGNMENT OF MORTGAGE PASSES THE POWER OF SALE CONTAINED THEREIN.** After the assignment, the assignee must bring the suit to foreclose, and the mortgagee can no longer maintain a suit for that purpose. *Niles v. Ransford*, 95.
10. **PARTY FORECLOSING UNDER POWER OF SALE IN MORTGAGE** must see that he

in all material matters keeps within the powers given to him, for there are no legal presumptions or intendments raised by the law to support his proceedings, as there might be if the sale was made pursuant to a decree and order of a court of chancery. *Id.*

11. ASSIGNEE OF MORTGAGE FORECLOSING UNDER POWER to foreclose contained in the mortgage can not advertise the sale in the name of the mortgagee, but must advertise it in his own name. *Id.*
 12. WHERE MORTGAGEE ASSIGNS MORTGAGE AFTER ADVERTISING SALE of mortgaged premises under a power of sale contained in the mortgage, the mere act of continuing the advertisement in the name of the mortgagee, by the assignee after he acquires the whole interest in the mortgage, gives it no force; and a sale and purchase by the assignee under such advertisement is of no effect. In such a case the assignee should have renewed the advertisement in his own name. *Id.*
 13. ASSIGNEE OF MORTGAGEE MAY MAINTAIN EJECTMENT on the mortgage deed and the assignment to him against the mortgagor or his lessee. *Id.*
 14. AGREEMENT BY MORTGAGEE NOT TO TAKE ADVANTAGE OF FORECLOSURE for a given time is binding, and waives the forfeiture and opens the foreclosure. *McNeil v. Call*, 188.
- See ASSIGNMENT OF CONTRACTS, 1; BAILMENTS, 2; DOWER, 2; FIXTURES; HUSBAND AND WIFE, 15, 16; LANDLORD AND TENANT, 5; LIENS, 3; TRUST DEEDS.

MULTIPLICITY OF ACTIONS.

See EQUITY, 4-6.

MUNICIPAL CORPORATIONS.

See CORPORATIONS, 2, 9-13.

MURDER.

See CRIMINAL LAW, 21-23, 33.

NAMES.

See CORPORATIONS, 2-4; GIFTS, 4; LIENS, 4-6; PARTNERSHIP, 3; TRUSTS AND TRUSTEES, 3, 4, 6, 8, 9; WILLS, 4, 5, 16.

NECESSARIES.

See MARRIED WOMEN, 10, 13.

NEGLIGENCE.

1. WHAT AMOUNTS TO NEGLIGENCE IS A QUESTION OF LAW. *Herring v. W. & R. R. Co.*, 395.
 1. WHERE SLAVE WHILE ASLEEP ON RAILROAD TRACK IS RUN OVER and killed by a train running at the usual speed, the law will not attribute negligence to the engineer because he does not act on the assumption that the slave has lost his faculties by being drunk or asleep. He has a right to presume that the slave, being a man, will get out of the way; and if, after he gets near enough to see that the slave is drunk or asleep, he uses due care and precaution to avert the accident, the railroad company will not be liable to the owner of the slave. *Id.*
- See ATTORNEY AND CLIENT; COMMON CARRIERS, 2; CORPORATIONS, 12; INNS; NUISANCES, 3; RAILROADS; TRESPASS, 6.

NEGOTIABLE INSTRUMENTS.

1. **CERTIFICATE OF DEPOSIT PAYABLE AT FUTURE DAY IS PROMISSORY NOTE** in legal effect. *Leavitt v. Palmer*, 333.
2. **ADMISSION BY ONE OF TWO JOINT MAKERS OF A NON-NEGOTIABLE NOTE**, that it was given for value and is binding, does not estop the other from impeaching the consideration, even against a purchaser for value on the faith of the admission. So held, where there was no proof of partnership between the makers. *Lewis v. Woodworth*, 319.
3. **INDORSER NOT DISCHARGED BY SURRENDER OF COLLATERAL SECURITY.**—The indorser for value, and in usual course of business, of a negotiable bill or note, does not become a surety for the maker or acceptor in such sense that he is discharged by the holder's surrendering a collateral security received from the maker. *Pitt v. Congdon*, 299.
4. **SUCH AN INDORSER IS DISCHARGED BY ANY DEALINGS** between the holder and the principal debtor which defeat the indorser's remedy on the instrument. But he has no claim on a collateral security which the holder may have taken on his own account from the principal, and therefore no remedy of his is prejudiced by its surrender. *Id.*
5. **ACCOMMODATION INDORSER OR ACCEPTOR IS TO BE REGARDED AS SURETY** for the principal debtor on a note or bill, as to all persons having notice. *Per Gardiner, J. Id.*
6. **PAROL EVIDENCE IS INADMISSIBLE TO VARY TERMS OF CHECK**; consequently, if one give a check for so much money, it is not competent for him to prove, by oral testimony, that it was agreed, either expressly or impliedly, at the time the check was given, that it should be payable in bank notes. *Pack v. Thomas*, 135.
7. **NOTICE OF DISHONOR OF CHECK IS NOT NECESSARY** where the drawer had no funds in the bank at the time, although he may have had reasonable grounds to believe that it would be paid. *Id.*
8. **DRAWER OF CHECK, INJURED BY WANT OF NOTICE OF ITS DISHONOR**, is only exonerated to the extent of the injury. A mere partial injury would not entitle him to be exonerated from the whole debt. *Id.*
9. **IF HOLDER IS IGNORANT OF PLACE WHERE INDORSER RESIDED** at the time of protest, and could not ascertain it after diligent inquiry, notice sent to the place where the note bears date will be sufficient. *Goodloe v. Godley*, 159.
10. **JURY DETERMINES WHETHER DUE DILIGENCE IN GIVING NOTICE** of demand and non-payment was used. *Id.*
11. **DUE DILIGENCE TO ASCERTAIN INDORSER'S RESIDENCE IS USED** if inquiries are made by the notary in the place where the note was payable. *Id.*
12. **WHERE MATTER IN EXCUSE FOR WANT OF DEMAND AND NOTICE IS RELIED UPON**, it is usual to declare as if there had been due presentment and notice. Sufficient matter in excuse is in legal effect equivalent to demand and notice. *Id.*
13. **DEMAND ON NOTE PAYABLE AT BANK** after banking hours is sufficient; indeed, where a note is payable at a particular time at a bank, and indorsed to such bank for collection, no specific demand is necessary. *Id.*
14. **PLACARD NOTICE THAT INDORSERS WILL BE REQUIRED TO WAIVE DEMAND AND NOTICE** by a bank does not obviate the necessity of such waiver appearing upon the face of the note. *Piscataqua Ex. Bank v. Carter*, 217.

15. AGREEMENT TO WAIVE DEMAND AND NOTICE by an indorser can not be shown by parol evidence. *Id.*
 16. INDORSER'S RIGHT TO DEMAND AND NOTICE CAN NOT BE WAIVED BY A CUSTOM OR USAGE established by a bank for its own convenience. *Id.*
 17. CUSTOM OF INDORSERS TO WAIVE DEMAND AND NOTICE can not be shown to change the contract implied in law from the indorsement. *Id.*
 18. INDORSER WHO GIVES HIS NOTE IN PAYMENT OF BILL, with full knowledge of the drawee's failure, can not resist payment of such note on the ground of want of demand and notice. *Bank of Hamburg v. Wray*, 659.
 19. TIME OF PAYMENT OF NOTE IS NOT EXTENDED by confession of judgment with a stay of execution which expired before the time when, in the regular progress of a suit against the principal, execution might have been recovered. *Id.*
- See AGENCY, 9, 10; ASSIGNMENT OF CONTRACTS, 3; ASSUMPSIT; BANKRUPTCY AND INSOLVENCY, 2; BANKS AND BANKING; CORPORATIONS, 1, 2; GUARANTY, 4; JUDGMENTS, 11; JUDICIAL SALES, 1; MARRIED WOMEN, 7, 10; MORTGAGES, 1; PARTNERSHIP, 2, 3; PAYMENT, 1-3; PLEADING AND PRACTICE, 5; TRUST DEEDS, 4; VENDOR AND VENUE, 7.

NEW TRIAL.

See JUDGMENTS, 11; PLEADING AND PRACTICE, 17; STATUTE OF LIMITATIONS, 7.

NON-NEGOTIABLE NOTES.

See NEGOTIABLE INSTRUMENTS, 2.

NONSUIT.

See PLEADING AND PRACTICE, 9, 10.

NOTES.

See ASSUMPSIT; NEGOTIABLE INSTRUMENTS; PAYMENT, 1-3.

NOTICE.

1. LEGAL NOTICE MUST SHOW ON ITS FACE that it emanates from some person or court claiming to have the power to act in the manner indicated by the notice. *Niles v. Ransford*, 95.
- See BAILMENTS, 3, 4; BANKS AND BANKING, 1; BONA FIDE PURCHASERS; CORPORATIONS, 5; COVENANTS, 5; EQUITY, 2, 3; EXECUTIONS, 29, 30; EXECUTORS AND ADMINISTRATORS, 8; GUARANTY, 2, 3; NEGOTIABLE INSTRUMENTS, 7-18; PARTNERSHIP, 2.

NUISANCE.

1. ACT LEGALIZING EXISTING NUISANCE IN STREET of a city is a mere license for its continuance, and is revocable at pleasure where there is no consideration for it. *Reading v. Commonwealth*, 534.
2. RIGHT OF A LAND-OWNER TO MAKE EXCAVATIONS in his land (such as are involved in making a canal) is subject to the limitation that he must not cast the soil, stones, etc., upon neighboring land, to the annoyance or inconvenience of its owners. *Hay v. Cohoes Co.*, 279.
3. LAND-OWNER WHO, IN EXCAVATING HIS LAND for a contemplated improvement, has cast dirt, stones, and rubbish upon adjoining land, to the injury

thereof, can not defend an action for compensatory damages by evidence that the work was done with care and skill; he is liable for the actual injury, irrespective of negligence. *Tremain v. Cohoes Co.*, 284.

See ANIMALS, 1; CORPORATIONS, 10; ESTOPPEL, 2; MANDAMUS, 2.

OATHS.

See JURY AND JURORS, 1; WITNESSES, 4.

OFFICES AND OFFICERS.

See BANKS AND BANKING, 1; CORPORATIONS, 11; EXECUTIONS, 15, 16; EXECUTORS AND ADMINISTRATORS, 11; PROCESS.

ORDINANCES.

See CORPORATIONS, 10.

ORPHANS' COURT.

See EXECUTORS AND ADMINISTRATORS, 21.

OUSTER.

See CO-TENANCY.

PARENT AND CHILD.

See EVIDENCE, 4.

PAROL EVIDENCE.

See CORPORATIONS, 14; DEEDS, 14; EVIDENCE, 4-6, 8-10; JUDGMENTS, 10, 11, 19; NEGOTIABLE INSTRUMENTS, 6, 15; SALES, 7; TRUSTS AND TRUSTEES, 8, 9; WILLS, 19.

PARTIES.

See ESTOPPEL, 5; GIFTS, 4; HUSBAND AND WIFE, 11; JUDICIAL SALES; MARRIED WOMEN, 4; PARTNERSHIP, 4; SURETYSHIP, 3, 4; WITNESSES, 4; WRITS OF ASSISTANCE.

PARTITION.

1. HEIRS MAY MAKE VALID PAROL PARTITION OF LAND among themselves, where they are all of age, and if one is not of age at the time of the partition, it is nevertheless valid, if acquiesced in and confirmed by such heir after coming of age. *Lynch v. Baxter*, 735.
2. VERBAL PARTITION OF LAND WAS BINDING under the Mexican law where possession was taken. *Id.*

PARTNERSHIP.

1. PERSON HOLDING HIMSELF OUT AS PARTNER, though in fact no partnership exists, is liable to a creditor who contracts with the firm. *Crosier v. Kirker*, 724.
2. EVERY PARTNER HAS IMPLIED AUTHORITY TO BIND HIS COPARTNER by the making of notes and the drawing and accepting of bills for commercial purposes consistent with the object of the partnership; and to rebut this presumption of authority, there must be proof of fraud, or a knowledge of the want of authority, or notice to the party seeking to charge

the firm that the other partners would not be responsible for the acts of their copartners. *Id.*

3. IN ALL CONTRACTS CONCERNING NEGOTIABLE PAPER, ACT OF ONE PARTNER binds all, even though he sign his individual name, if it appear on the face of the paper to be on partnership account, and to be intended to have a joint operation. *Id.*
4. ONE PARTNER CAN MAINTAIN AN ACTION AT LAW against another partner for a breach of the partnership agreements, and need not join other partners as defendants if they have sold out before the cause of action arose. *Vance v. Blair*, 467.
5. PARTNER'S INTEREST IN PARTNERSHIP GOODS IS HIS SHARE OF THE SURPLUS after all demands against the firm are paid. *Sutcliffe v. Dohrman*, 450.
6. EXECUTION AGAINST A PARTNER FOR HIS INDIVIDUAL DEBT may be levied upon the partnership property, but a sale under such execution will pass only the interest of the debtor in the firm property. *Id.*
7. EQUITY WILL RESTRAIN THE SALE OF THE ENTIRE PARTNERSHIP PROPERTY in satisfaction of the individual debt of one partner. *Id.*

See EXECUTIONS, 6; NEGOTIABLE INSTRUMENTS, 2; STATUTE OF LIMITATIONS, 9-11.

PART PERFORMANCE.

See STATUTE OF FRAUDS, 1.

PAWNS.

See BAILMENTS.

PAYMENTS.

1. NEGOTIABLE NOTE GIVEN FOR PRE-EXISTING DEBT IS PRESUMED PAYMENT in Massachusetts, whether it be the note of the debtor or of a third person. *Melledge v. Boston Iron Co.*, 59.
 2. PRESUMPTION OF PAYMENT FROM GIVING NOTE for a pre-existing debt may be rebutted by evidence that such was not the intention of the parties. *Id.*
 3. PLAINTIFF COUNTING ON NOTE IS NOT PRECLUDED FROM SURRENDERING IT so as not to amount to payment, and from recovering on a count for goods sold constituting the consideration, if he can not recover on the note. *Id.*
 4. WHERE ONE PERSON IS COMPELLED TO PAY MONEY WHICH ANOTHER IS BOUND by law to pay, a promise by the latter is raised by law to reimburse the person paying. *Winchester v. Beardin*, 702.
 5. WHERE PERSON IS SUBJECTED BY LEGAL PROCESS TO PAY MONEY WHICH ANOTHER is bound by law to pay, it can not be required that the former shall have exhausted every possible means of litigation, in resisting the payment, before he shall be entitled to his action for money paid. *Id.*
- See BAILMENTS, 3-6; EXECUTIONS, 4, 13, 14; GUARANTY, 3; HUSBAND AND WIFE, 16; MORTGAGES, 3, 4, 6; NEGOTIABLE INSTRUMENTS, 18, 19; PLEADING AND PRACTICE, 4, 7; STATUTE OF LIMITATIONS, 7, 8; TRUST DEEDS, 3, 6; VENDOR AND VENDEE, 6.

PENALTIES.

See ACCORD AND SATISFACTION; GUARDIAN AND WARD, 2.

PERFORMANCE.

See PLEADING AND PRACTICE, 2.

PLEAS.

See CRIMINAL LAW, 36, 37.

PLEADING AND PRACTICE.

1. WHERE THE OBLIGATION OF PAYING MONEY AND DUTY OF RECEIVING IT UNITE in the same person, no suit can be brought in the event of an omission to pay. At the common law, where such a state of things is produced by the act of the creditor, the debt is extinguished, but where it is created by the law, no extinguishment takes place. *State v. Hearst*, 167.
2. ALLEGATION OF OFFER OF PERFORMANCE MUST STATE THE DATE on which such offer was made. *Vance v. Blair*, 467.
3. JUSTICE'S WARRANT MUST GIVE SOME GENERAL STATEMENT OF THE CAUSE OF ACTION; and if the warrant summons the defendant to answer on promises, and the evidence shows a liability in tort, it is inapplicable. *Manning v. Wells*, 688.
4. DENIAL OF MATERIAL ALLEGATIONS ONLY IS NECESSARY.—Defendant justified an arrest under an execution. Plaintiff replied payment before arrest, and traversed that the judgment was in full force. *Held*: That the traverse was to an immaterial matter, and the rejoinder of payment was good. *Breck v. Blanchard*, 222.
5. OMISSION IN COUNT ON NOTE TO SET OUT MEMORANDUM thereon, which constitutes a defeasance or qualifies the stipulations of the note, is a variance, and the note will not support the count; but if the declaration contains the common money counts, and the memorandum is merely that the note is given as collateral security for another note, the variance is immaterial. *Tebbetts v. Pickering*, 48.
6. COURT IN WHICH TRIAL TAKES PLACE IS THE PROPER ONE TO JUDGE of the truth or sufficiency of the causes assigned for a motion for a continuance or removal of a trial. *State v. Hildreth*, 364.
7. COURT TAKING CHARGE OF FUND TO WHICH CREDITORS ARE ENTITLED will direct payment to be made them according to their legal rank. *Gracey v. Davis*, 663.
8. PARTY WHO PRODUCES TRANSCRIPT OF PART ONLY OF RECORDS OF COURT can not object that certain things do not appear by it to have been done which should have been done, for they are not thereby shown not to have been done, and the appellate court is bound to believe they were done and are of record. *Lynch v. Baxter*, 735.
9. NONSUIT SHOULD NOT BE DIRECTED IF PLAINTIFF IS ENTITLED TO RECOVER ANYTHING upon the evidence. *Van Rensselaer v. Jewett*, 275.
10. TO NONSUIT PLAINTIFF ON EVIDENCE OF DEFENDANT IS IRREGULAR, and the supreme court will seldom grant a nonsuit where the motion was not made on the circuit. *Jones v. Weathersbee*, 653.
11. COURT IS NOT BOUND TO GIVE OPINION ON LEGAL QUESTION ARISING ON PART OF EVIDENCE as stated in a prayer for instructions. *Melledge v. Boston Iron Co.*, 59.
12. INSTRUCTION ASSUMING HYPOTHETICAL CASE of which there is no evi-

- dence is regarded as a mere illustration of a rule of law which can not mislead the jury. *Id.*
13. INSTRUCTION IS ERRONEOUS WHICH ASSUMES FACT TO BE PROVEN instead of leaving it to the jury. *Crozier v. Kirker*, 724.
 14. REFUSAL TO GIVE ABSTRACT INSTRUCTIONS is not error. *Stevenson's Heirs v. McReary*, 102.
 15. INSTRUCTION MUST BE UNDERSTOOD IN REFERENCE TO THE ISSUE AND EVIDENCE in the case. The words employed must be taken in their ordinary and popular acceptation. *Mitchell v. Zimmerman*, 717.
 16. TO INSTRUCT JURY ON MATTERS NOT IN EVIDENCE IS ERROR. *State v. Hildreth*, 369.
 17. WHERE THERE WERE NO EXCEPTIONS TO THE CHARGES OF THE COURT, at the time they were given, but after the motion for a new trial was overruled the testimony and charges of the court were set out, and the bill of exceptions says, "and therefore the jury returned a verdict for the defendant, to all of which the plaintiff excepts," this does not amount to anything more than an exception to the refusal to grant a new trial, because not reserved or taken until after the verdict; and the instructions can not therefore be reviewed. *Anderson v. Hill*, 130.
 18. OBJECTION TO WANT OF NOTICE OF SPECIAL MATTER of defense admitted in evidence can not be taken in the appellate court unless the evidence appears to have been specifically objected to on that ground in the court below. *Rearick v. Swinehart*, 540.
 19. OBJECTION THAT NO BILL OF PARTICULARS WAS FILED as required by the rules of practice, if not taken in the court below, can not be insisted upon afterwards. *Tebbetts v. Pickering*, 48.
 20. BILL OF PARTICULARS IS UNNECESSARY TO LET IN NOTE AS EVIDENCE under the money counts in a declaration giving notice of the nature of the claim by containing a count on the note. *Id.*
 21. WRIT OF ERROR CORAM NOBIS, or *quæ coram nobis resident*, to correct errors in matter of fact only, is addressed to the same court where the judgment was rendered, and the jurisdiction is in that court; consequently, the circuit court can not issue the writ to correct an erroneous entry of judgment in this court in a certain cause affirming a judgment of the circuit court. *Land v. Williams*, 117.
 22. IT IS WITHIN DISCRETION OF COURT TO REFUSE TO DISMISS APPEAL on account of the mere informality or insufficiency of the appeal bond, where the appellant will immediately give a good and sufficient bond. *Shelton v. Wade*, 722.
 23. CONSTITUTION GUARANTEES RIGHT OF APPEAL.—The laws regulating the exercise of the right are intended to afford the party every possible facility in its furtherance consistent with a due regard to the rights of the opposite party, and they should be so construed as most certainly and effectually to attain this object. *Id.*
 24. IT IS NOT NECESSARY THAT PRINCIPAL IN APPEAL BOND should have signed; the execution of the bond by the sureties is sufficient. *Id.*
- See AGENCY, 15; ARBITRATION AND AWARD; ASSUMPSIT; CASE; CONTRACTS, 4; CORPORATIONS, 4; COSTS; COVENANTS, 5; CRIMINAL LAW, 21, 22, 28, 29, 33-39; EJECTMENT, 5; EQUITY; EVIDENCE; EXECUTIONS; EXECUTORS AND ADMINISTRATORS, 1; GUARDIAN AND WARD, 1, 4; HUSBAND AND WIFE, 11, 16; INJUNCTIONS; JUDGMENTS; MANDAMUS; MARRIAGE AND DIVORCE,

4-9; MARRIED WOMEN, 6; MISTAKE, 2; NEGLIGENCE, 1; NEGOTIABLE INSTRUMENTS, 10, 12; PARTNERSHIP, 4; PAYMENT, 3; REPLEVIN, 1; STATUTE OF FRAUDS, 3; STATUTE OF LIMITATIONS, 6, 7; SURETSHIP, 3-5; TRESPASS; TROVER; USAGE, 3; WILLS, 16; WITNESSES, 3, 4; WRITS OF ASSISTANCE.

PLEDGES.

See BAILMENTS, 2-6.

POSSESSION.

1. POSSESSION OF TENANT OR AGENT EMPLOYED TO HOLD POSSESSION is the possession of the person under whom he holds. *McCormac v. Wilkes*, 637.
 2. POSSESSION OF PART, WITH EVIDENCE OF EXTENT OF CLAIM, is possession of the whole. *Id.*
 3. EXTENT OF POSSESSION BY OCCUPANCY OF PART depends not merely on the evidence of the bounds, but on the character of a conflicting claim, and the possession which attends it. *Id.*
 4. EXTENT OF POSSESSION AS AGAINST THIRD PARTY not connected with the owner will be to the whole claim. *Id.*
 5. ACTUAL POSSESSION MEANS an actual and continuous occupancy or exercise of full dominion, either by occupancy of the whole or by occupancy of part in the name of the whole, with evidence of the bounds where the law would extend the possession to such bounds. *Id.*
 6. OCCUPANT OF PART, CLAIMING WHOLE, takes the place of an adverse occupant upon his leaving, and is in possession of the land, the occupant's continued possession of part and claiming the whole being equivalent to a re-entry. *Id.*
 7. ACTS OF OWNERSHIP WHICH MUST ACCOMPANY ACTUAL POSSESSION of land in order to justify the presumption of a grant are such acts as persons usually exercise over their own lands. *Wallace v. Maxwell*, 380.
- See ADVERSE POSSESSION; BONA FIDE PURCHASERS, 3; CO-TENANCY; DEEDS, 4, 8; EXECUTIONS, 13; EXECUTORS AND ADMINISTRATORS, 5, 7-11; GIFTS, 2; PARTITION, 2; PUBLIC LANDS; TRESPASS, 1, 3, 4; TROVER; VENDOR AND VENDER, 2, 6, 7.

POWER OF ATTORNEY.

See AGENCY, 16; ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; ASSIGNMENT OF CONTRACTS, 2.

PRESCRIPTION.

See EXECUTORS AND ADMINISTRATORS, 5-8; STATUTE OF LIMITATIONS, 7, 8.

PRESUMPTIONS.

See ADVERSE POSSESSION, 2; CRIMINAL LAW, 6, 22, 23; DEEDS, 4, 5, 9; EVIDENCE, 3; EXECUTIONS, 31; EXECUTORS AND ADMINISTRATORS, 5, 8; FACTORS, 2; LIENS, 8; MISTAKE, 1; MORTGAGES, 10; PARTNERSHIP, 2; PAYMENT, 1, 2; POSSESSION, 7; STATUTE OF LIMITATIONS, 7, 8; TRUST DEED, 6; TRUSTS AND TRUSTEES, 3, 4; USAGE, 2.

PRINCIPAL AND AGENT.

See AGENCY.

PRINCIPAL AND SURETY.

See SURETYSHIP.

PRIVIES.

See ESTOPPEL, 5.

PROBATE COURTS.

1. JUDGMENT OF PROBATE COURT CAN NOT BE QUESTIONED COLLATERALLY ON account of any error or defect in it. The only inquiry that can be made is, Had the court competent jurisdiction to render such judgment? *Lynch v. Baxter*, 735.
2. SETTLEMENT OF SUCCESSIONS IN PROBATE COURT IS PROCEEDING IN REM acting on the land directly, and a decree for its sale can not be collaterally attacked. If the sale was without any necessity existing at the time the order was made, still it was conclusive until set aside in proceedings having that object directly in view; and the purchaser, having purchased without fraud or collusion with the administrator, would be protected by the sale, if made under decree of a court having jurisdiction. *Id.*
3. PROBATE COURT HAS AUTHORITY TO ORDER SALE OF SLAVES AND REAL PROPERTY AT PLACE other than the county seat, under the acts of January 21, 1841, and of February 4, 1841; those acts are not repugnant to each other. *Neill v. Keese*, 746.

See EXECUTORS AND ADMINISTRATORS, 4, 5.

PROCESS.

1. TRESPASS LIES AGAINST AN OFFICER FOR ABUSE OF PROCESS, where he assumes to act under a process which does not authorize the acts done. He is liable as if he had acted without any process at all. *Breck v. Blanchard*, 222.
2. CASE LIES FOR ABUSE OF PROCESS where it is regularly sued out and valid in form, but sued out from improper motives and applied to improper purposes. *Id.*

See JUDGMENT, 14, 15; PAYMENT, 5.

PROMISSORY NOTES.

See NEGOTIABLE INSTRUMENTS.

PROTEST.

See NEGOTIABLE INSTRUMENTS, 9.

PUBLICATION.

See EXECUTIONS, 30.

PUBLIC LANDS.

1. WHERE JUNIOR GRANT COVERS AND INCLUDES OLDER GRANT, whether the holder claims the whole of the land within the outer bounds or excludes the older grant from his claim, is a question of fact, and if he claims all within the outer bounds, possession of part is possession of all of it, where there is no adverse claimant. *McColman v. Wilkes*, 637.

2. OCCUPANT UNDER A JUNIOR GRANT which covers an older grant will be protected against violation of his claim of right by any one not claiming under such older grant. *Id.*

QUESTIONS OF LAW AND FACT.

See CONTRACTS, 4; CRIMINAL LAW, 21, 22; EVIDENCE, 6; NEGLIGENCE, 1; NEGOTIABLE INSTRUMENTS, 10; PLEADING AND PRACTICE, 13; PUBLIC LANDS, 1; REPLEVIN, 1; TRUSTS AND TRUSTEES, 6; USAGE, 3; WILLS, 16.

QUORUM.

See JUDGMENTS, 18.

RAILROADS.

1. RAILROAD COMPANY IS BOUND TO KEEP ROAD IN REPAIR, so that persons and property may at all proper times pass over it in safety, and is liable for injuries from neglect of this duty. *Cumberland Valley R. R. Co. v. Hughes*, 513.
 2. OWNER OF FREIGHT CAR INJURED BY DEFECT IN ROAD over which it is running under a "clearance" from the railroad company, owing to the company's neglect to repair, may recover therefor, though the "clearance" was obtained by another person who was at the time in possession of the car. *Id.*
 3. RAILROAD COMPANY'S LIABILITY FOR NEGLIGENCE SHOULD BE STRICTLY ENFORCED on grounds of public policy. *Id.*
- See COMMON CARRIERS, 5; CORPORATIONS, 7; NEGLIGENCE, 2; TREMPASS, 6, 7; VENDOR AND VENDEE, 1.

RAPE.

See CRIMINAL LAW, 39.

RATIFICATION.

See AGENCY, 5; CORPORATIONS, 5; EXECUTORS AND ADMINISTRATORS, 15; HUSBAND AND WIFE, 7.

REAL ESTATE.

See ADVERSE POSSESSION; EJECTMENT; POSSESSION; PUBLIC LANDS; SPECIFIC PERFORMANCE; VENDOR AND VENDEE.

RECITALS.

See ESTOPPEL, 5; EXECUTORS AND ADMINISTRATORS, 3.

RECORDS.

See DEEDS, 3, 7, 10; EVIDENCE, 8; EXECUTIONS, 9; EXECUTORS AND ADMINISTRATORS, 4, 8; JUDGMENTS, 18; PLEADING AND PRACTICE, 3.

REDEMPTION.

See RAILMENTS, 2; EXECUTIONS, 19-22.

REFORMATION OF CONTRACTS.

See EQUITY, 9; INSURANCE—FIRE; TRUST DEEDS, 4.

RELATION.

See JUDGMENTS, 13.

REMOVAL OF TRIAL.

See PLEADING AND PRACTICE, 6.

RENT.

See INTEREST.

REPAIRS.

See RAILROADS; SHIPPING; WITNESSES, 2.

REPLEVIN.

1. EVIDENCE OF OWNERSHIP IN REPLEVIN, BEING A DISPUTED FACT, IS FOR JURY, and the court can not instruct them that the evidence shows title in one of the parties. *McDonald v. Scaife*, 556.
2. MEASURE OF DAMAGES IN REPLEVIN, where the defendant retains the property, is ordinarily its value with damages for the detention, which is usually interest on the value from the taking. *Id.*
3. EXEMPLARY DAMAGES ARE ALLOWABLE IN REPLEVIN where circumstances of aggravation and outrage attend the taking or detention. *Id.*
4. MEASURE OF DAMAGES IN AN ACTION OF REPLEVIN AGAINST A SHERIFF holding property under execution, when the defendant recovers judgment, is not the value of the property, except when that value is less than the amount, with interest, of the executions he may have in his hands. *Sutcliffe v. Dohrman*, 450.

REPLICATION.

See JUDGMENTS, 9.

RESCISSION OF CONTRACTS.

WHEN EQUITY DECREES RESCISSION OF CONTRACT, it places the parties as nearly as possible *in statu quo*. (*Per Clayton, J.*) *Brown v. Johnson*, 118.

See AGENCY, 4, 5, 13, 14; EXECUTORS AND ADMINISTRATORS, 13; FRAUDULENT CONVEYANCES; VENDOR AND VENDEE, 1.

RESULTING TRUSTS.

See TRUSTS AND TRUSTEES, 3-9.

RETROSPECTIVE LAWS.

See WILLS, 1.

RETURN.

See EXECUTIONS, 12, 26-28; MANDAMUS, 2.

REVERSAL.

See CRIMINAL LAW, 36; GUARDIAN AND WARD, 1; JUDGMENTS, 15, 17; MARRIED WOMEN, 4.

REVIVAL OF JUDGMENTS.

See EXECUTIONS, 10, 34; JUDGMENTS, 3, 4, 6, 16.

REVOCATION.

See TRUST DEEDS, 6; WILLS, 19, 20.

ROADS.

See RAILROADS.

SALES.

1. NO SALE OF PERSONAL PROPERTY IS COMPLETE so as to vest an immediate right of property in the buyer, so long as anything remains to be done as between the buyer and seller; hence where a person bargained for some corn in pens on the bank of a river, at one dollar per barrel, to be subsequently measured, and the corn is destroyed by flood before being measured, the loss must fall on the seller, and the purchaser may recover money advanced upon the price. *Williams v. Allen*, 709.
 2. DOCTRINE OF APPROPRIATION, AS CONSTITUTING DELIVERY, AND THEREBY PASSING TITLE, arises in cases of a sale of goods generally, as distinguished from the sale of a specific chattel; where a less quantity out of a larger is sold, no property passes until a delivery. To constitute a delivery, the vendor may appropriate the quantity purchased, by separating it from the bulk; but the appropriation is not complete until the vendee assents to take the separated portion. *Brazier v. Ansley*, 408.
 3. DELIVERY OF GOODS BY VENDOR AT PLACE DESIGNATED by the vendee's agent, who made the purchase, is a good performance of the contract, though the vendor knows that they are to be used by a third person and not by the purchaser. *Melledge v. Boston Iron Co.*, 59.
 4. CONSTRUCTIVE DELIVERY OF CHATTELS.—Where the owner of corn gave an order on the agent at the depot where the corn was to arrive, to deliver six hundred and twenty-five bags to a person designated, and the agent recognized the person's right to the property, it was held that there was a constructive delivery. *Sahlman v. Mills*, 630.
 5. IN DETERMINING WHETHER CHATTELS HAVE BEEN DELIVERED CONSTRUCTIVELY, the intention of the parties, if it can be collected from what they have said and done, will largely govern. *Id.*
 6. IDENTIFICATION OF CORN MIXED WITH LARGER LOT.—Where the owner of corn, to arrive at a depot, gives an order for a portion of it, that is a sufficient identification of it, and the first to arrive will be the corn meant. *Id.*
 7. CONTRACT MAY BE PROVED BY PAROL, where the chattels have been delivered and no writing is necessary. *Id.*
 8. IN EVERY SALE OF CHATTEL THERE IS AN IMPLIED WARRANTY OF ITS EXISTENCE, and that the vendor has title to it. *Lile v. Hopkins*, 115.
 9. SALE OF GOODS BY SAMPLE IMPLIES A WARRANTY BY THE VENDOR that the goods sold will correspond in kind with the samples, but not in quality, in the absence of fraud or any express warranty. *Fraley v. Bispham*, 486.
- See AGENCY, 12-14; BONA FIDE PURCHASERS, 2; ESTOPPEL, 8; EXECUTORS AND ADMINISTRATORS; LIENS, 2; PAYMENT, 3; PROBATE COURTS, 2, 3; SPECIFIC PERFORMANCE, 3; USAGE, 1.

SATISFACTION.

See EXECUTIONS, 4, 5, 17; JUDGMENTS, 6; MORTGAGES, 4, 8; TRUST DEEDS, 1; TRUSTS AND TRUSTEES, 2.

SCIRE FACIAS.

See EXECUTIONS, 1, 34; JUDGMENTS, 3, 4, 6; JUDICIAL SALES.

SEPARATE ESTATE.

See HUSBAND AND WIFE, 1, 12-16; MARRIED WOMEN, 1.

SERVICE.

See JUDGMENTS, 14, 15, 20.

SHERIFFS.

See EXECUTIONS; REPLEVIN, 4.

SHERIFF'S DEED.

See EXECUTIONS, 12-14, 33.

SHERIFF'S SALE.

See EXECUTIONS, 7, 8, 10, 19, 20, 23-25, 27, 28; JUDGMENTS, 12.

SHIPPING.

TIME FROM WHICH DAMAGES FOR BREACH OF CONTRACT for the repair of a vessel are to be computed is the time when the contract was broken, although the vessel may not have been called for until after that time. *Sibbs v. Paine*, 339.

See WITNESSES, 2.

SLANDER.

1. IN AN ACTION OF SLANDER, where the defendant, a justice of the peace, voluntarily stated before the grand jury the charge against the plaintiff, as having repeatedly come to him as a rumor, the occasion on which the words were spoken furnishes a *prima facie* excuse for their having been spoken, and it falls upon the plaintiff to show that the occasion was only used as a colorable pretense, and to establish express malice in the defendant. *Sands v. Robison*, 132.
2. PLAINTIFF'S BAD REPUTATION MAY BE SHOWN IN AN ACTION FOR SLANDER in mitigation of damages. *Wetherbee v. Marsh*, 244.
3. MITIGATION OF DAMAGES FOR SLANDEROUS WORDS.—Defendant may prove that when the slanderous words were spoken there was a general report current to the same effect as the words spoken. *Id.*

See JURY AND JURORS, 2.

SLAVES.

See NEGLIGENCE, 1; PROBATE COURTS, 2.

SOVEREIGNTY.

See ESTOPPEL, 1.

SPECIFIC PERFORMANCE.

1. WHERE PERSON COVENANTS TO CONVEY TITLE TO CERTAIN LAND, a court of equity will not decline to decree a specific performance upon a mere showing that the covenantor is only a tenant in common of the land, and that "after reasonable exertion he has been unable to procure the title" of his co-tenants. *Love v. Camp*, 419.
2. WHERE COVENANTEE KNOWS THAT THE COVENANTOR DOES NOT OWN ALL THE TITLE which he is covenanting to convey, whether equity would decree a specific performance, *quære*. *Id.*
3. SPECIFIC DELIVERY OF CHATTELS DETAINED WILL BE DECREED where the law does not afford adequate redress by compensation in damages, or where such chattels have been deposited upon a trust. *McGowan v. Remington*, 584.

See INFANCY, 1; MARRIED WOMEN, 15.

STAKEHOLDERS.

See GAMING.

STATUTE OF FRAUDS.

1. PART PERFORMANCE OF PAROL CONTRACT FOR SALE OF LAND does not take it out of the statute of frauds. *Box v. Stanford*, 142.
2. ON PAROL CONTRACT FOR THE SALE OF LANDS, the fact that it formed a part of the agreement itself that it should be reduced to writing, and that the defendant fraudulently evaded this part of the contract, is not sufficient to take the case out of the statute of frauds. *Id.*
3. STATUTE OF FRAUDS MAY BE TAKEN ADVANTAGE OF BY DEMURRER, although the bill alleges that the contract was prevented from being put in writing by the fraud of the defendant, if, admitting the fraud as charged, the complainant is entitled to no relief. *Id.*

See EVIDENCE, 9; EXECUTIONS, 20.

STATUTE OF LIMITATIONS.

1. COURT OF CHANCERY IS AS MUCH BOUND TO GIVE EFFECT TO STATUTE OF LIMITATIONS as a court of law, and will not prohibit the use of this defense in a court of law except in plain cases of a fraudulent abuse of the advantage of the lapse of time gained by the party seeking to use it; but a mere request to delay suit, or to institute suit against another, instead of the person making the request, does not constitute such a case. *Bank of Tennessee v. Hill*, 698.
2. STATUTE OF LIMITATIONS DOES NOT BEGIN TO RUN, IN EQUITY, against a claim, where fraud is involved, until the fraud is discovered. *Ferris v. Henderson*, 550.
3. IN DETERMINING WHEN THE STATUTE OF LIMITATIONS BEGINS TO RUN, IN CASE OF FRAUD, regard may be had to the condition and circumstances of the person on whom the knowledge of the facts is to operate. *Id.*
4. STATUTE OF LIMITATIONS DOES NOT RUN AGAINST AN EXPRESS TRUST, in favor of the trustee or his personal representatives. *Commonwealth v. Moltz*, 499.
5. WHEN STATUTE OF LIMITATIONS BEGINS TO RUN, it continues to do so. *Stevenson v. McReary*, 102.

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6. IF PLAINTIFFS RELY ON EXCEPTIONS IN FAVOR OF INFANTS OR FEMES COVERT in the statute of limitations, they must show that they are entitled to the benefits of the exceptions. *Id.*
 7. PRESUMPTION OF PAYMENT AFTER LAPSE OF TWENTY YEARS is one of fact and not of law, though equally as important as if it were; but it shifts the burden of proof, and though the court can not make such a presumption, yet a new trial will usually be granted if the jury disregards it. *Stover v. Duren*, 634.
 8. MERE ACKNOWLEDGMENTS MADE AFTER TWENTY YEARS that the debt had not been paid will not rebut the presumption of payment arising from the lapse of time; to do so there should be a distinct admission of the legal obligation and no expression of unwillingness to pay. *Id.*
 9. ACKNOWLEDGMENT OR NEW PROMISE TO PAY OUTLAWED PARTNERSHIP DEBT, made by one only of the partners, after a dissolution, will not remove the bar of the statute as against the other partners. *Van Keuren v. Parmelee*, 322.
 10. IMPLIED AGENCY OF A PARTNER to bind his copartner by a new promise ceases at dissolution. *Id.*
 11. ACKNOWLEDGMENT OR NEW PROMISE TO TAKE DEBT OUT OF STATUTE OF LIMITATIONS, sufficiency of, in general, discussed *per* Bromson, J. *Id.*
 12. OWNER'S ENTRY ON LAND AVOIDS STATUTE OF LIMITATIONS as against an adverse occupant, if accompanied by an explicit declaration or act of notorious dominion. *Ingersoll v. Lewis*, 536.
 13. ENTRY BY OWNER'S AGENT TO SURVEY LAND AVOIDS STATUTE OF LIMITATIONS as against an adverse occupant having knowledge thereof and assenting thereto. *Id.*
 14. ACKNOWLEDGMENT OF OWNER'S TITLE BY ADVERSE POSSESSOR of land interrupts the running of the statute of limitations. *Id.*
 15. AGREEMENT BY ADVERSE POSSESSOR TO PURCHASE PART of the tract in his occupancy from the true owner, recognizing the latter's title to a larger tract, of which the whole land is a part, tolls the statute as to all. *Id.*
- See BANKRUPTCY AND INSOLVENCY, 3; EXECUTORS AND ADMINISTRATORS, 16; JUDGMENTS, 12; SURETYSHIP, 5.

STATUTES.

1. COURTS HAVE NO DISPENSING POWER OVER STATUTES; where they contain no exceptions, the courts can make none; if they are too rigid in their terms, the remedy is with the legislature. *Box v. Stanford*, 142.
 2. STATUTES ARE NOT CONSIDERED TO BE REPEALED BY IMPLICATION, unless the repugnancy between the new provision and the former statute be plain and unavoidable. *Neill v. Keese*, 746.
 3. STATUTES, BEING IN PARI MATERIA, AND RELATING TO SAME SUBJECT, are to be taken together, and so construed, in reference to each other, as that, if practicable, effect may be given to the entire provisions of each. *Id.*
- See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; CRIMINAL LAW, 1; EXECUTIONS, 1, 26, 27; MARRIED WOMEN, 6, 9-14; NUISANCE, 1; PROBATE COURTS, 3; TRUST DEEDS, 1; TRUSTS AND TRUSTEES, 5; WILLS, 1, 2; WITNESSES, 4.

STAY OF EXECUTION.

See JUDGMENTS, 16; NEGOTIABLE INSTRUMENTS, 19; SURETYSHIP, 1.

STOCK.

See BAILMENTS, 2-6.

STREETS.

See CORPORATIONS, 12-14; MANDAMUS, 2; NUISANCE, 1.

SUBROGATION.

See EXECUTIONS, 25; HUSBAND AND WIFE, 15; MORTGAGES, 3, 5.

SUCCESSION.

See DEEDS, 15; PROBATE COURTS.

SUPERSEDEAS.

See JUDGMENTS, 10, 11.

SURETYSHIP.

1. SURETY IS NOT DISCHARGED BY AGREEMENT TO SUSPEND EXECUTION where no positively defined period was agreed upon for the suspension, and the direction to the sheriff was "not to execute the execution until ordered to do so," as in such a case, the time being indefinite, the stay could have been arrested at any time that the surety requested it to be done. *McGee v. Metcalf*, 122.
 2. FAILURE OF PLAINTIFF IN EXECUTION TO ENROLL JUDGMENT upon a forfeited forthcoming bond until more than a year after its rendition, does not discharge the surety on the bond, although such failure lets in the lien of younger judgments, which take all the principal's property. *Id.*
 3. IN SUIT BY SURETY AGAINST CO-SURETIES FOR CONTRIBUTION, all the co-sureties must be joined; but if some of them are without the jurisdiction of the court, the plaintiff, by stating that fact in his bill, may proceed against those within its jurisdiction. *Jones v. Blanton*, 415.
 4. CO-SURETY HAS TO MAKE CONTRIBUTION WITHOUT REGARD TO THE SHARE of another co-surety who is without the jurisdiction of the court and therefore not made a defendant. *Id.*
 5. SURETY ON GUARDIAN'S BOND IS NOT OBLIGED TO PLEAD THE STATUTE OF LIMITATIONS in an action against him by the ward, and that he did not is no defense to his co-surety in a suit for contribution. *Id.*
- See EXECUTIONS AND ADMINISTRATORS, 18-21; GUARANTY; GUARDIAN AND WARD, 2, 3; NEGOTIABLE INSTRUMENTS, 3, 5; PLEADING AND PRACTICE, 24.

TAVERNS.

See INNS.

TAXATION.

See COVENANTS, 1, 2; DEEDS, 15.

TENANCY BY ENTIRETIES.

See HUSBAND AND WIFE, 2-4.

TENANCY IN COMMON.

See SPECIFIC PERFORMANCE, 1.

TENDER.

TENDER BY EXECUTOR OF DEED EXECUTED BY TESTATOR in his life-time, in accordance with a direction in the will, is good. *Rearick v. Swinchart*, 540.

See BAILMENTS, 5; INTEREST, 3.

TIME.

See EXECUTORS AND ADMINISTRATORS, 13; SHIPPING.

TRANSCRIPT.

See PLEADING AND PRACTICE, 8.

TRESPASS.

1. TO SUSTAIN TRESPASS QUARE CLAUSUM FREGIT, plaintiff must have had, at the time of the trespass, the possession of the place trespassed upon. *McColman v. Wilkes*, 637.
2. IN TRESPASS QUARE CLAUSUM FREGIT, DEFENDANT MAY JUSTIFY by showing title in himself, but not by showing title in a third person with whom he is not connected. *Id.*
3. PARTY IN POSSESSION, THOUGH WITHOUT TITLE, MAY MAINTAIN TRESPASS against a wrong-doer; and defendant's showing the title to be in a third person will not avail him—he must show that the right is in himself. *Id.*
4. OWNER OF LAND CAN NOT MAINTAIN TRESPASS QUARE CLAUSUM FREGIT against one who was in possession at the time he acquired title. *Id.*
5. CONSTRUCTIVE POSSESSION IS SUCH AS THE LAW ANNEXES TO THE TITLE, and will without entry maintain trespass *quare clausum fregit* against a casual trespasser, but it is always displaced by actual possession. *Id.*
6. ENGINEER IN CHARGE OF LOCOMOTIVE IS NOT LIABLE for injury to cattle trespassing upon a railroad track, unless he willfully causes such injury, or is guilty of such gross negligence as would amount to willfulness. *Vandegrift v. Rediker*, 262.
7. OWNER OF CATTLE, WHO ALLOWS THEM TO TRESPASS ON RAILROAD, does so at his peril. *Id.*
8. RIGHT TO CONTRIBUTION DOES NOT EXIST BETWEEN JOINT TRESPASSERS. *Cumpton v. Lambert*, 442.

See ESTOPPEL, 2; PROCESS, 1.

TROVER.

TO SUSTAIN THE ACTION OF TROVER, THE RIGHT OF PROPERTY, and of possession at the time of the alleged conversion, must be united in the plaintiff, and he must prove that while the property was his the defendant converted it. *Brasier v. Ansley*, 408.

See AGENCY, 13, 14; EJECTMENT, 1; EMBODIMENT; TRUSTS AND TRUSTEES.

TRUST DEEDS.

1. DEED OF TRUST IS BUT A SPECIES OF MORTGAGE, and is included within the statute prescribing the entering of satisfaction of mortgages. *Wolfe v. Doe ex dem. Dowell*, 147.

2. **WHEN GRANTOR IN DEED OF TRUST CONVEYS THE PROPERTY afterwards to the party secured by the deed of trust, the conveyance does not extinguish the deed of trust, but passes only his equitable title; in such a case the legal title remains in the trustee, and until it is united with the equitable title, an ejectment can not be sustained.** *Id.*
3. **ON PAYMENT OF DEBT SECURED BY DEED OF TRUST, the trust does not become extinguished and the title absolute in the grantor until something has been done which is equivalent to a reconveyance.** *Id.*
4. **TRUST DEED BY BANKING ASSOCIATION TO SECURE NOTES ISSUED IN VIOLATION OF STATUTE is void.** It can not be supported by the doctrine that a transaction illegal only in part may be enforced so far as it is valid, nor can it (in absence of proof of mistake) be reformed and enforced as a security for the individual debt. *Leasitt v. Palmer*, 333.
5. **DEED OF TRUST MADE TO SECURE SEVERAL DEBTS due to different individuals, some of which are usurious and some *bona fide*, is not void, but is a security for the debts not tainted with usury, where these debts are distinct from and independent of the usurious debts.** *Doe ex dem. Brannock v. Brannock*, 398.
6. **TRUST DEED FOR BENEFIT OF CREDITORS NOT REVOCABLE.**—When a trust deed has been executed, conveying property in trust for the payment of debts, and the trustee has accepted the same, the relation of trustee and *cestui que trust* is established in favor of creditors assenting (and the assent will be presumed unless the contrary is shown), and the trustee can not, with or without the direction of the grantor, apply the fund to any other purpose until the trusts of the deed are satisfied. *Ingram v. Kirkpatrick*, 428.

See EXECUTIONS; MORTGAGES, 8.

TRUSTS AND TRUSTEES.

1. **ABUSE OF TRUST DOES NOT CONFER ANY PRIVILEGE on the guilty party, nor on those in privity with him.** *Brown v. Johnson*, 118.
2. **RECOVERY IN TROVER by TRUSTEE without satisfaction vests the legal title in the defendant, and he becomes the trustee, and a court of equity will aid the *cestui que trust* against either the trustee or vendee for the recovery of the property.** *Bush v. Bush*, 675.
3. **WHEN ONE MAKES PURCHASE OF LAND IN NAME OF ANOTHER, and pays the consideration money, a resulting trust immediately arises by virtue of the transaction, and the nominal purchaser will be a trustee for the person paying the purchase money; this presumption of a resulting trust may be rebutted by circumstances, but the burden of proof rests upon the nominal purchaser.** *Dudley v. Bosworth*, 690.
4. **WHERE PERSON MAKING PURCHASE OF LAND IN NAME OF ANOTHER, and paying the consideration money himself, is under a natural or moral obligation to provide for the person in whose name the conveyance is taken, no presumption of a resulting trust arises, but the transaction will be regarded *prima facie* as an advancement for the benefit of the nominal purchaser.** *Id.*
5. **RESULTING TRUST WILL NOT BE RAISED OR ENFORCED in contravention of public policy, or the provisions of a statute, as in the case of a conveyance in the name of another, made to hinder, delay, or defraud the creditors of the purchaser.** *Id.*

6. **WHETHER CONVEYANCE TAKEN IN NAME OF ANOTHER THAN THE PERSON PAYING THE CONSIDERATION** is an advancement to such other, or a resulting trust is created, depends upon the character of the transaction at its inception. *Id.*
 7. **DEATH OF NOMINAL PURCHASER AND DESCENT** of the mere naked title does not destroy or impair a resulting trust. *Id.*
 8. **WHERE ONE BUYS LAND IN NAME OF ANOTHER AND PAYS THE PURCHASE MONEY**, a trust results in his favor, and even after the death of the nominal purchaser, parol evidence is admissible to establish the trust, against the express declaration of the deed. *Neill v. Keese*, 746.
 9. **PAROL TESTIMONY OF DECLARATIONS OF DECEASED PERSON THAT ANOTHER PERSON** was jointly interested with him in the purchase of certain land, the deed to which was taken in the name of such deceased person alone, is not competent to raise a resulting trust in such other person, without proof of the payment of part of the purchase money by him. *Id.*
- See EQUITY, 10; SPECIFIC PERFORMANCE, 3; STATUTE OF LIMITATIONS, 4; TRUST DEEDS.

UNDUE INFLUENCE.

See DEEDS, 12; MARRIED WOMEN, 6; WILLS, 12-15.

USAGE.

1. **USAGE AND CUSTOM A DEFENSE**.—In *assumpsit* for goods sold defendants may show that the bills were not marked, and that in such cases six months' credit was the custom among like dealers, and that the action was prematurely brought. *Farnsworth v. Chase*, 206.
2. **UNIFORM, KNOWN, AND ESTABLISHED USAGE IS BINDING** on the parties if proved, and is presumed to be part of the contract. *Id.*
3. **EXISTENCE OF CUSTOM OR USAGE IS A QUESTION OF FACT** for the jury. *Id.*
See NEGOTIABLE INSTRUMENTS, 16, 17.

USURY.

See TRUST DEEDS, 5.

VARIANCE.

See EXECUTIONS, 12, 33; PLEADING AND PRACTICE, 2, 5.

VENDITIONI EXPONAS.

See EXECUTIONS, 7.

VENDOR AND VENDEE.

1. **WHERE, ON PUBLIC SALE OF TOWN LOTS**, it is in proof that a certain lot extending to the Tombigbee river was, on the day of sale, reserved as a depot for a railroad, which was to have its terminus at that point, and the lot bought by the defendant and other lots similarly situated were regarded at the sale as front business lots, and consequently brought higher prices, and afterwards the railroad was abandoned and the lot intended for the depot was sold out in small lots, covered, at the time of the trial, with cotton-sheds, cutting off from the river the lots purchased,

and making it a back instead of a front lot, causing it to greatly depreciate in value, these facts would justify and require a court of equity to rescind the contract, and will form a good defense to an action on a writing obligatory given for the price. *Anderson v. Hill*, 130.

2. DEFENSE OF FRAUD IN A CONTRACT OF SALE MAY, apart from and independent of any defect of title, be made in an action for the price of the land, although the defendant has not been evicted or disturbed in the possession of his lot. *Id.*
3. PURCHASER OF SPECIFIC TRACT OF LAND, ERRONEOUSLY DESIGNATED ON SURVEYOR'S MAP as containing a certain number of acres, can not, in the absence of deceit or fraud on the part of the grantor, recover a proportionate part of the purchase price, upon discovering that there was a less quantity of land than that shown on the map, although the land was paid for at so much per acre. *Farmers' and Mechanics' Bk v. Galbraith*, 498.
4. OWNER OF PREMISES MUST BE SUPPOSED TO BE PECULIARLY COGNIZANT OF QUANTITY OF LAND fit for cultivation in a tract which he undertakes to sell or lease. And a stranger coming to buy or lease has both a natural and proper right to look to him for such information and to expect the truth. *Mitchell v. Zimmerman*, 717.
5. WHEN MISREPRESENTATION IS MADE BY VENDOR AS TO THE QUANTITY OF LAND, though innocently, the right of the purchaser is to have what the vendor can convey, with an abatement out of the purchase money for so much as the quantity falls short of the representation. *Id.*
6. VENDEE CAN NOT RESIST PAYMENT OF PURCHASE MONEY, on ground of defect of title, while he retains the warranty bond and continues in the possession of the land. *Lynch v. Baxter*, 735.
7. IN ACTION ON PROMISSORY NOTE GIVEN FOR PURCHASE OF LAND, possession of warranty bond for title and possession of the land afford ample and legal consideration to entitle the plaintiff to recover, without regard to title. *Id.*

See CONTRACTS, 5; LIENS, 2; SPECIFIC PERFORMANCE, 1; TRUSTS AND TRUSTEES, 3-7.

VERDICT.

See CRIMINAL LAW, 33, 36, 38; ESTOPPEL, 2; JURY AND JURORS, 3.

VOID JUDGMENTS.

See JUDGMENTS, 15, 17, 20.

WAGERS.

See GAMING.

WAIVER.

See JUDGMENTS, 9; JURY AND JURORS, 4; MORTGAGES, 14; NEGOTIABLE INSTRUMENTS, 14-17.

WARRANTS.

See PLEADING AND PRACTICE, 3.

WARRANTY.

See DOWER, 1; EXECUTORS AND ADMINISTRATORS, 2, 3; JUDGMENTS, 21; SALES, 8, 9; VENDOR AND VENDEE, 6, 7.

WILLS.

1. STATUTE INTENDED TO OPERATE ON WILLS ALREADY EXECUTED AND CONSUMMATED by the death of the testator, as well as upon future wills, prescribing what shall be deemed a sufficient signing of a will, is, so far as it is retrospective, an exercise of judicial power and therefore unconstitutional, and must be construed exclusively prospective. *Greenough v. Greenough*, 567.
2. STATUTE CONFIRMING WILLS DEFECTIVELY EXECUTED does not stand on the same ground as a statute confirming defective conveyances, because the devisee is a volunteer. *Id.*
3. TESTATOR AFFIXING MARK TO HIS NAME, WRITTEN BY ANOTHER without his direction, is not a sufficient signing of a will under a statute requiring the will to be signed by the testator or "by some person in his presence and by his express direction." *Id.*
4. MARK IS NOT A SIGNATURE at common law, or under the Pennsylvania statute of wills of 1833. *Id.*
5. EXPRESS DIRECTION BY TESTATOR TO THIRD PERSON TO SIGN HIS NAME to his will is a substantive part of the execution, under the Pennsylvania statute of 1833, and must be proved expressly or presumptively by the oaths or attestations of two witnesses. *Id.*
6. ATTESTATION OF WILL BY WITNESSES IS SUFFICIENT PROOF of a compliance with the statute where, from death, defect of memory, or other cause, the testimony of the witnesses can not be had. *Id.*
7. POSITIVE TESTIMONY OF ONE WITNESS TO WILL WITH ATTESTATION OF THE OTHER, who has forgotten the facts, is sufficient *prima facie* evidence of a compliance with the statute. *Id.*
8. WILL CAN NOT BE SET ASIDE BY COURT because of its disapprobation of the motive that actuated the testator, or of the disposition that he makes of his property, unless there is, not merely in the motives, but in the actual disposition, something which is against good morals or against public policy. *Trumbull v. Gibbons*, 253.
9. WHERE CONDITION SUBSEQUENT IN DEVISE OF LANDS IS BAD, the estate devised is discharged of the condition, and is absolute in the first taker. *Id.*
10. INSANITY OF TESTATOR, IF RELIED UPON TO DEFEAT WILL, must be proved. *Id.*
11. PARTIAL INSANITY OF TESTATOR MAY INVALIDATE WILL which is proved to have been the direct result of such insanity. But where the facts of the case are sufficient to account for the motives of the testator in making the disposition of his property that he does, there is no reason for resorting to the explanation of monomania or any other form of insanity. *Id.*
12. INFLUENCE ACQUIRED OVER TESTATOR BY KIND OFFICES, or even by persuasion unconnected with fraud or contrivance, is not such undue influence as will invalidate a will. *Id.*

13. CONVINCING EVIDENCE OF UNDUE INFLUENCE, fear, or constraint in the making of a will is necessary to be shown to overthrow it. *Woodward v. James*, 649.
14. UNDUE INFLUENCE TO AVOID WILL must be such as, in some degree, to destroy free agency, and the burden of proof is on the party who alleges the undue influence. *Id.*
15. EVIDENCE OF UNDUE INFLUENCE.—The fact that the testator willed his property to his son, who had great influence with him, and gave nothing to his daughter, is not of itself sufficient evidence to establish undue influence. *Id.*
16. WHERE NAME AND DESCRIPTION IN DEVISE ANSWER IN SAME DEGREE TO EACH OF TWO OBJECTS, the intention is a pure question of fact, and does not depend in any degree on legal direction. *Brownfield v. Brownfield*, 590.
17. TO REMOVE LATENT AMBIGUITY IN WILL, acts and declarations of a testator in respect to the thing given are admissible; also, the relative amount of advancements, and the differences in value of portions of land devised to children, are proper subjects for consideration. *Id.*
18. SUBSEQUENT CONDITION, IN GENERAL RESTRAINT OF MARRIAGE, when annexed to a devise of land, is not void, for reasons of public policy, although when annexed to a legacy the rule is otherwise. *Commonwealth v. Stauffer*, 489.
19. REVOCATION OF WILL MUST BE SHOWN BY SOME OVERT ACT apparent in another writing or on the paper itself, and can not be established by parol proof merely. *Hise v. Fischer*, 383.
20. WHERE ONE ORDERED BY TESTATOR TO BURN WILL DECEIVES HIM by pretending to burn it, while it is in fact preserved, there is no revocation. *Id.*

See DEEDS, 12; DOWER, 1; TENDER.

WITNESSES.

1. PERSONS OF SKILL ARE PERMITTED TO GIVE THEIR OPINIONS IN EVIDENCE on questions of science or trade, on the ground that they are conversant with the business to which they are called to testify, and have, therefore, peculiar knowledge concerning it. *Sikes v. Paine*, 389.
2. PERSONS WHO HAVE OWNED, COMMANDED, AND REPAIRED VESSELS are, although not ship-carpenters, competent to testify as to the difference between the value of a vessel repaired in a certain way, and her value had she been repaired in the manner called for by the contract under which the repairs were made. *Id.*
3. TESTIMONY OF A WITNESS WHO HAS REMAINED IN THE COURT-ROOM after an order directing all witnesses to withdraw from the room may be received at the discretion of the trial judge. *Laughlin v. State*, 444.
4. STATUTE PROVIDING THAT WHERE PARTY WILL MAKE OATH THAT HE HAS NO OTHER EVIDENCE than his own oath to establish a material fact he may testify himself touching such fact, contemplates that the party proposing to testify in his own case shall, in his preliminary examination touching his right to do so, state the fact or facts to which he proposes to testify. *Crozier v. Kirker*, 724.

See JURY AND JURORS, 2; WILLS, 5-7.

WORDS AND PHRASES.

See GIFTS, 3, 5; JUDGMENTS, 14.

WRITS OF ASSISTANCE.

WRITS OF ASSISTANCE CAN NOT REGULARLY BE ISSUED AT INSTANCE OF ONE NOT PARTY to the cause; the purchaser at commissioner's sale can only proceed by getting the vendor to make application for the process; and he has no right of appeal on the refusal of the chancellor to grant his application for a writ of assistance. *Wilson v. Poll*, 151.

WRITS OF ERROR.

See JUDGMENTS, 15; PLEADING AND PRACTICE, 21.

EXTRA ANNOTATION
TO
PRECEDING VOLUME

NOTES

ON THE

AMERICAN DECISIONS.

CASES IN 51 AM. DEC.

51 AM. DEC. 41, WHEELER v. EARLE, 5 CUSH. 31.

Breach of restrictive covenants in lease.

Cited in *West Shore R. Co. v. Wenner*, 70 N. J. L. 233, 103 A. S. R. 801, 57 Atl. 408, 1 A. & E. Ann. Cas. 790, holding transfer of lease in violation of covenant, "failure to perform" within clause providing for forfeiture.

—As to use of premises.

Cited in *Miller v. Prescott*, 163 Mass. 12, 47 A. S. R. 434, 39 N. E. 409, holding lessee's covenant not to make or suffer unlawful use of premises, broken by unlawful use by subtenant.

Cited in reference note in 47 A. S. R. 436, on effect of unlawful use of premises by sublessee.

Distinguished in *Granite Bldg. Corp. v. Greene*, 25 R. I. 586, 57 Atl. 649, holding lease not forfeited by act of subtenant in violation of restriction in lease, unless lessee undertook to prevent obnoxious act.

51 AM. DEC. 44, JORDAN v. FALL RIVER R. CO. 5 CUSH. 69.

Baggage man as agent of company.

Cited in *Ouimit v. Henshaw*, 35 Vt. 605, 84 A. D. 646, holding that passenger has right to regard man handling baggage as agent of company.

Liability of carrier for loss of passenger's effects — Baggage generally.

Cited in *Indianapolis & C. R. Co. v. Cox*, 29 Ind. 360, 95 A. D. 640, holding carrier liable for lost baggage, although no distinct price paid for its transportation; *Warner v. Burlington & M. River R. Co.* 22 Iowa, 166, 92 A. D. 398, holding railroad company undertaking to send passenger's baggage by subsequent train, liable for its loss; *Doyle v. Kiser*, 6 Ind. 242, holding carrier's liability limited to reasonable articles of baggage necessary for traveler's convenience.

Cited in reference note in 56 A. D. 470, 487, on liability of carrier of passengers for baggage.

— Samples.

Cited in *Stimson v. Connecticut River R. Co.* 98 Mass. 83, 93 A. D. 140, holding carrier not liable for loss of samples checked as ordinary baggage.

— Money.

Cited in *St. Louis S. W. R. Co. v. Berry*, 60 Ark. 433, 46 A. S. R. 212, 28 L.R.A. 501, 30 S. W. 764, holding carrier liable for loss of money shipped as baggage, when not in excess of necessary or usual amount; *Dunlap v. International S. B. Co.* 98 Mass. 371, holding carrier's liability for loss of valise containing money, limited to sum necessary to defray traveling expenses; *Hickox v. Naugatuck R. Co.* 31 Conn. 281, 83 A. D. 143, holding carrier liable for loss of money intended for passenger's expenses and personal use and contained in trunk received for transportation, but not checked; *Merrill v. Grinnell*, 30 N. Y. 594, holding ocean carrier liable for loss of \$800 contained in passenger's trunk; *Abbott v. Bradstreet*, 55 Me. 530, denying liability of owners of steamboat for money stolen from pocket of passenger by some person unknown; *International Trust Co. v. Williams*, 183 Mass. 173, 66 N. E. 798, holding money intended for business purposes, but stolen by porter of parlor car, not baggage for which company liable; *Dunlap v. International S. B. Co.* 98 Mass. 371, holding carrier not liable for loss of money placed by one passenger in valise of another.

Cited in reference note in 45 A. D. 655, as to how much money is baggage.

Cited in notes in 71 A. D. 161; 99 A. S. R. 348, 349,—on money as baggage.

— Bonds.

Cited in *Weeks v. New York, N. H. & H. R. Co.* 9 Hun, 669, holding carrier not liable for loss by robbery of bonds in passenger's possession.

— Jewelry.

Cited in *McKee v. Owen*, 15 Mich. 115, on liability of lake carrier for money and jewelry stolen at night from passenger's stateroom; *Humphreys v. Perry*, 148 U. S. 627, 37 L. ed. 587, 13 Sup. Ct. Rep. 711, holding carrier not liable for loss of stock of jewelry contained in trunk checked as ordinary baggage; *Alling v. Boston & A. R. Co.* 126 Mass. 121, 30 A. R. 667, holding carrier not liable for loss of jewelry contained in sample trunk checked as baggage; *Michigan C. R. Co. v. Garrow*, 73 Ill. 348, 24 A. R. 248, holding carrier not liable, in absence of gross negligence, for loss of diamonds and costly jewelry contained in trunk checked as ordinary baggage.

What constitutes baggage.

Cited in *United States v. The Anna*, Fed. Cas. No. 14,457; *Smith v. Boston & M. R. Co.* 44 N. H. 325; *Oakes v. Northern P. R. Co.* 20 Or. 392, 23 A. S. R. 126, 12 L.R.A. 318, 26 Pac. 230; *Mississippi C. R. Co. v. Kennedy*, 41 Miss. 671,—holding that baggage consists of articles of necessity or convenience for passenger's use, but not merchandise or other valuables; *Davis v. Cayuga & S. R. Co.* 10 How. Pr. 330, holding gun and tools of passenger's trade, included in term "baggage;" *Choctaw, O. & G. R. Co. v. Twirtz*, 13 Okla. 411, 73 Pac. 941, holding butcher's tools not baggage for which carrier liable; *Collins v. Boston & M. R. Co.* 10 Cush. 506, holding shoes intended as articles of merchandise, not baggage; *Pfister v. Central P. R. Co.* 70 Cal. 169, 59 A. R. 404, 11 Pac. 686, holding money intended for transportation, and not for passenger's use while traveling, not luggage.

Cited in notes in 56 A. D. 470, 487; 11 L.R.A. 759,—on what constitutes baggage; 99 A. S. R. 347, on what baggage includes; 71 A. D. 159, on what is baggage to which passenger is entitled.

Question for jury as to baggage.

Cited in *Root v. New York C. Sleeping Car Co.* 28 Mo. App. 199, holding reasonable amount of baggage or money for traveling expenses for traveler, question for jury.

Liability of connecting carriers.

Cited in reference notes in 59 A. D. 450, on liability of connecting carriers for loss or injury to goods; 55 A. D. 45, on carrier's responsibilities for acts of agent of another line on whose road it is running.

Validity of carrier's contract to transport beyond its line.

Cited in *Fatman v. Cincinnati, H. & D. R. Co.* 2 Disney (Ohio), 248; *Noyes v. Rutland & B. R. Co.* 27 Vt. 110,—upholding validity of contract by carrier to carry beyond limits of its own road.

Liability of innkeeper.

Distinguished in *Berkshire Woolen Co. v. Proctor*, 7 Cush. 417, holding liability of innkeeper for safety of money of guest, not limited to ordinary traveling expenses.

Reasonableness of rule of express company.

Cited in *Alsop v. Southern Exp. Co.* 104 N. C. 278, 6 L.R.A. 271, 10 S. E. 297, holding rule of express company not to receive money for transportation after departure of last train for day, unreasonable.

Proof of amount of goods stolen.

Cited in *Taylor v. Monnot*, 1 Abb. Pr. 325, 4 Duer, 116, holding guest at inn whose portmanteau was rifled, competent witness to prove its contents.

51 AM. DEC. 48, *TEBBETTS v. PICKERING*, 5 CUSH. 83.**Proof of items not specified under count.**

Cited in *Currier v. Boston & M. R. Co.* 31 N. H. 209, holding evidence of items of claim specified under one count, admissible under another in which they are not specified.

Cited in reference note in 55 A. D. 581, on causes of action admissible under count for money had and received.

Cited in notes in 52 A. D. 756; 57 A. D. 310,—on admissibility of note, bill, etc., under count for money had and received; 62 A. D. 119, as to when variance between allegation and proof is material.

Extent of review on appeal.

Cited in *Bond v. Bond*, 7 Allen, 1, holding that on exceptions no objections can be considered unless raised and passed on at trial.

Right to recover on original undertaking when note is unavailing.

Cited in reference note in 51 A. D. 73, on payee's right to recover on original consideration when note is unavailing.

Right to bill of particulars.

Cited in *Com. v. Maize*, 3 Legal Chron. 29, 7 Legal Gaz. 199, holding that court may direct bill of particulars to be furnished defendant before plea to indictment; *Whitehouse v. Schalek*, 5 W. N. C. 122, ordering bill of particulars applied for before answer in contested election proceeding; *Vila v. Weston*, 33 Conn. 42, holding, in suit on note declared upon specially, plaintiff not entitled to bill of particulars.

Operation of insolvent laws as against foreign creditors.

Cited in *Wilson v. Matthews*, 32 Ala. 332, holding foreign creditors, as a general rule, not bound by insolvent laws.

— Effect of discharge.

Cited in *Poe v. Duck*, 5 Md. 1; *Anderson v. Wheeler*, 25 Conn. 603,—holding that discharge under insolvent law of state operates only on contracts made between its own citizens; *Brighton Market Bank v. Merick*, 11 Mich. 405, holding contract with nonresident, not discharged, unless he has submitted his interests to action of insolvency court.

Cited in reference notes in 54 A. D. 716, on effect of discharge under foreign bankrupt law; 43 A. D. 454; 54 A. D. 723,—on effect of discharge under state insolvent laws upon nonresident creditors; 73 A. D. 676, on discharge in insolvency as not affecting nonresidents.

51 AM. DEC. 51, WOODBURY v. PERKINS, 5 CUSH. 86.**Discharge in bankruptcy or insolvency as affecting judgment**

Cited in *Re Gallison*, 2 Low. Dec. 72, Fed. Cas. No. 5,203, holding judgment obtained pending bankrupt proceedings, not affected by discharge; *Bowen v. Eichel*, 91 Ind. 22, 46 A. R. 574; *Boynton v. Ball*, 105 Ill. 627,—holding bankrupt failing to procure stay of pending suit, not released, by final discharge, from judgment recovered therein; *Faxon v. Baxter*, 11 Cush. 35, holding that discharge under insolvency laws does not discharge a judgment which was not provable against estate; *Bradford v. Rice*, 102 Mass. 472, 3 A. R. 483, holding discharge no defense to judgment recovered pending proceedings in bankruptcy on debt provable in bankruptcy; *Short v. Hill*, 15 Phila. 34, 38 Phila. Leg. Int. 260, holding discharge in bankruptcy, defense to action upon judgment obtained in suit pending when petition in bankruptcy filed; *Pauley v. Cauthorn*, 101 Ind. 91, holding that discharge in bankruptcy releases bankrupt from personal liability on judgment, but does not relieve his land from the lien.

Cited in reference notes in 73 A. D. 677, on effect of judgment against insolvent after discharge; 77 A. D. 387, on effect of reduction of fiduciary debt to judgment as to whether it will be discharged in bankruptcy.

Cited in notes in 53 A. D. 296, as to whether bankrupt's discharge is bar to judgments recovered after petition filed and before discharge; 46 A. R. 578, on effect of discharge upon judgment of state court against bankrupt obtained after adjudication of bankruptcy.

Distinguished in *Bennett v. Municipal Justices*, 166 Mass. 126, 44 N. E. 121, holding that discharge in insolvency exempts from arrest under judgment recovered on provable demand; *Haggerty v. Amory*, 7 Allen, 458, holding, in New York, discharge in bankruptcy, bar to action on judgment recovered on debt contracted before filing of petition for discharge.

Disapproved in *Downer v. Rowell*, 26 Vt. 397, holding that discharge is bar to action on judgment recovered pending proceedings in bankruptcy on debt due at time of decree in bankruptcy.

Effect of reducing claim to judgment.

Cited in *Handrahan v. Cheshire Iron Works*, 4 Allen, 396, holding debt or demand, merged in judgment obtained upon it; *Wolcott v. Hodge*, 15 Gray, 547, 77 A. D. 381, holding fiduciary character of claim against bankrupt, lost if reduced to judgment; *Gilman v. Cate*, 63 N. H. 278, holding that reducing debt

provable in bankruptcy to judgment creates new debt not provable; *Sturtevant v. Armsby Co.* 66 N. H. 557, 49 A. S. R. 627, 23 Atl. 368, holding if claim reduced to judgment, neither it nor original demand, provable against estate of insolvent.

Collateral attack on judgment.

Cited in note in 23 A. S. R. 112, on collateral attacks upon judgments.

51 AM. DEC. 54, ROBINSON v. BAKER, 5 CUSH. 137.

Lien of carrier.

Cited in *Clark v. Lowell & L. R. Co.* 9 Gray, 231; *Stevens v. Boston & W. R. Corp.* 8 Gray, 262,—holding that carrier has no lien on property received from one without authority to ship.

Cited in reference notes in 66 A. D. 546, on carrier's lien; 79 A. D. 368; 14 A. S. R. 411,—on lien of carrier for freight charges.

Cited in notes in 5 E. R. C. 283, on lien of carrier for freight; 12 L.R.A. (N.S.) 255, on carrier's duty to recognize demands of stranger on property delivered to it for transportation; 16 E. R. C. 112, on lien of common carrier receiving goods from wrongdoer; 40 A. D. 44, on right of carrier to detain goods against owner, where possession was not received from him; 70 L.R.A. 369, on what contracts will support maritime lien for freight; 21 L.R.A. 118, on payment or tender of freight charges as condition precedent to an action of trover against a carrier.

— Wrong route.

Cited in *Marsh v. Union P. R. Co.* 3 McCrary, 236, 9 Fed. 873, holding that carrier has no lien for freight money, where goods are sent, not according to contract with owner, but by some other route; *Denver & R. G. R. Co. v. Hill*, 13 Colo. 35, 4 L.R.A. 376, 21 Pac. 914, holding that carrier accepting from connecting carrier goods directed to be sent over rival road has no lien for its own charges or those advanced to connecting carrier; *Whitney v. Beckford*, 105 Mass. 267, holding freight charges, valid lien on property shipped by agent by route not intended or to wrong place.

— Back charges.

Distinguished in *Briggs v. Boston & L. R. Co.* 6 Allen, 246, 83 A. D. 626, holding carrier entitled to lien for freight earned and charges advanced to preceding carrier; *Berry Coal & Coke Co. v. Chicago, P. & St. L. R. Co.* 116 Mo. App. 214, 92 S. W. 714, holding final carrier paying claim of preceding carrier for general average, entitled to retain goods for reimbursement.

— Effect of agreement between shipper and initial carrier.

Distinguished in *Somner v. Southern R. Asso.* 7 Baxt. 345, 32 A. R. 565, holding agreement as to freight charges between shipper and initial carrier, not binding on subsequent carriers; *Wells v. Thomas*, 27 Mo. 17, 72 A. D. 228, holding lien of final carrier for charges, not affected by contract as to freight made with initial carrier by shipper; *Schneider v. Evans*, 25 Wis. 241, 3 A. R. 56, holding that final carrier has lien for freight earned and back charges paid, although exceeding amount stipulated between shipper and initial carrier.

— Partial prepayment of charges.

Cited in *Travis v. Thompson*, 37 Barb. 236, denying lien of final carrier paying previous charges for portion of them paid by shipper to initial carrier.

Distinguished in *Crossman v. New York & N. E. R. Co.* 149 Mass. 196, 14 A.

S. R. 408, 3 L.R.A. 766, 21 N. E. 367, holding that last carrier may claim lien for balance of freight which was not paid in full at regular rates.

— Validity of carrier's lien as against chattel mortgage.

Cited in *Owen v. Burlington, C. R. & N. R. Co.* 11 S. D. 153, 74 A. S. R. 786, 76 N. W. 302, holding lien for freight charges, inferior to lien of chattel mortgage of which carrier had notice.

Agistor's lien.

Cited in *Lowe v. Woods*, 100 Cal. 408, 38 A. S. R. 301, 34 Pac. 959, denying right of livery-stable keeper to agistor's lien for keeping of horse left with him by one in possession under conditional sale.

Cited in reference note in 38 A. S. R. 305, on lien of agistors and livery-stable keepers.

— Validity as against chattel mortgage.

Cited in *Sargent v. Usher*, 55 N. H. 287, 20 A. R. 208, holding lien of chattel mortgage of horses, superior to that of agistor with whom horses left by mortgagor; *Charles v. Neigelson*, 15 Ill. App. 17, holding chattel mortgage on horse, gig, and harness, superior to lien of livery-stable keeper.

Innkeeper's lien.

Cited in *McClain v. Williams*, 11 S. D. 227, 74 A. S. R. 791, 49 L.R.A. 610, 76 N. W. 930, holding that no innkeeper's lien exists upon property of third person brought to inn by guest; *Torrey v. McClellan*, 17 Tex. Civ. App. 371, 43 S. W. 64, holding innkeeper not entitled to lien upon drummer's samples owned by latter's employer.

Lien for repairs.

Distinguished in *White v. Smith*, 44 N. J. L. 105, 43 A. R. 347, upholding lien for repairs to wagon left with wheelwright by husband, but owned by wife.

Lien for storage.

Cited in *Storms v. Smith*, 137 Mass. 201, holding mortgagee of chattels left by mortgagor with third person for storage, not liable for storage charges.

Lien of warehouseman.

Cited in *State v. Intoxicating Liquors*, 50 Me. 506, holding that lien of warehouseman will not prevent forfeiture of intoxicating liquors intended for sale in violation of law.

Equitable lien.

Cited in *Fowler v. Parsons*, 143 Mass. 401, 9 N. E. 799, holding that consignee paying duties acquires equitable lien against claimant purposely waiting until duties were paid before replevying goods.

On what right or title lien operates.

Cited in *Booker v. Jones*, 55 Ala. 266, holding that lien of factor or carrier operates only on right or title of those with whom they deal.

Validity of limitation of liability in shipping receipt.

Distinguished in *Bates v. Weir*, 121 App. Div. 275, 105 N. Y. Supp. 785, holding consignee and owner of valuable property sent by express, bound by limitation of liability in shipping receipt.

Succeeding carrier as agent of initial carrier.

Cited in *Moses v. Port Townsend Southern R. Co.* 5 Wash. 595, 32 Pac. 488 (dissenting opinion), on succeeding carrier as agent of initial carrier receiving pay for through transportation.

Duty of carrier to afford connecting carrier reasonable facilities.

Cited in *Denver & N. O. R. Co. v. Atchison, T. & S. F. R. Co.* 4 McCrary, 325, 15 Fed. 650, requiring railroad company to afford connecting carrier reasonable facilities for exchange of passengers and freight.

Power of trespasser to pass title.

Cited in *Caldwell v. Bartlett*, 3 Duer, 341, holding that trespasser taking goods without owner's consent cannot vest title in even bona fide purchaser.

51 AM. DEC. 59, MELLEDGE v. BOSTON IRON CO. 5 CUSH. 158.**Acceptance of negotiable instrument as payment.**

Cited in *Bantz v. Bassett*, 12 W. Va. 772 (dissenting opinion), on check or note as payment; *O'Conner v. Hurley*, 147 Mass. 145, 16 N. E. 764, holding acceptance of note and mortgage by contractor, satisfaction of original agreement between parties; *Pecker v. Kennison*, 46 N. H. 488, holding that acceptance of invalid note does not discharge debt; *Montgomery v. Forbes*, 148 Mass. 249, 19 N. E. 342, holding purchaser of goods giving void notes of defectively organized corporation, liable on original contract; *Atkinson v. Minot*, 75 Me. 189, holding worthless personal note of town treasurer accepted as evidence of town's indebtedness, not payment; *Strang v. Hirst*, 61 Me. 9, holding debt not extinguished by unaccepted bill of exchange, unless parties so agree; *Green v. Russell*, 132 Mass. 536, holding that whether acceptance of a note extinguishes pre-existing debt depends upon intent of parties.

Cited in reference notes in 55 A. D. 710, as to when note is deemed a payment; 56 A. D. 61, as to when note is payment of pre-existing debt; 56 A. D. 662, 681, on negotiable instrument as payment of pre-existing debt; 64 A. D. 296; 1 A. S. R. 288,—on note given for simple contract debt as prima facie evidence of payment; 87 A. D. 570, as to whether giving of note, check, etc., is payment of debt; 64 A. D. 296, on discharge of debt by presumption of payment from giving note for pre-existing debt.

Cited in notes in 61 A. D. 506, as to when giving note is considered payment of debt; 11 A. D. 54, on presumption of payment from acceptance of promissory note.

Distinguished in *Wyman v. Fabens*, 111 Mass. 77, holding acceptance of renewal note, payment and satisfaction of previous note.

Rebutting presumption of payment.

Cited in *Paine v. Dwinel*, 53 Me. 52, 87 A. D. 533, holding acceptance payable to order, prima facie evidence of payment; *Bunker v. Barron*, 79 Me. 62, 1 A. S. R. 282, 8 Atl. 253; *Tozier v. Crafts*, 123 Mass. 480,—holding that presumption of payment arising from acceptance of notes may be rebutted by proof of contrary intent; *Sweet v. James*, 2 R. I. 270, holding presumption of discharge of original debt arising from acceptance of note, rebutted where lien is to be given up or security abandoned.

Cited in reference note in 72 A. D. 620, on rebutting presumption that old debt was discharged by acceptance of negotiable note.

Implied warranty of genuineness of paper sold.

Cited in notes in 36 L.R.A. 96, on implied warranty of genuineness on sale of negotiable paper; 50 A. D. 606, on liability of seller of forged note.

Right to sue on original debt after taking note.

Cited in reference note in 51 A. D. 50, on payee's right to surrender note and recover on original consideration.

Proof of agency or capacity in which person acts.

Cited in *Gerber v. Stuart*, 1 Mont. 172, holding capacity in which person executing instrument acts, question of intent, explainable by evidence *aliunde*; *Walker v. Popper*, 2 Utah, 96, holding parol evidence admissible to show ownership, and transfer by bank of note made payable to its cashier; *Fuller v. Hooper*, 3 Gray, 334, holding parol evidence admissible to show that individual conducted business in artificial name; *Lay v. Austin*, 25 Fla. 933, 7 So. 143 (dissenting opinion), on proof of agency by evidence *aliunde* to uphold defectively executed instrument as act of corporation; *Baker v. Cotter*, 45 Me. 236, holding testimony of president of corporation, competent to prove his agency to indorse.

Cited in reference notes in 61 A. S. R. 459, on negotiable instrument not in corporate name; 51 A. D. 458, on proof of authority of corporation's agent by parol evidence; 84 A. D. 313, on effect of note signed with maker's name followed by title of his office; 34 A. S. R. 110, on parol evidence to show capacity in which corporate officers signed negotiable instruments.

Cited in note in 20 L.R.A. 708, on extrinsic evidence to show who is liable as maker of note in suits against principal, where signature is by agent and promise is individual.

Distinguished in *Brown v. Parker*, 7 Allen, 337, holding parol evidence inadmissible to show that one signing notes in his own name did so as agent; *Heffron v. Pollard*, 73 Tex. 96, 15 A. S. R. 764, 11 S. W. 165, holding parol evidence inadmissible to show that one signing name of another to contract as his agent intended to bind himself.

Liability for transaction in name of another.

Cited in *Chandler v. Coe*, 54 N. H. 561, holding undisclosed principals carrying on business in name of agent, liable for his contracts; *Jefferds v. Alvard*, 151 Mass. 94, 23 N. E. 734, on acceptance of note of husband for fertilizers used on wife's farm as precluding suit against latter; *Devendorf v. West Virginia Oil & Oil Land Co.* 17 W. Va. 135, holding that person may make signature of another his own by allowing it to be used in the course of his business; *Graham v. Eisner*, 28 Ill. App. 269, holding that person may transact business in name different from his own, and may sue and be sued by such name; *American Preservers' Trust v. Taylor Mfg. Co.* 46 Fed. 152, holding it immaterial by what name corporation assents to contract, provided it intends to become bound.

Distinguished in *Bartlett v. Tucker*, 104 Mass. 336, 6 A. R. 240, holding one signing notes with names of persons he had no authority to use or with fictitious names, not liable as maker.

Liability of one signing note as agent.

Cited in notes in 2 A. D. 518, as to whether principal or agent is liable on instrument nothing appearing therein as to agency; 4 E. R. C. 285, on personal liability of one signing written instrument as agent.

Distinguished in *Williams v. Robbins*, 16 Gray, 77, 77 A. D. 396, holding note signed by individual, his personal contract, although word "agent" affixed to signature.

Liability of banker on cashier's check.

Cited in *Brenner v. Lawrence*, 27 Misc. 755, 58 N. Y. Supp. 769, holding bankers liable on cashier's check drawn upon them by their cashier by their direction.

Authority of officer or agent to act for corporation.

Cited in *Jones v. Williams*, 139 Mo. 1, 61 A. S. R. 436, 37 L.R.A. 682, 39

S. W. 486, holding corporation bound by contract of officer, although his authority not recited, nor his official designation added to his signature; *Whitehead v. O'Sullivan*, 12 Misc. 577, 33 N. Y. Supp. 1098, holding formal act of trustees of corporation, not absolutely essential to validity of corporate contract; *Topping v. Bickford*, 4 Allen, 120, holding proof of note of directors, unnecessary, where president authorized to transfer notes of corporation by indorsement.

Cited in reference notes in 87 A. D. 76, as to whether corporation is bound by unauthorized contract of its officers; 63 A. D. 339, as to when corporations are bound by acts of agents under implied authority; 86 A. D. 354, on liability of corporation on contract not formally authorized or ratified by it; 96 A. D. 259, as to when corporation and when its officers are bound by instrument for payment of money.

— **Ratification by corporation.**

Cited in *Beacon Trust Co. v. Souther*, 183 Mass. 413, 67 N. E. 345, holding that indorsement of note for benefit of corporation may be confirmed by acts of directors; *Henderson v. Raymond Syndicate*, 183 Mass. 443, 67 N. E. 427, holding that ratification by directors of sale made by general manager ratifies everything incidental thereto; *Dedrick v. Ormsby Land & Mortg. Co.* 12 S. D. 59, 80 N. W. 153, holding that corporation accepting benefit of contract confirms authority of contracting party, and ratifies his acts; *Washington Times Co. v. Wilder*, 12 App. D. C. 62, holding corporation ratifying the signing and delivery of notes made for its benefit by unauthorized person, liable thereon.

Distinguished in *Sceery v. Springfield*, 112 Mass. 512, holding act of superintendent of streets in excess of his authority, not ratification by city of unauthorized contract of mayor.

— **Acquiescence.**

Cited in *Hirschmann v. Iron Range & H. B. R. Co.* 97 Mich. 384, 56 N. W. 842, holding corporation acquiescing in unauthorized acts of agent, bound thereby; *Sherman v. Fitch*, 98 Mass. 59, holding that authority of officer of corporation to execute mortgage may be inferred from long-continued acquiescence of directors; *Ford v. Hill*, 92 Wis. 188, 53 A. S. R. 902, 66 N. W. 115, holding that authority of president of corporation to execute power of attorney to confess judgment may be implied from acquiescence of directors.

Cited in reference note in 91 A. D. 637, on acquiescence or silence of board of corporate directors as ratifying unauthorized acts of agent.

— **Estoppel.**

Cited in *Sanderson v. Imperial Underwear Co.* 15 Pa. Dist. R. 695, holding corporation estopped to deny power of officers to execute mortgage, where they were authorized to do so by consent of all the stockholders; *Wisconsin Lumber Co. v. Greene & W. Teleph. Co.* 127 Iowa, 350, 109 A. S. R. 387, 69 L.R.A. 968, 101 N. W. 742, holding that corporation accepting stock subscriptions secured by officers cannot repudiate their promise to take back the stock under certain circumstances.

Cited in reference note in 36 A. S. R. 186, on estoppel by unauthorized acts of corporate agent.

Estoppel to assert individual liability of corporate officer.

Cited in *Scanlan v. Keith*, 102 Ill. 634, 40 A. R. 624, holding one obtaining judgment against corporation on note, estopped to assert it was individual note of officers executing it.

Propriety of instruction.

Cited in *Dodge v. Emerson*, 131 Mass. 467, upholding charge in which judge called attention of jury to fact as bearing upon question which they were to decide; *Com. v. Johnson*, 188 Mass. 382, 74 N. E. 939, holding that judge may call attention of jury to evidence in explaining and illustrating the necessity and value of opinion evidence.

Cited in reference notes in 68 A. D. 510, on effect of judge's expression of opinion on facts; 53 A. D. 496, on right of court to refuse to give abstract instruction; 53 A. D. 495, on right to refuse instructions which cannot be fairly inferred from evidence; 71 A. D. 635, on impropriety of giving instructions assuming hypothesis at variance with facts; 59 A. D. 80, on refusal of instructions assuming facts not fairly inferable from the evidence.

Grounds for reversal.

Cited in reference note in 60 A. D. 440, on refusal to reverse for nonprejudicial errors.

Cited in notes in 51 A. D. 294, on effect of immaterial errors of any kind in course of trial; 51 A. D. 294, on erroneous instructions which could not have prejudiced losing party, as ground for reversal.

Liability of trading corporation.

Cited in reference notes in 72 A. D. 363, on trading corporation being bound to same obligations as natural person; 77 A. D. 401, on power of partnership to adopt and sign instruments in name other than its regular name.

51 AM. DEC. 75, PEOPLE v. RICHARDS, 1 MICH. 216.**What constitutes crime of conspiracy.**

Cited in *Alderman v. People*, 4 Mich. 414, 69 A. D. 321, holding that, to constitute an indictable conspiracy, there must be a combination of two or more persons to commit a common-law or statutory offense; *People v. Saunders*, 25 Mich. 119, holding that it is the unlawful conspiracy that constitutes the crime, and not acts done in pursuance of it.

Cited in reference notes in 32 A. S. R. 202, on conspiracy; 69 A. D. 332; 60 A. S. R. 40,—on what constitutes conspiracy; 80 A. D. 550, on definition and nature of "conspiracy;" 90 A. D. 654, as to law of conspiracy; 4 A. S. R. 77, on criminal conspiracy; 56 A. D. 655, as to when indictment for conspiracy lies; 62 A. D. 340; 80 A. D. 183,—on conspiracies to cheat and defraud; 36 A. S. R. 696, on conspiracies injurious to commerce and trade; 46 A. S. R. 657, on boycotting.

Cited in notes in 67 A. S. R. 407, on conspiracy; 3 A. S. R. 474, on definition of "conspiracy;" 3 A. S. R. 475, on nature of the offense of conspiracy; 3 A. S. R. 475, on what constitutes indictable conspiracy; 76 A. D. 785, on boycotting as criminal conspiracy; 3 A. S. R. 475, on conspiracies to commit crimes or to induce others to commit them.

Merger of conspiracy in felony.

Cited in note in 3 A. S. R. 491, on merger of conspiracy with the crime to commit which the conspiracy was formed.

Distinguished in *United States v. Gardner*, 42 Fed. 829, holding charge of conspiracy, not merged in felonious charge of larceny as to defendant charged with former, but not latter offense.

Effect of acquittal of one conspirator.

Cited in note in 3 A. S. R. 492, on effect of acquittal of one conspirator where two are indicted.

Liability for false pretenses.

Cited in reference note in 25 A. S. R. 294, on liability for false pretenses.

Sufficiency of information alleging conspiracy.

Cited in *People v. Dyer*, 79 Mich. 480, 44 N. W. 937, holding that information alleging conspiracy to falsely accuse another of arson charges an offense.

Cited in notes in 3 A. S. R. 480, 481, on general averments in indictment for conspiracy; 3 A. S. R. 482, on necessity for averment of agreement or combination in indictment for conspiracy.

— Necessity of averring object of conspiracy or means employed.

Cited in *Martens v. Reilly*, 109 Wis. 464, 84 N. W. 840, holding that object of conspiracy must be averred, if criminal; or if crime depends on means employed, they must be alleged; *State v. Witherspoon*, 115 Tenn. 138, 90 S. W. 852, holding indictment charging existence and object of conspiracy, sufficient without stating means intended to be employed; *People v. Arnold*, 46 Mich. 268, 9 N. W. 406, holding that if object of conspiracy, unlawful, means intended to be employed need not be averred; *People v. Petheram*, 64 Mich. 252, 31 N. W. 188, holding that specific means to be employed to accomplish conspiracy need only be alleged, when the combination is to do a lawful act in an unlawful manner; *United States v. Dennee*, 3 Woods, 47, Fed. Cas. No. 14,948, holding that indictment for conspiracy to defraud need not aver the means agreed upon to carry the conspiracy into effect; *People v. Butler*, 111 Mich. 483, 69 N. W. 734, holding that information charging conspiracy to cheat and defraud county states offense, although means by which defendants conspired not alleged.

Cited in notes in 3 A. S. R. 483, on necessity for setting forth unlawful object in indictment for conspiracy; 3 A. S. R. 482, on necessity that indictment for conspiracy set out means by which object was to be accomplished.

51 AM. DEC. 95, NILES v. RANSFORD, 1 MICH. 338.**How right of mortgagee may be assigned.**

Cited in *Hoffman v. Harrington*, 33 Mich. 392; *Densmore v. Savage*, 110 Mich. 27, 67 N. W. 1103,—holding that right of mortgagee may be transferred either by legal or equitable assignment.

— By quitclaim deed.

Cited in *Thayer v. McGee*, 20 Mich. 195, holding that quitclaim deed by mortgagee operates as assignment of mortgage.

What passes under assignment of mortgage.

Cited in *Lillibridge v. Tregent*, 30 Mich. 905, holding that assignment of invalid foreclosure decree transfers mortgage debt; *Johnstone v. Scott*, 11 Mich. 232, holding that assignee or purchaser under mortgage entitling mortgagee to possession acquires good possessory title until redemption; *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32, holding that deed and assignment of mortgage executed by purchaser on foreclosure passes his equitable interest, although period of redemption not expired.

Cited in reference note in 83 A. D. 224, on effect of assignment of mortgage to pass power of sale therein.

Effect of assignment of mortgage.

Cited in *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32, holding foreclosure not annulled by subsequent assignment of mortgage.

Assignment of vendor's lien.

Cited in reference note in 60 A. D. 560, on right to assign vendor's lien.

Necessity of recording assignment.

Cited in *Miller v. Clark*, 56 Mich. 337, 23 N. W. 35, holding statutory requirement that assignment of mortgage be recorded, inapplicable where title transferred by operation of law.

Assignment of claim as abating suit.

Cited in *Brown v. Fletcher*, 140 Fed. 639, holding that assignment of claim in suit abates suit.

Conveyance as assignment of grantor's lien.

Cited in *McClain v. Sullivan*, 85 Ind. 174, holding that conveyance of premises operates as assignment of grantor's lien for redemption money.

Power of sale in mortgage.

Cited in reference notes in 68 A. D. 677, on validity of mortgage with power of sale; 93 A. D. 112, on necessity for strictly following directions in power of sale in mortgage.

Cited in notes in 92 A. S. R. 575, on validity of powers in mortgages and trust deeds, and of proceedings thereunder; 92 A. S. R. 597, on effect of defective sale under power in mortgage or trust deed.

Right to foreclose by advertisement.

Cited in *Gage v. Sanborn*, 106 Mich. 269, 64 N. W. 32, holding foreclosure of mortgage by advertisement, within statutory powers of bank.

Priority of mortgages.

Distinguished in *Kitchell v. Mudgett*, 37 Mich. 81, holding that wife, by joining in mortgage on husband's land, does not subject her prior mortgage to lien of the one signed.

Validity of notice.

Cited in *Re Central Irrig. District*, 117 Cal. 382, 49 Pac. 354, holding unsigned notice of presentation of petition for formation of irrigation district, invalid; *Hathaway v. Marquette Circuit Judge*, 117 Mich. 323, 75 N. W. 761, holding that notice of trial should be signed with name of attorney or party giving notice.

Cited in note in 75 A. D. 713, on sufficiency of notice of adjournment of sale.

— Of foreclosure.

Cited in *Bausman v. Kelley*, 38 Minn. 197, 8 A. S. R. 661, 36 N. W. 333, holding notice of foreclosure in name of deceased mortgagee, void; *Dunning v. McDonald*, 54 Minn. 1, 55 N. W. 864, holding notice of foreclosure sale, invalid unless signed by all persons in interest.

Who may maintain ejectment.

Distinguished in *Kinney v. Harrett*, 46 Mich. 87, 8 N. W. 708, holding that guardian cannot maintain ejectment in her own name, but must sue in name of wards.

Effect of tenant's attornment to stranger.

Cited in *O'Donnell v. McIntyre*, 37 Hun, 623, holding landlord's possession

not affected by attornment of tenant to stranger, unless made with his consent or in consequence of legal process.

Estoppel of tenant to deny landlord's title.

Cited in reference notes in 55 A. D. 708; 58 A. D. 233; 61 A. D. 541,—on estoppel of tenant to deny landlord's title; 53 A. D. 421, as to when tenant is not estopped to deny title of lessor.

Cited in notes in 69 A. D. 510, as to when tenant can dispute landlord's title; 89 A. S. R. 83, on acquisition of landlord's title by tenant; 15 E. R. C. 305, on right of tenant to purchase landlord's land on sale against latter; 53 L.R.A. 936, on right of tenant to acquire title not inconsistent with landlord's title at commencement of tenancy; 15 E. R. C. 306, on right of tenant to show that landlord's title has expired by operation of law; 89 A. S. R. 100, on effect of termination of relation on estoppel of tenant to deny landlord's title; 120 A. S. R. 60, on termination of landlord's title as defense in action for unlawful detainer.

51 AM. DEC. 102, STEVENSON v. McREARY, 12 SMEDES & M. 9.

Necessity of strict compliance with statute authorizing sale of decedent's realty.

Cited in *Currie v. Stewart*, 26 Miss. 646; *Currie v. Stewart*, 27 Miss. 52, 61 A. D. 500,—holding that strict compliance with statute authorizing probate court to order sale of lands of decedent must be shown to render order and sale valid; *Lum v. Reed*, 53 Miss. 73, holding purchaser of lands sold under decree of probate court, not affected by mistakes or informalities in advertisement of sale.

Cited in reference notes in 68 A. D. 100, on requisites of probate jurisdiction to order sale of real estate; 79 A. D. 555, on necessity for strict compliance with statute authorizing sale of decedent's land; 57 A. D. 168; 58 A. D. 503; 60 A. D. 755,—on necessity of strict compliance with statutes authorizing executors to sell real estate; 94 A. D. 317, on necessity of following statutory provision regarding power of sale of decedent's property; 58 A. D. 503, on inability of probate court to order sale unless its jurisdiction appears upon its records; 61 A. D. 233, on effect of failure to give additional bond at sale of realty.

Collateral attack on judgment of probate court.

Cited in reference note in 72 A. D. 121, as to when judgment of probate court ordering distribution may be collaterally attacked.

Proceedings on bond of personal representative.

Cited in reference note in 61 A. D. 233, on proceedings upon executors' and administrators' bonds.

Presumptions arising from lapse of time.

Cited in *Nixon v. Carco*, 28 Miss. 414, holding that written evidence of title will be presumed in favor of long possession; *State v. Dickinson*, 129 Mich. 221, 88 N. W. 621, holding that grant may be presumed against state from facts and circumstances in absence of original grant or record of it; *Gantt v. Phillips*, 23 Ala. 275, holding that appointment and qualification of executrix may be presumed after lapse of time, and loss of records.

Cited in reference notes in 80 A. D. 118, as to when grant will be presumed; 58 A. D. 503, on presumptions in favor of regularity of proceedings on adminis-

trator's sale; 64 A. D. 352, on dispensing with strict proof after great length of time.

What constitutes adverse possession.

Cited in reference note in 54 A. D. 357, on what constitutes adverse possession.

Title by adverse possession.

Cited in reference note in 61 A. D. 305, on adverse possession for time prescribed by statute of limitations as tolling owner's right of entry and giving title.

Necessity of ceremonial marriage.

Cited in *Dickerson v. Brown*, 49 Miss. 357, holding that marriage may be contracted without formal or ceremonial solemnization.

Right to refuse to give abstract instruction.

Cited in reference notes in 56 A. D. 702, on refusal to give abstract instructions as error; 53 A. D. 496, on right of court to refuse to give abstract instruction; 62 A. D. 688, as to whether correct but abstract and irrelevant instructions may be given.

Estoppel by recitals in deeds.

Cited in reference note in 78 A. D. 533, on estoppel of grantor and privies by recitals in deeds.

Cited in notes in 65 A. D. 500; 11 E. R. C. 72,—on estoppel by recitals in deed.

Form and contents of administrator's deed.

Cited in note in 56 A. D. 56, on form and contents of administrator's deed.

Enforcement of foreign statute relating to adverse possession.

Cited in *McArthur v. Carrie*, 32 Ala. 75, 70 A. D. 529, on enforcement of statute of another state relating to title by adverse possession.

Running of statute of limitations.

Cited in *North v. James*, 61 Miss. 761, holding that mere ability of married woman to sue will not subject her to plea of statute of limitations; *Traweek v. Kelly*, 60 Miss. 652, holding that statute having once commenced to run against right of female of full age continues to do so, notwithstanding her subsequent marriage.

Cited in reference note in 1 A. S. R. 789, on continuance of statute of limitations after it has commenced to run.

Cited in note in 11 A. S. R. 342, on effect of subsequent disability upon running of statutes of limitations.

51 AM. DEC. 115, LILE v. HOPKINS, 12 SMEDES & M. 299.

Implied warranty of existence of thing sold or transferred.

Cited in *Lillibridge v. Tregent*, 30 Mich. 105, holding that seller warrants existence of thing he assumes to sell, and for which he is paid; *Findley v. Smith*, 42 W. Va. 299, 26 S. E. 370, holding that assignor of judgment, without recourse, warrants its existence; *Hurd v. Hall*, 12 Wis. 113, holding that assignor of school-land certificates warrants their existence and validity.

Cited in reference note in 54 A. D. 505, on implied warranty of title in sale of chattels.

Cited in notes in 62 A. D. 464, on implied warranty of title on sale of chattel; 78 A. S. R. 48, on implied warranty on assignment of judgment.

51 AM. DEC. 117, LAND v. WILLIAMS, 12 SMEDES & M. 362.**Writ of error coram nobis.**

Cited in *Adler v. State*, 35 Ark. 517, 37 A. R. 48, holding that errors of fact may be corrected on writ of error *coram nobis* in circuit court where judgment rendered; *Sanders v. State*, 85 Ind. 318, 44 A. R. 29, upholding power of court to issue writ *coram nobis* to suggest new fact, which would have prevented judgment, and is not otherwise available.

Cited in notes in 91 A. D. 194, on writ of error; 18 L.R.A. 839, on writ of error *coram nobis*; 97 A. S. R. 365, on authority of courts to issue writs of error *coram vobis*; 97 A. S. R. 364, on difference between writs of error, writs of error *coram nobis*, and writs of error *coram vobis*.

51 AM. DEC. 118, BROWN v. JOHNSON, 12 SMEDES & M. 398.**Validity of contract of agent in excess of his authority.**

Cited in *Curry v. Hale*, 15 W. Va. 867, holding that contract of agent made in excess of his authority will not bind principal.

Cited in reference notes in 94 A. D. 330, on liability of principal for acts of agent; 56 A. D. 711, on liability of principal for acts of agent outside scope of authority; 63 A. D. 427, on how far principal is bound by acts of special agent; 4 A. S. R. 86, on invalidity of act of special agent exceeding his authority; 55 A. D. 204, on necessity of specially pursuing authority of special agent.

Cited in note in 69 A. D. 692, on liability of principal for agent's acts in excess of authority.

Duty and liability of one acting for another.

Cited in reference note in 62 A. D. 758, on duty and liability of one acquiring property in his own name actually or ostensibly for the benefit of another.

Rescission of entire contract.

Cited in reference note in 62 A. D. 665, on necessity that rescission of entire contract be *in toto*.

Duty of one dealing with agent to look to extent of his power.

Cited in *Everman v. Herndon*, 71 Miss. 823, 15 So. 135, holding that one dealing with agent appointed to do particular act must see that act done is within his authority.

Cited in reference note in 55 A. D. 204, on necessity of person dealing with special agent looking to his powers.

Cited in note in 88 A. S. R. 781, on duty of one dealing with agent to ascertain extent of his authority.

51 AM. DEC. 122, MCGEE v. METCALF, 12 SMEDES & M. 535.**Discharge of surety by indulgence to principal.**

Cited in *Wright v. Watt*, 52 Miss. 634, holding that indulgence granted principal debtor, for definite time on valuable consideration without consent of surety exonerates latter; *Jenness v. Cutler*, 12 Kan. 500, holding that invalid agreement for extension of time for payment of debt will not discharge surety; *Williams v. Covilland*, 10 Cal. 419; *Cox v. Mobile & G. R. Co.* 37 Ala. 320,—holding that extension of time of payment will not discharge surety unless valid and for a definite time; *Gardner v. Watson*, 13 Ill. 347, holding that promise to delay collection of debt for uncertain period will not discharge surety; *Dillon v. Russell*, 5 Neb. 484; *Bunn v. Commercial Bank*, 98 Ga. 647, 26 S. E. 63,—holding that

extension of time of payment of note for indefinite period will not discharge surety.

Cited in reference notes in 55 A. D. 481, on what will discharge surety; 58 A. D. 338, on surety not being discharged by mere forbearance; 90 A. D. 415, on forbearance, delay, negligence, or indulgence of creditor as discharging surety; 60 A. D. 332, on discharge of surety by binding extension of time given to principal.

Cited in note in 5 L.R.A.(N.S.) 765, on extension of time for levying execution as discharge of surety.

—By stay of execution.

Cited in *Freeland v. Compton*, 30 Miss. 424, holding that stay of execution will not discharge surety, when not granted for any fixed period.

51 AM. DEC. 124, MATHEWS v. CHRISMAN, 12 SMEDES & M. 595.

What is a guaranty.

Cited in reference note in 30 A. S. R. 727, on what is a guaranty.

Cited in note in 58 A. D. 647, on guaranty by indorsement of genuineness of negotiable instrument.

When guaranty is absolute.

Cited in *Friend v. Smith Gin Co.* 59 Ark. 86, 26 S. W. 374, holding guaranty of punctual payment of notes, absolute and unconditional.

Necessity of notice of acceptance to guarantor.

Cited in *Scott v. Myatt*, 24 Ala. 489, 60 A. D. 485, holding notice of acceptance, not necessary on direct promise to be "good" for merchandise furnished another.

Cited in reference notes in 60 A. D. 505, as to when guarantor is entitled to notice of acceptance of guaranty; 53 A. D. 289, on necessity to charge guarantor with notice of acceptance of guaranty or of demand on nonpayment by principal.

Cited in note in 16 L.R.A.(N.S.) 365, on necessity of notice of acceptance to bind guarantor in case of existing liability of definite amount.

—Necessity of notice of nonpayment to guarantor.

Cited in *Beebe v. Dudley*, 26 N. H. 249, 59 A. D. 341, holding notice to guarantor, unnecessary, where undertaking to pay is absolute; *Simons v. Steele*, 36 N. H. 73, holding absolute guarantor, liable, although not notified, if not injured by want of notice; *Baker v. Kelly*, 41 Miss. 696, 93 A. D. 274, holding demand and notice, not necessary where indorser absolutely guarantees payment of note.

Cited in reference notes in 59 A. D. 345, on necessity for notice of nonpayment to guarantor; 60 A. D. 505; 70 A. D. 237,—as to whether guarantor is entitled to notice of principal's default.

Cited in notes in 20 L.R.A. 257, on necessity of notice of default to bind guarantor; 20 L.R.A. 260, on necessity of notice of default to bind guarantor of purchase money.

Termination of guaranty generally.

Cited in reference notes in 57 A. S. R. 286, on discharge of guarantor; 61 A. S. R. 659, on what constitutes, and mode of terminating, continuing guaranty.

51 AM. DEC. 128, WHITESIDES v. THURLKILL, 12 SMEDES & M. 599.

Liability of carrier.

Cited in reference notes in 55 A. D. 591; 62 A. D. 128; 64 A. D. 159,—on liability of common carrier; 76 A. D. 775, on carrier's liability for losses; 57 A. D.

701; 71 A. D. 587,—on liability of common carriers as insurers except for act of God or public enemies; 61 A. D. 568, on liability for damages occasioned by collision of vessels.

. Cited in note in 5 E. R. C. 264, on carrier as insurer against all hazards except act of God or public enemies.

— **For damage by rain.**

Cited in *Wolfe v. Lacy*, 30 Tex. 349; *Chevallier v. Patton*, 10 Tex. 344,—holding carrier not liable for damage to cotton by rain, if shipper notified it would be transported in open boat.

Exemption in bill of lading as part of contract.

Cited in *McMillan v. Michigan, S. & N. I. R. Co.* 16 Mich. 179, 93 A. D. 208; *Louisville & N. R. Co. v. Brownlee*, 14 Bush. 590,—holding exemption embodied in bill of lading, part of contract.

Validity of stipulation exempting carrier from liability.

Cited in *Mobile & O. R. Co. v. Weiner*, 49 Miss. 725, upholding right of carrier to limit his common-law liability by express contract; *Hays v. Kennedy*, 3 Grant, Cas. 351, 20 Phila. Leg. Int. 117 (affirming 2 Pittsb. 262), holding carrier not in fault in collision, not liable under bill of lading excepting unavoidable dangers of navigation.

Cited in reference notes in 55 A. D. 233, 484, on power of carrier to limit his common-law liability; 62 A. D. 573, on power of common carrier to limit his liability by special contract.

— **From negligence.**

Cited in *New York C. R. Co. v. Lockwood*, 17 Wall. 357, 21 L. ed. 627, holding stipulation by carrier for exemption of responsibility for negligence, unreasonable; *Bourland v. Itawamba County*, 60 Miss. 996; *Maslin v. Baltimore & O. R. Co.* 14 W. Va. 180, 35 A. R. 748; *Ohio & M. R. Co. v. Selby*, 47 Ind. 471, 17 A. R. 719,—denying right of carrier to stipulate for exemption of liability for negligence; *Christenson v. American Exp. Co.* 15 Minn. 270, Gil. 208, 2 A. R. 122, holding that exception of “perils of navigation” does not excuse carrier negligently running boat upon snag.

Cited in notes in 10 A. R. 372, on common carrier's stipulation against his negligence; 4 E. R. C. 695, on right of carrier to exempt himself by contract from liability for negligence.

Meaning of “dangers of the sea,” etc.

Cited in reference notes in 64 A. D. 412, on “dangers of sea”; 64 A. D. 412, on “dangers of the river” as including loss by collision; 63 A. D. 585, on what constitutes “dangers of river,” “perils of sea,” etc.

51 AM. DEC. 130, ANDERSON v. HILL, 12 SMEDES & M. 670.

Fraud or defect in title as defense to suit for purchase money.

Cited in *Johnson v. Jones*, 13 Smedes & M. 580, holding that vendee in possession may defend suit on purchase-money note for any fraud in contract of sale, independent of defect in title; *Harris v. Ransom*, 24 Miss. 504, holding that vendee of land cannot defend suit on purchase-money note on ground of defect in title, in absence of eviction.

Cited in reference note in 61 A. D. 539, as to when vendee is relieved in equity on ground of vendor's fraud.

Cited in note in 35 A. D. 427, on fraudulent representations.

Liability of vendor to action for deceit.

Cited in *Henderson v. Henshall*, 4 C. C. A. 352, 7 U. S. App. 544, 54 Fed. 320, holding vendor misrepresenting quantity of land cleared, fenced, and planted, liable in action for deceit; *Varner v. Carson*, 59 Tex. 303, holding misrepresentations of value, matters of opinion not entitling those deceived to relief.

Fraud in obtaining note as defense.

Cited in reference note in 41 A. D. 589, on right to set up fraud in obtaining promissory note as defense to action thereon by payee.

Objections and exceptions to instruction.

Cited in *Jones v. Van Patten*, 3 Ind. 107; *Godwin v. Bryan*, 16 Fla. 396,—holding that exceptions to instructions must be taken before verdict; *Drake v. Surget*, 36 Miss. 458, holding that instructions, not objected to when given, nor before verdict, will not be reviewed on appeal.

Cited in reference notes in 61 A. D. 101, on necessity that objections to instructions be timely; 70 A. D. 570, as to when exceptions to instruction must be taken.

Cited in note in 99 A. D. 134, on time when objection to instructions should be taken.

Sufficiency of bill of exceptions.

Cited in reference note in 64 A. S. R. 791, on sufficiency of bill of exceptions.

51 AM. DEC. 132, SANDS v. ROBINSON, 12 SMEDES & M. 704.**Right of juror or grand juror to testify.**

Cited in *Hughes v. Chicago*, St. P. M. & O. R. Co. 126 Wis. 525, 106 N. W. 526, holding that juror may testify to material, relevant facts learned while making view of premises, when called as witness on subsequent trial; *State v. Moran*, 15 Or. 262, 14 Pac. 419, holding that grand juror may be permitted by court to disclose testimony given by a witness before the grand jury; *State v. Campbell*, 73 Kan. 688, 9 L.R.A.(N.S.) 533, 85 Pac. 784, 9 A. & E. Ann. Cas. 1203, holding that grand juror may testify as to what passed before grand jury, when disclosure necessary in furtherance of justice.

Cited in reference note in 71 A. D. 743, on competency of grand jurors as witnesses.

Admissibility of confession made before grand jury.

Cited in *Wisdom v. State*, 42 Tex. Crim. Rep. 579, 61 S. W. 926, holding confessions of accused made before grand jury after being warned, admissible.

Mitigation of damages in slander.

Cited in reference note in 60 A. D. 463, on mitigation of damages in slander.

Privileged communications.

Cited in *Miller v. Nuckolls*, 77 Ark. 64, 113 A. S. R. 122, 4 L.R.A.(N.S.) 149, 91 S. W. 759, 7 A. & E. Ann. Cas. 110, holding communication to peace officer, privileged only when made in good faith; *Myers v. Hodges*, 53 Fla. 197, 44 So. 357, holding impertinent, libelous matters published in course of legal procedure, prima facie privileged.

Cited in reference note in 123 A. S. R. 641, on question of malice in libel or slander in course of judicial proceedings.

51 AM. DEC. 135, PACK v. THOMAS, 13 SMEDES & M. 11.**Parol evidence to contradict, vary, or explain contract.**

Cited in *American Emigrant Co. v. Clark*, 47 Iowa, 671, holding parol evidence, inadmissible to contradict contract which parties, by operation of law, entered into; *Woodward v. Foster*, 18 Gratt. 200, denying right of indorser to prove special agreement varying ordinary legal import of indorsement.

Cited in reference notes in 52 A. D. 693; 53 A. D. 436; 60 A. D. 482; 65 A. D. 786,—on parol evidence to add to, vary, or explain terms of written agreement; 53 A. D. 589, on admissibility of parol evidence to vary legal effect of written instrument; 54 A. D. 321, on parol evidence to control or vary written contracts; 56 A. D. 139, on rule as to varying written instrument by parol; 53 A. D. 55, on admissibility of parol stipulation to vary written contract; 67 A. D. 80, on admissibility of prior oral negotiations to control written contract; 61 A. S. R. 244, on parol evidence to vary terms of check.

— To explain word “dollars.”

Cited in *Richie v. Frazer*, 50 Ark. 393, 8 S. W. 143, holding parol evidence not admissible to modify or explain note payable in “dollars;” *Thorington v. Smith*, 1 Legal Gaz. 165, holding parol proof that promise to pay “dollars” meant Confederate treasury notes, inadmissible.

Necessity of notice of dishonor.

Cited in reference notes in 57 A. D. 622, on necessity of giving notice of dishonor of check; 85 A. D. 373, as to when notice of dishonor of check is not necessary; 52 A. D. 710, on lack of drawer's funds in hands of drawee as excuse for want of notice of dishonor.

Cited in note in 17 A. S. R. 810, on duty of holder of check in order to render drawer or indorser liable.

Effect of failure to promptly present check or give notice of dishonor.

Cited in *Fritz v. Kennedy*, 119 Iowa, 628, 93 N. W. 603, holding that failure to promptly present check not paid on presentation does not discharge drawer in absence of proof of prejudice; *Gregg v. George*, 16 Kan. 546, holding failure to promptly give notice of nonpayment of check does not discharge drawer in absence of prejudice.

Cited in notes in 53 L. R. A. 432, on necessity of loss to discharge of drawer by delay in presenting check; 53 L. R. A. 434, on what loss from delay in presenting check to drawee remaining solvent is sufficient to work a discharge on the drawer.

51 AM. DEC. 140, GARLAND v. HULL, 13 SMEDES & M. 76.**Extent of decree taken pro confesso.**

Cited in *George v. Solomon*, 71 Miss. 168, 14 So. 531; *Austin v. Barber*, 88 Miss. 553, 41 So. 265,—holding that a decree taken on a *pro confesso* can only grant such relief as the allegations in the bill show complainant is entitled to.

51 AM. DEC. 142, BOX v. STANFORD, 13 SMEDES & M. 93.**Part performance taking contract out of statute of frauds.**

Cited in *McGuire v. Stevens*, 42 Miss. 724, 2 A. R. 649; *Washington v. Soria*, 73 Miss. 665, 55 A. S. R. 555, 19 So. 485,—holding that part performance of oral agreement will not take it out of statute of frauds; *Niles v. Davis*, 60 Miss. 750,

holding that neither payment of purchase money nor improvement of property will take parol sale out of statute of frauds.

Cited in reference notes in 68 A. D. 201, on effect of part performance of parol contract for sale of land; 53 A. D. 487, on sufficiency of part performance to take parol contract out of statute of frauds; 68 A. D. 538, on part performance of parol contract concerning land as taking it out of statute of frauds; 84 A. D. 499, on applicability of statute of frauds to partially performed parol contract for sale of land; 55 A. S. R. 561, on part performance of contract for purchase of land within statute of frauds; 90 A. D. 708, as to perversion of statute of frauds into instrument of fraud.

Cited in notes in 3 L.R.A.(N.S.) 803, on sufficiency of transfer of possession of real property to satisfy statute of frauds; 6 E. R. C. 746, on right to have specific performance of contract for sale of lands under which plaintiff has altered his position, by making improvements on land or otherwise, although contract is not in writing and signed by party to be charged.

Effect of neglect to reduce contract to writing.

Cited in *Caylor v. Roe*, 99 Ind. 1, holding that neglect or refusal of one party to reduce contract to writing does not take it out of statute of frauds.

Cited in note in 25 L.R.A. 570, on prevention of reduction of contract to writing as affecting operation of statute of frauds.

Power of court to make implied exception to statute.

Cited in *Cook v. Rives*, 13 Smedes & M. 328, 53 A. D. 88, holding that court will not introduce implied exception into statute of limitations; *Hairston v. Jaudon*, 42 Miss. 380; *Gumbel v. Koon*, 59 Miss. 264,—holding that court will not engraft exception upon statute of frauds.

Cited in reference notes in 61 A. D. 745, on dispensing power of courts over statutes; 57 A. D. 189, on right of courts to consider wisdom, sound policy, or expediency of law.

Breach of oral agreement to reconvey as fraud.

Cited in *Brock v. Brock*, 90 Ala. 86, 9 L.R.A. 287, 8 So. 11, holding mere breach of oral agreement to reconvey lands on happening of certain event, not such fraud as renders grantee trustee *ex maleficio*.

Necessity of averring fraud.

Cited in *Jackson v. Myers*, 120 Ind. 504, 22 N. E. 90, holding that facts or circumstances constituting fraud must be averred.

Mode of taking advantage of statute of frauds.

Cited in reference notes in 86 A. D. 684, on right to take advantage of statute of frauds by demurrer; 72 A. D. 102, as to when statute of frauds must be pleaded and when it can be relied on by demurrer.

51 AM. DEC. 147, WOLFE v. DOE, 13 SMEDES & M. 103.

Payment or release of mortgage debt.

Cited in reference notes in 82 A. D. 58, on discharge or release of mortgage; 63 A. S. R. 467, on satisfaction or discharge of mortgage; 57 A. D. 470, on effect of payment or release of mortgage debt before or after forfeiture; 63 A. D. 339, on effect of payment or release of mortgage debt to discharge mortgage.

Cited in note in 18 E. R. C. 573, 577, on release of debt as discharge of all securities for same and necessity of reconveyance to revest legal estate in mortgagor.

—Effect of failure to enter satisfaction.

Cited in *Pickett v. Buckner*, 45 Miss. 226, holding that payment of mortgage without entry of satisfaction does not reinvest mortgagor with legal title; *Smith v. Doe*, 26 Miss. 291, holding that tender or payment of deed of trust without entry of satisfaction does not reinvest grantor with legal title.

Distinguished in *Stadeker v. Jones*, 52 Miss. 729, holding that payment of trust deed on personalty may be shown, although there has been no formal entry of satisfaction.

Deed of trust as mortgage.

Cited in *Carpenter v. Bowen*, 42 Miss. 28, holding deed of trust, species of mortgage; *Myers v. Estell*, 48 Miss. 372, holding deed of trust, same sort of security as mortgage.

Criticized in *Southern Bldg. & L. Asso. v. McCants*, 120 Ala. 616, 25 So. 8, holding deed of trust and mortgage, not synonymous, even when used in reference to security for debt.

What subject to levy or sale under execution.

Cited in reference note in 69 A. D. 422, on liability to execution of equitable interests in realty and personalty.

—Liability of mortgagor's interest.

Cited in *Cantzon v. Dorr*, 27 Miss. 245; *Paulling v. Barron*, 32 Ala. 9,—holding equity of redemption, not subject to sale under process of court of law; *Boarman v. Catlett*, 13 Smedes & M. 149; *Carpenter v. Bowen*, 42 Miss. 28,—holding when mortgage debt fully paid, interest of mortgagor subject to sale under execution; *Otley v. Haviland*, 36 Miss. 19, holding that purchaser of land sold under execution to enforce mechanics' lien acquires no title, where property subject to prior deed of trust.

Cited in note in 97 A. D. 308, on liability of mortgagor's equity of redemption to execution.

—Interest of grantee in deed of trust.

Cited in *Presley v. Rodgers*, 24 Miss. 520, holding that deed of trust of slaves does not pass an estate subject to execution at law.

Effect of interlineation in deed of trust.

Cited in *Collins v. Collins*, 51 Miss. 311, 24 A. R. 632, upholding deed of trust interlined after execution by consent of parties.

Right to maintain ejectment.

Cited in *Moody v. Farr*, 33 Miss. 192, holding that purchaser of land paying purchase money and taking title bond has mere equitable title, which will not support action in ejectment; *Heard v. Baird*, 40 Miss. 793, holding that grantee of one who has given deed of trust acquires mere equity of redemption, and cannot maintain ejectment; *Gibbs v. McGuire*, 70 Miss. 646, 12 So. 829, holding that deed without seal does not convey legal title, entitling grantee to maintain ejectment.

Cited in reference notes in 60 A. D. 422; 70 A. D. 620; 95 A. D. 790,—on need that plaintiff in ejectment recover on strength of his own title.

Proof of title in ejectment.

Cited in *Hughes v. Wilkinson*, 28 Miss. 600, holding defendant in ejectment, not precluded by proof of common source of title from showing that he claims title from another source; *Griffin v. Sheffield*, 38 Miss. 359, 77 A. D. 646, holding

that where parties in ejectment derive title from common source, defendant cannot show outstanding title with which he has no connection.

Cited in reference note in 60 A. D. 165, on what evidence of title is necessary to maintain ejectment.

Cited in note in 18 L.R.A. 781, on plaintiff in ejectment proving title.

Sufficiency of title to defeat recovery in ejectment.

Cited in *Lockhart v. Campbell*, 48 Miss. 470, holding holder of title bond who has not tendered purchase money has not superior equitable title sufficient to defeat recovery in ejectment.

Right to impeach title of common grantor.

Cited in reference note in 65 A. D. 602, on necessity of plaintiff going back of common grantor.

Cited in note in 47 A. S. R. 77, on right to impeach title of common grantor.

51 AM. DEC. 151, WILSON v. POLK, 13 SMEDES & M. 131.

Writ of assistance in aid of purchaser or his grantee.

Cited in reference notes in 78 A. D. 101; 85 A. D. 385,—on writs of assistance; 44 A. S. R. 452; 65 A. S. R. 357; 101 A. S. R. 649,—as to when writ of assistance will issue; 5 A. S. R. 250, on power to grant writ of assistance; 81 A. D. 148, on issue of writ of assistance in aid of purchaser at foreclosure sale; 92 A. D. 615, on right of officer acting under writ of assistance in suit to foreclose mortgage to put out of possession person not party to suit nor named therein.

Criticized in *Jones v. Hooper*, 50 Miss. 510, holding that purchaser on judicial sale may petition for writ of assistance in his own name.

Cited as overruled in *Gibson v. Marshall*, 64 Miss. 72, 8 So. 205, holding that purchaser at master's sale may petition for writ of assistance in aid of his grantee.

— Right to writ.

Cited in note in 93 A. S. R. 162, on persons in whose favor writ of assistance may issue.

Distinguished in *Griswold v. Simmons*, 50 Miss. 123, holding complainant becoming purchaser of land at sale under decree, entitled to writ of assistance.

Cited as overruled in *McLane v. Piaggio*, 24 Fla. 71, 3 So. 823, holding purchaser at foreclosure sale, entitled to writ of assistance.

What will defeat writ of assistance.

Annotation cited in *Fox v. Subenrauch*, 2 Cal. App. 88, 83 Pac. 82, holding that tenant of grantee of party defendant in foreclosure suit misnamed in record cannot defeat writ of assistance.

Retention of jurisdiction by court of equity.

Cited in *Griswold v. Simmons*, 50 Miss. 123, holding that equity after acquiring jurisdiction will retain it.

51 AM. DEC. 159, GOODLOE v. GODLEY, 13 SMEDES & M. 233.

Liability of principal for acts of agent.

Cited in reference notes in 94 A. D. 330, on liability of principal for acts of agent; 77 A. D. 592, on liability of principal for unauthorized act of agent; 56 A. D. 711, on liability of principal for acts of agent outside scope of authority; 53 A. D. 585, as to when bank is bound by acts of its officers; 55 A. D. 204, on necessity of specially pursuing authority of special agent.

Cited in notes in 69 A. D. 692, on liability of principal for agent's acts in excess of authority; 36 A. D. 189, on officer's or agent's notice in representative capacity to bind corporation.

Necessity of demand and notice of nonpayment.

Cited in reference notes in 64 A. S. R. 309, on presentment for payment of negotiable instruments payable on demand; 98 A. D. 426, on diligence required in giving notice of dishonor so as to charge indorser; 54 A. D. 557, on necessity for demand and notice to charge indorser of bill or note; 45 A. D. 289, on sufficiency of notice of dishonor of note, when holder is ignorant of residence of indorser.

Cited in notes in 34 A. D. 310; 77 A. S. R. 619,—on duty of collecting banks as to demand and protest.

51 AM. DEC. 163, BANK OF MISSOURI v. WELLS, 12 MO. 361.

Application of doctrine of relation to execution sales.

Cited in reference note in 65 A. D. 503, as to time from which execution lien binds property.

Cited in note in 15 A. D. 249, on application of doctrine of relation to execution sales.

Validity of sale under execution.

Cited in *Wood v. Messerly*, 46 Mo. 255, upholding sale under execution extended by statute until a term when it can be sold.

Loss of lien of judgment by sale under junior judgment.

Cited in reference note in 70 A. D. 675, on senior judgment lien being lost by sale of premises under junior judgment and execution.

Priority among executions.

Cited in reference note in 70 A. D. 603, on priority among executions.

Effect of revival of judgment.

Cited in *Whiting v. Beebe*, 12 Ark. 421, holding that revival of senior judgment does not relate back so as to make purchaser under it during suspension of lien a senior lien creditor.

Cited in reference note in 39 A. S. R. 721, on effect of revival of judgment liens.

Cited in note in 94 A. D. 245, on judgment in *scire facias* to revive judgment.

Extension of lien of judgment—By issue and levy of execution.

Cited in *Rice v. Morton*, 19 Mo. 263, holding that issue of execution prolongs lien of judgment until writ executed; *Burton v. Deleplain*, 25 Mo. App. 376, holding execution not issued so as to prolong lien of judgment, unless delivered to officer for enforcement; *Huff v. Morton*, 94 Mo. 405, 7 S. W. 283; *Riggs v. Goodrich*, 74 Mo. 108,—holding that levy of execution continues lien of judgment until writ executed; *Durrett v. Hulse*, 67 Mo. 201, holding that levy continues lien of judgment and its priority until writ executed.

Cited in reference note in 99 A. D. 271, on effect of suing out execution to continue lien of judgment.

Cited in notes in 58 A. D. 363; 70 A. D. 603,—on noncontinuance of judgment lien by levy of execution; 70 A. D. 703, on execution sued out and delivered to sheriff effecting continuance of judgment lien.

Distinguished in *Isaac v. Swift*, 10 Cal. 71, 70 A. D. 698, holding that issue and levy of execution does not prolong statutory lien of judgment.

— **By appeal and supersedeas.**

Distinguished in *Christy v. Flanagan*, 87 Mo. 670 (affirming 14 Mo. App. 253), holding judgment lien not extended by appeal and supersedeas.

51 AM. DEC. 167, STATE USE OF JACOBS v. HEARST, 12 MO. 365.

Payment and receipt of money by same person.

Cited in *Cavender v. Cavender*, 114 U. S. 464, 29 L. ed. 212, 5 Sup. Ct. Rep. 955, holding that where one person is to pay and receive same money, the law will consider that as done which ought to be done.

Capacity in which fund is held.

Cited in *Fielder v. Rose*, 61 Mo. App. 189, holding residue of estate in hands of executor, who is also life tenant, held in latter capacity; *Walker v. Walker*, 25 Mo. 367, holding legacy of wife held by husband as administrator, reduced to possession after order for payment and receipt given.

— **Right to elect as to.**

Cited in *Tittman v. Green*, 108 Mo. 22, 18 S. W. 885, holding that person occupying two different fiduciary relations may elect in which capacity he will hold trust fund.

Liability of sureties.

Distinguished in *White v. Ditson*, 140 Mass. 351, 54 A. R. 473, 4 N. E. 606, holding sureties of executor, liable for portion of estate held by him as trustee.

51 AM. DEC. 168, GIBSON v. ZIMMERMAN, 12 MO. 385.

Estate created by conveyance to husband and wife.

Cited in reference note in 88 A. D. 696, on effect of conveyance to husband and wife at common law.

Cited in notes in 26 A. R. 65; 2 L.R.A. 435,—on estate created by conveyance to husband and wife.

Distinguished in *Harrison v. McReynolds*, 183 Mo. 533, 82 S. W. 120, holding that decree in partition setting off share of husband and wife makes them tenants in common, and not by the entirety.

— **Estate in entirety.**

Cited in *Roulston v. Hall*, 66 Ark. 305, 74 A. S. R. 97, 50 S. W. 690, holding that conveyance to husband and wife, in legal contemplation, is conveyance to but one person; *Garner v. Jones*, 52 Mo. 68; *Shroyer v. Nickell*, 55 Mo. 264; *Hall v. Stephens*, 65 Mo. 670, 27 A. R. 302; *Hough v. Jasper County Light & Fuel Co.* 127 Mo. App. 570, 106 S. W. 547; *Baker v. Stewart*, 40 Kan. 442, 10 A. S. R. 213, 2 L.R.A. 434, 79 Pac. 904,—holding that deed to husband and wife conveys estate in entirety, and on death of one survivor takes estate; *Wilson v. Frost*, 186 Mo. 311, 105 A. S. R. 619, 85 S. W. 375, 2 A. & E. Ann. Cas. 557, holding that deed to husband and wife will not be construed as creating tenancy in common, and not by entirety, unless such intent is clearly shown; *Robinson v. Eagle*, 29 Ark. 202, holding statute declaring grant to two or more persons shall be in tenancy in common unless stated to be otherwise, inapplicable to conveyance to husband and wife; *McLeod v. Venable*, 163 Mo. 536, 63 S. W. 847, holding that deed to husband and wife jointly of land purchased with funds of wife, does not create estate by entirety.

Cited in reference notes in 67 A. D. 495, on conveyance to husband and

wife creating estate in entirety; 88 A. D. 696, on conveyance to husband and wife vesting in them estate by entireties; 10 A. S. R. 99, as to how estate by entirety arises and effect of statutes; 10 A. S. R. 99, on rights of survivor in estates by entireties.

Cited in notes in 30 L.R.A. 315, as to where and to what extent entirety estates exists; 18 A. D. 379, on difference between joint tenancy and estate by entirety; 13 L.R.A. 326, on court's attitude towards estates by entirety.

Husband's control over joint property.

Cited in reference note in 70 A. D. 275, on husband's control over joint property.

Right to partition between husband and wife.

Cited in *Russell v. Russell*, 122 Mo. 235, 43 A. S. R. 581, 26 S. W. 677, holding wife divorced from husband, entitled to partition of land held by them as tenants by the entirety.

51 AM. DEC. 172, HEMMAKER v. STATE, 12 MO. 453.

Jurisdiction over crimes — Continuing crimes.

Cited in *Armour Packing Co. v. United States*, 14 L.R.A.(N.S.) 400, 82 C. C. A. 135, 153 Fed. 1, holding continuing crime running through several jurisdictions, committed in and cognizable in each.

— Murder committed in another jurisdiction.

Cited in *Com. v. Macloon*, 101 Mass. 1, 100 A. D. 89, upholding right of state to try accused for murder, where deceased died in state from injury inflicted on high seas; *State v. Hall*, 114 N. C. 909, 41 A. S. R. 822, 28 L.R.A. 59, 19 S. E. 602, holding state without jurisdiction of murder committed by one within it who shoots across state boundary and kills person in another state.

Offense of bringing stolen goods into state.

Cited in *State v. Mathews*, 87 Tenn. 689, 11 S. W. 793; *State v. Butler*, 67 Mo. 59,—holding person bringing stolen property into state, punishable for larceny; *Watson v. State*, 36 Miss. 593, holding larceny considered as committed in every county or state jurisdiction into which thief carries goods.

Cited in reference notes in 40 A. S. R. 802, on bringing stolen property within state as larceny; 63 A. D. 768, as to when stealing goods in one state and bringing them to another is larceny in latter; 71 A. D. 458, as to when larceny of goods in one state and bringing them into another is larceny in the latter; 77 A. D. 259, on right of legislature to punish offense of bringing stolen goods into state.

— What law controls.

Cited in *State v. White*, 76 Kan. 654, 14 L.R.A.(N.S.) 556, 92 Pac. 829; *State v. Kief*, 12 Mont. 92, 15 L.R.A. 722, 29 Pac. 654; *Barclay v. United States*, 11 Okla. 503, 69 Pac. 798,—holding that, in determining question of larceny, law of state into which property brought controls.

Cited in note in 15 L.R.A. 723, on what law defines larceny under statute against bringing stolen property into state.

— Sufficiency of indictment.

Cited in *Norris v. State*, 33 Miss. 373, upholding indictment charging larceny of property brought into state from another state; *State v. Mintz*, 189

Mo. 268, 88 S. W. 12, holding that indictment for larceny of property brought into state need not charge that property was stolen in another state.

51 AM. DEC. 174, KNIGHTON v. TUFLI, 12 MO. 531.

When action of debt lies.

See *Seretto v. Rockland*, S. T. & O. H. R. Co. 101 Me. 140, 63 Atl. 651, holding debt maintainable for amount due on contract for construction of electric railway, abandoned before completion.

51 AM. DEC. 175, YOUSE v. NORCOMS, 12 MO. 549.

Power of married woman to convey real estate.

Cited in *Harrod v. Myers*, 21 Ark. 592, 76 A. D. 409, holding that statute enabling married woman to convey real estate does not authorize infant married woman to make conveyance; *Caho v. Endress*, 68 Mo. 224, holding that married woman attains majority for purpose of executing deeds when eighteen years of age.

Cited in reference note in 67 A. D. 288, on conveyance of wife's estate by husband.

Cited in note in 53 A. D. 399, on control of married woman over her separate estate.

Voidability of deed of infant married woman.

Cited in *Scranton v. Stewart*, 52 Ind. 68, holding deed of infant married woman, voidable.

Cited in note in 76 A. D. 418, on passing of estate in land conveyed by husband and infant wife.

Law governing rights of married persons.

Cited in reference note in 73 A. D. 287, on law governing property rights of married persons.

Effectuating intent of parties.

Cited in *Miller v. Dunn*, 62 Mo. 216, holding that court will effectuate intent of parties whether made with a view to the Spanish or common law.

Validity of infant's deed.

Cited in reference note in 60 A. D. 469, on voidability of deed of infant.

Cited in note in 18 A. S. R. 582, on validity of infant's deed of conveyance.

Disaffirmance of deed or mortgage executed by infant.

Cited in *Stull v. Harris*, 51 Ark. 294, 2 L.R.A. 741, 11 S. W. 104, holding that infant married woman may file bill to disaffirm conveyance during her husband's lifetime; *Harris v. Ross*, 86 Mo. 89, 56 A. R. 411, holding that heir of infant married woman has until expiration of statutory period after attaining majority to disaffirm deed executed by mother.

Cited in reference note in 76 A. D. 418, on disaffirmance of infant's deed.

Cited in notes in 18 A. S. R. 679, 681, on disaffirmance of deeds of infant *feme covert* after reaching majority; 18 A. S. R. 677, on disaffirmance of deeds within reasonable time after reaching majority.

—By subsequent deed.

Cited in *Peterson v. Laik*, 24 Mo. 541, 60 A. D. 441; *Norcum v. Gaty*, 19 Mo. 65, holding that conveyance made after attaining majority avoids deed

execution during minority; *Vallandigham v. Johnson*, 85 Ky. 288, 3 S. W. 173, holding that subsequent conveyance by infant amounts to disaffirmance.

Cited in reference notes in 69 A. D. 443, on disaffirmance of infant's deed by subsequent conveyance after age; 93 A. D. 124, on subsequent sale after reaching majority as disaffirmance of sale during minority.

Cited in note in 18 A. S. R. 665, on infant's disaffirmance by second deed, mortgage, or lease.

Distinguished in *Singer Mfg. Co. v. Lamb*, 81 Mo. 221, holding quitclaim deed, not disaffirmance of prior mortgage executed during minority.

Affirmance of infant's conveyance by inaction.

Cited in *Linville v. Greer*, 165 Mo. 380, 65 S. W. 579, holding mere silence or omission to act, not affirmance of deed made by minor or infant married woman; *Huth v. Carondelet Marine R. & Dock Co.* 56 Mo. 202, holding that mere silence or inaction will not prevent infant from disaffirming contract, unless continued for statutory period of limitation.

Disapproved in *Goodnow v. Empire Lumber Co.* 31 Minn. 468, 47 A. R. 798, 18 N. W. 283, holding that acquiescence beyond reasonable time after minority bars right to disaffirm conveyance.

51 AM. DEC. 184, ELKINS v. BOSTON & M. R. 19 N. H. 337.

Who may bring action.

Cited in reference notes in 91 A. D. 363, on who may maintain action against carrier for loss of goods; 61 A. D. 751, on right of agent or treasurer of private association to sue on note made to him by name with addition of agency or office.

— Undisclosed principal.

Cited in *Chandler v. Coe*, 54 N. H. 561, holding that unknown principal may sue upon express contract made by agent; *Usher v. Daniels*, 73 N. H. 206, 69 L.R.A. 629, 60 Atl. 746, 6 A. & E. Ann. Cas. 296, holding that undisclosed principal may sue upon written as well as oral contract made by agent in his own name; *Bryant v. Wells*, 56 N. H. 152, holding that undisclosed principal may sue on contract made by his agent for use and occupation of real estate; *Lake Shore & M. S. R. Co. v. Hochstim*, 67 Ill. App. 514, holding that undiscovered principal may sue carrier for loss of merchandise.

Cited in notes in 27 A. D. 137, on rights of undisclosed principal; 55 A. S. R. 917, on suits by undisclosed principals on contracts made with agents; 66 A. D. 389, on right of undisclosed principal to sue or be sued on contract not under seal made by agent.

— Bailee or consignor.

Cited in *Murray v. Warner*, 55 N. H. 546, 20 A. R. 227, holding that bailee may sue carrier delivering goods without collecting payment as directed; *Southern Exp. Co. v. Craft*, 49 Miss. 480, 19 A. R. 4, holding that consignor may sue carrier for loss of property whether owner of it or not.

Cited in note in 32 A. S. R. 726, on remedies of holder of collateral against third persons.

— Third person on contract made for his benefit.

Cited in *Butler v. Western U. Teleg. Co.* 62 S. C. 222, 89 A. S. R. 803, 40 S. E. 162, holding that signer of telegram may sue company for failure to deliver the message left with it by third person.

51 AM. DEC. 188, McNEIL v. CALL, 19 N. H. 403.**What constitutes a waiver — Of forfeiture.**

Cited in *Moore v. Beasom*, 44 N. H. 215, holding that acceptance of part of mortgage debt waives forfeiture, and precludes foreclosure.

— Of foreclosure.

Cited in *Scott v. Childs*, 64 N. H. 566, 15 Atl. 206, holding acceptance of part payment of mortgage debt, waiver of foreclosure; *Ross v. Leavitt*, 70 N. H. 602, 50 Atl. 110, holding payment of mortgage debt in whole or part, waiver of foreclosure complete or pending; *Dow v. Moor*, 59 Me. 118, holding receipt of part of debt after foreclosure, deemed waiver of foreclosure, especially when so agreed.

Distinguished in *Welch v. Stearns*, 74 Me. 71, holding that part payment of debt does not affect pending foreclosure in absence of agreement.

— Of notice.

Cited in *Lyman v. Littleton*, 50 N. H. 42, holding that town may waive statutory requirement of written notice as to support of pauper.

— Of right to deed.

Cited in *Whiting v. Butler*, 29 Mich. 122, holding that purchaser on execution sale may waive right to deed by accepting payment from debtor.

Right to costs in suit to redeem.

Cited in *Bean v. Brackett*, 35 N. H. 88, holding petitioner filing bill to redeem from mortgage, entitled to costs, if successful.

Effect of tender.

Cited in *Brown v. Simons*, 45 N. H. 211, holding mortgagee not entitled to interest after valid tender; *Ricker v. Blanchard*, 45 N. H. 39, holding that equity will relieve against forfeiture based on trifling deficiency in amount tendered mortgagee.

Cited in reference note in 60 A. D. 200, on necessity, validity, and effect of tender.

51 AM. DEC. 192, STONE v. CHESHIRE R. CORP. 19 N. H. 427.**Liability of independent contractor.**

Cited in reference notes in 72 A. S. R. 410, on liability of independent contractors; 72 A. S. R. 409, on joint liability of contractors for negligence.

Cited in note in 76 A. S. R. 427, on liability of independent contractors for negligence and other torts.

— For acts of subcontractor.

Cited in reference note in 86 A. D. 347, on contractor's liability for acts of subcontractor.

Liability of employer for acts of contractor.

Cited in *Hackett v. Western U. Teleg. Co.* 80 Wis. 187, 49 N. W. 822, holding telegraph company not liable for injury due to post hole left unguarded by contractor.

Annotation cited in *Stevens v. United Gas & Electric Co.* 73 N. H. 159, 70 L.R.A. 119, 60 Atl. 848 (dissenting opinion), on right of servant of independent contractor to recover from owner of premises for injury.

Cited in reference notes in 1 A. S. R. 744, on nonliability for acts of contractor; 63 A. D. 757; 68 A. D. 359; 74 A. D. 762; 86 A. D. 347; 24 A. S. R.

378; 66 A. S. R. 547; 76 A. S. R. 382; 88 A. S. R. 779,—on liability of employer for acts of contractor; 80 A. D. 82, on employer's liability for acts or omissions of contractor; 17 A. S. R. 932, on master's liability for acts or omissions of independent contractor; 65 A. D. 528; 27 A. S. R. 241; 40 A. S. R. 202; 43 A. S. R. 815; 45 A. S. R. 350; 51 A. S. R. 919; 64 A. S. R. 326,—on liability for negligence of independent contractor; 33 A. S. R. 696, on who are liable for independent contractor's negligence; 74 A. D. 728, as to when employer is liable for neglect of contractor; 76 A. S. R. 384, on nonliability for negligence and other torts of independent contractors; 14 A. S. R. 261, on employer's nonliability for acts, negligence, or torts of contractor; 56 A. D. 496, as to when corporations liable for acts of its contractors; 65 A. D. 210, on liability of corporation for torts of agents or contractors; 71 A. D. 286, on liability of railroad company for tortious acts of contractors; 4 A. S. R. 264, on employer's liability for injury to contractor's servant.

Cited in notes in 54 A. S. R. 92, on master's liability for acts of independent contractors; 59 A. D. 738, on liability of owner of premises for negligence of contractors; 76 A. S. R. 411, 416, on liability for negligence of independent contractor in performing railroad work; 1 E. R. C. 367, on effect of statute requiring railroad company to pay damages inflicted in constructing road; 55 A. D. 318, on liability of employer for acts or negligence of contractor; 65 L.R.A. 628, on distinction between real and personal property in reference to employer's liability for torts of independent contractors.

Distinguished in *Carter v. Berlin Mills Co.* 58 N. H. 52, 42 A. R. 572, holding one employing independent contractor to cut timber, not liable for injury due to his unreasonable use of dam.

Disapproved in *Wright v. Holbrook*, 52 N. H. 120, 13 A. R. 12, holding committee appointed by town to clear land, not liable for escape of fire set by sub-contractor.

—Blasting.

Cited in *Wetherbee v. Partridge*, 175 Mass. 185, 78 A. S. R. 486, 55 N. E. 894, holding landowner liable for injury due to blasting done by independent contractor, where danger obvious; *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 A. R. 267 (dissenting opinion), on liability of employer for negligence of contractor hired to do blasting.

Cited in notes in 14 L.R.A. 831, on employer's liability for injuries caused by independent contractor through blasting; 65 L.R.A. 855, on employer's liability for joint owner's injuries resulting from blasting operations by independent contractor.

Liability for injury inflicted by servant.

Cited in *Patterson v. Kates*, 152 Fed. 481, holding master not liable for injury inflicted by servant while running master's automobile on expedition of his own.

Cited in reference notes in 63 A. D. 589; 72 A. D. 479,—on liability of railroad for injury caused by negligence of its servants.

Cited in note in 35 A. D. 192, on liability of master for torts of servant.

Liability for negligence of agent.

Cited in reference note in 59 A. D. 220, on liability of principal for agent's lack of skill and caution.

51 AM. DEC. 206, FARNSWORTH v. CHASE, 19 N. H. 534.**Proof of usage and custom.**

Cited in *George v. Joy*, 19 N. H. 544, holding evidence of usage, admissible to explain contract of parties; *Jones v. Wick*, 10 Misc. 112, 30 N. Y. Supp. 924, holding proof of custom of trade, admissible to show intent to abandon property; *Wausau Boom. Co. v. Dunbar*, 75 Wis. 133, 43 N. W. 739, holding evidence of custom to sell for owner's benefit logs carried away by floods, admissible in action to recover boomage charges.

Cited in note in 11 A. S. R. 632, on admissibility of evidence of custom or usage to explain technical expressions in contract or to disclose intention of parties.

Usage as part of contract.

Cited in *Johnson v. Concord R. Corp.* 46 N. H. 213, 88 A. D. 199, holding parties deemed to have entered into contract of carriage with reference to established usage.

Cited in reference notes in 53 A. D. 435, on effect of custom upon contract; 54 A. D. 321, as to when usages are binding as part of contracts; 65 A. D. 379, on validity and effect of general and particular usages and customs.

Cited in note in 10 L.R.A. 785, on effect of usage on obligations of contracts.

Question for jury, as to usage.

Cited in *Milroy v. Chicago, St. P. & K. C. R. Co.* 98 Iowa, 188, 67 N. W. 276, holding existence of custom or usage, question for jury.

Cited in reference note in 70 A. D. 523, on existence of custom as question for jury.

Admissibility of deposition.

Cited in *Hayward v. Barron*, 38 N. H. 366, holding deposition inadmissible if witness is produced in court by opposite party.

Cited in reference note in 62 A. D. 521, on admissibility of deposition of witness living in town where trial actually takes place if taken to be used in another town.

51 AM. DEC. 210, BOODY v. DAVIS, 20 N. H. 140.**Sufficiency of delivery of instrument.**

Cited in *Kellogg v. Miller*, 2 McCrary, 395, 13 Fed. 198, holding delivery of mortgage to recorder for record, sufficient delivery to grantee; *Newton v. Emerson*, 66 Tex. 142, 18 S. W. 348, holding deposit of instrument with proper officer for record, constructive delivery; *Baker v. Haskell*, 47 N. H. 479, 93 A. D. 456, holding deposit of deed with third person, not good delivery, if grantor retains right to recall it; *Rogers v. Carey*, 47 Mo. 232, 4 A. R. 322, holding delivery of deed to purchaser on execution sale of interest of grantees in possession, not constructive delivery to them.

Cited in reference notes in 67 A. D. 263, on what constitutes delivery of deed; 56 A. D. 442, on what is sufficient delivery of deed; 67 A. D. 270, on recording deed as proof of delivery; 31 A. S. R. 919, on delivery of deeds by recording.

Cited in notes in 8 E. R. C. 597, on sufficiency of delivery of deed; 53 A. S. R. 549, on recording deed as delivery; 53 A. S. R. 545, on intention and acceptance on delivery of deed.

Possession as proof of delivery.

Cited in *Campbell v. Carruth*, 32 Fla. 264, 13 So. 432; *Re Minturn*, 5 Dem. 508,—holding possession of instrument, prima facie evidence of delivery.

Cited in reference note in 56 A. D. 442, on presumption of delivery from possession of deed.

Presumption of grantee's assent to deed.

Cited in reference note in 84 A. D. 564, on grantee's presumptive acceptance of deed.

Cited in note in 54 L.R.A. 894, on presumption of acceptance of deed.

Validity of mortgage.

Cited in reference note in 67 A. S. R. 889, on validity of mortgage.

Description of note secured by mortgage—Sufficiency.

Cited in *Kimball v. Cotton*, 58 N. H. 515, holding description of notes in mortgage, sufficient, although not containing every particular, if notes can be identified by the description; *Cushman v. Luther*, 53 N. H. 562, upholding mortgage, although note produced did not correspond with description in mortgage.

Cited in reference note in 63 A. D. 172, on sufficiency of description of debt in mortgage.

—Effect of variance.

Cited in *Yeaton v. Haines*, 43 N. H. 26, on effect of variance between note described in condition of bond and that actually given.

—Latent ambiguity.

Cited in *Gilman v. Moody*, 43 N. H. 239, holding that latent ambiguity in mortgage deed as to note intended raises question of law.

Parol evidence to identify note secured.

Cited in *Benton v. Sumner*, 57 N. H. 117; *Colby v. Dearborn*, 59 N. H. 326,—holding that identity of note secured by mortgage may be shown by parol; *Paine v. Benton*, 32 Wis. 491; *Thompson v. Cobb*, 95 Tex. 140, 93 A. S. R. 820, 65 S. W. 1090,—holding parol evidence admissible to identify note produced as that described in mortgage, when not totally variant; *Barker v. Barker*, 62 N. H. 366, holding that note signed by surety before execution of indemnity mortgage may be shown by parol to be secured by mortgage.

Construing ambiguity in mortgage.

Cited in *Snow v. Pressey*, 85 Me. 408, 27 Atl. 272, holding that ambiguity in mortgage may be construed in light of surrounding circumstances.

Effect of mortgage containing void condition.

Cited in *Somersworth Sav. Bank v. Roberts*, 38 N. H. 22, holding that mortgage containing condition void for uncertainty operates as absolute conveyance between parties.

51 AM. DEC. 217, PISCATAQUA EXCH. BANK v. CARTER, 20 N. H. 246.**Banking custom as to demand and notice.**

Cited in note in 21 L.R.A. 441, on banking custom as to demand and notice.

Proof of custom or usage.

Cited in *Rogers v. Allen*, 47 N. H. 529, holding proof of custom or usage, inadmissible to alter, or when opposed to, settled principles of statute or

common law; *St. Nicholas Ins. Co. v. Mercantile Mut. Ins. Co.* 5 Bosw. 238, holding that party cannot avoid express promise by proof of local custom not to require performance.

Cited in reference notes in 53 A. D. 436, on parol evidence to explain or vary contracts; 57 A. S. R. 488, on evidence of waiver of notice of presentment and dishonor; 58 A. D. 335, on parol evidence of waiver of demand and notice by indorser.

Cited in notes in 13 L.R.A. 439, on necessity that custom be not in conflict with rules of law; 57 A. D. 665, on parol testimony of waiver of right to demand and notice on part of indorser.

51 AM. DEC. 219, ADAMS v. ADAMS, 20 N. H. 299.

Acts of adultery subsequent to commencement of divorce suit—As cause of action.

Cited in *Schwab v. Schwab*, 96 Md. 592, 94 A. S. R. 584, 54 Atl. 653, holding that, in suit for divorce *a vinculo*, subsequent acts of adultery by defendant with other persons cannot be set up by supplemental bill; *Schwab v. Schwab*, 93 Md. 382, 52 L.R.A. 414, 49 Atl. 331, holding that defendant's adultery since commencement of suit for divorce *a mensa et thoro* cannot be set up by supplemental bill.

—As defense and counterclaim.

Cited in *Blanc v. Blanc*, 67 Hun, 384, 23 N. Y. Civ. Proc. Rep. 101, 22 N. Y. Supp. 264, holding that adultery of plaintiff since commencement of suit may be pleaded as defense and counterclaim in action for divorce.

Variance in proof of adultery.

Cited in reference note in 69 A. D. 406, on sufficiency of proof of adultery at different place from one alleged.

Sufficiency of allegations of adultery.

Cited in reference notes in 69 A. D. 407, on sufficiency of charge of adultery with persons unknown to libellant; 84 A. D. 168, on requisites of allegation of adultery as ground for divorce.

Setting up fresh acts of adultery by supplementary pleading.

Cited in reference note in 94 A. S. R. 603, on supplementary pleading in fresh acts of adultery.

What amendments allowable.

Cited in reference note in 55 A. D. 490, on criterion for determining whether amendment to declaration is allowable.

51 AM. DEC. 222, BRECK v. BLANCHARD, 20 N. H. 323.

Liability for acts committed under authority of process.

Cited in *Wurmser v. Stone*, 1 Kan. App. 131, 40 Pac. 993, holding officer using authority under process as a cover for illegal conduct, trespasser *ab initio*; *Stanley v. Carey*, 89 Wis. 410, 62 N. W. 188, holding creditor attaching property without right, liable for its loss by fire while in possession of officer.

Cited in reference notes in 54 A. D. 427; 99 A. D. 556,—on liability of officer for abuse of process; 84 A. D. 92, on abuse of legal process as making one trespasser *ab initio*; 62 A. D. 332, on justification of officers by their process; 56 A. D. 655, on void process as protection to officer serving it; 61 A. D. 473,

on protection of officer under process which he is executing; 60 A. D. 390, on protection of officer by process regular on its face and not disclosing want of jurisdiction; 60 A. D. 145, as to whether officer is protected in levying and selling under execution issued on satisfied judgment.

Cited in note in 24 A. S. R. 797, on conversion by agent, bailee, or officer by sale not made pursuant to authority.

51 AM. DEC. 231, LORD v. STATE, 20 N. H. 404.

Description of money or property in indictment.

Cited in *Re Waterman* (Nev.) 11 L.R.A.(N.S.) 424, 89 Pac. 291, holding that indictment for obtaining money by false pretenses must describe money obtained with same certainty as indictment for larceny.

Cited in reference notes in 55 A. D. 687, on requisites of indictment for stealing money, etc.; 10 A. S. R. 175, on description of money in indictments; 23 A. S. R. 155, on description of stolen property in indictment for larceny; 60 A. D. 440, as to certainty with which indictment should describe stolen property; 67 A. D. 675, on sufficiency of description of property in indictment for larceny; 54 A. D. 378, on sufficiency of description of money, bankbills, etc., in indictment; 54 A. D. 186, on description of money and bills in indictment for larceny; 41 A. S. R. 569, on allegation of value in indictment for larceny.

Conviction of one of two offenses in same count.

Cited in *State v. Merrill*, 44 N. H. 624, upholding conviction of one of two offenses charged in same count in indictment, after abandonment of other charge.

51 AM. DEC. 235, HAM v. BOODY, 20 N. H. 411.

Power of married woman to contract.

Cited in *Phelps v. Panama*, 1 Wash. Terr. 519, holding that married woman may contract with carrier for safe transportation.

Cited in reference note in 21 A. S. R. 931, on contracts of married women.

Right to question agent's authority.

Cited in reference note in 61 A. D. 521, on right to question agent's authority to make demand at the time only.

Ratification of unauthorized act of agent.

Cited in *Pickard v. Perley*, 45 N. H. 188, 86 A. D. 153, holding notice to quit given by unauthorized agent, not ratified by commencing suit to obtain possession; *Lyon v. Washburn*, 3 Colo. 201, holding commencement of action for rent, ratification of act of agent in accepting attornment from tenant.

51 AM. DEC. 238, BELLOWS v. RUSSELL, 20 N. H. 427.

Illegality of contract.

Cited in *Wiggins Ferry Co. v. Chicago & O. R. Co.* 5 Mo. App. 347, holding that agreements or combinations which prevent or withdraw competition are illegal; *Weld v. Lancaster*, 56 Me. 453, holding agreement to indemnify mail contractor if he will repudiate contract with government, illegal.

Cited in reference note in 67 A. D. 689, on determining contracts to be void as against public policy.

— For joint bid.

Cited in *Huntington v. Bardwell*, 46 N. H. 492, upholding agreement by one to bid for mail contract on account of himself and others in absence of fraud; *Gulick v. Webb*, 41 Neb. 706, 43 A. S. R. 720, 60 N. W. 13, holding foreclosure sale not invalidated by combination of lien holders to bid jointly because unable to do so individually.

Cited in notes in 20 L.R.A. 545, 552, on effect of preventing or checking bids on validity of sale at auction; 96 A. D. 270, on effect of combination tending to stifle competition at auctions.

Validity of contract as question for court or jury.

Cited in *Mulligan v. Smith*, 32 Colo. 404, 76 Pac. 1063, upholding instruction that certain terms or conditions would render disputed contract void as against public policy.

51 AM. DEC. 240, WELD v. SABIN, 20 N. H. 533.**Substitution of mortgagee discharging prior encumbrance.**

Cited in *Passumpsic Sav. Bank v. Weeks*, 59 N. H. 239, holding that second mortgagee paying first mortgage acquires rights of first mortgagee.

Ignorance of law as ground for relief.

Cited in *Bolles v. Dalton*, 59 N. H. 479, holding that party failing to file claim for injury from defective highway within statutory period because of ignorance of law may file it later.

51 AM. DEC. 242, BARTLETT v. PEASLEE, 20 N. H. 547.**Nature and extent of easement.**

Cited in reference note in 54 A. D. 733, on right to go *extra viam* over another's land where private way is impassable.

Cited in notes in 10 E. R. C. 34, on right and liability as to repair of easement; 15 L.R.A.(N.S.) 993, on duty of owner of servient tenement to maintain and protect easement.

51 AM. DEC. 244, WETHERBEE v. MARSH, 20 N. H. 561.**Elements increasing or mitigating damages in slander or libel.**

Cited in *Wier v. Allen*, 51 N. H. 177; *Gray v. Elzroth*, 10 Ind. App. 587, 53 A. S. R. 400, 37 N. E. 551,—holding proof of general rumors, admissible in mitigation of damages in slander suit; *B— v. I—*, 22 Wis. 372, 94 A. D. 604; *Schulze v. Jalonick*, 18 Tex. Civ. App. 296, 44 S. W. 580,—holding evidence that plaintiff was generally reputed to be guilty of the crime charged, admissible in mitigation of damages; *Montgomery v. Knox*, 23 Fla. 595, 3 So. 211, holding general belief in truth of libelous charge, admissible in mitigation of damages; *Republican Pub. Co. v. Mosman*, 15 Colo. 399, 24 Pac. 1051, holding common circulation of defamatory reports in community before publication in newspaper, admissible in mitigation; *Hess v. Ganzs*, 90 Mo. App. 439, holding proof of general report of truth of words spoken, admissible in mitigation of damages, but not in justification.

Cited in reference notes in 60 A. D. 463, on mitigation of damages in slander; 53 A. S. R. 405, on evidence of rumors in mitigation of damages in slander; 80 A. D. 90, on evidence of circulation of prior reports of similar nature in mitigation of damages in slander; 71 A. D. 274, on right to show

general bad character of plaintiff in mitigation of damages in action for libel or slander.

Cited in notes in 15 A. S. R. 342, on elements increasing or mitigating damages for newspaper libel; 55 A. S. R. 612, on right to prove other origin of defamatory charge, in mitigation of damages.

Disapproved in *Pease v. Shippen*, 80 Pa. 513, 21 A. R. 116; *Knight v. Foster*, 39 N. H. 576,—holding proof of common report, inadmissible to mitigate damages in action of slander.

Liability for repetition of slander.

Cited in reference note in 66 A. D. 348, on liability for repetition of slander already in circulation.

Admissibility of facts relied on as basis of charge.

Cited in *Wrege v. Jones*, 13 N. D. 267, 112 A. S. R. 679, 100 N. W. 705, 3 A. & E. Ann. Cas. 482, holding facts and circumstances relied on by one making slanderous charge, admissible to show absence of malice.

51 AM. DEC. 248, STATE v. COOPER, 22 N. J. L. 52.

What constitutes crime of abortion.

Cited in *Munk v. Frink*, 75 Neb. 172, 106 N. W. 425, holding that crime of abortion consists in unlawful use of drugs or instruments resulting in destruction of vitalized foetus or its mother.

Abortion as a crime.

Cited in *State v. Murphy*, 27 N. J. L. 114, construing statute against procuring abortion as not requiring averment or proof that woman swallowed potion prescribed by defendant; *State v. Gedicke*, 43 N. J. L. 89, holding proof that noxious thing administered to produce abortion will have that effect, unnecessary.

Cited in reference notes in 93 A. D. 691, on indictable nature of attempt to procure abortion; 54 A. D. 614, on indictability of performing operation to procure abortion.

Cited in notes in 66 A. D. 82, 83, on crime of causing abortion; 63 L.R.A. 908, on homicide in killing of unborn child or of attempting to commit an abortion.

— On woman not yet quick with child.

Cited in *Evans v. People*, 1 Cowen Crim. Rep. 494, holding that crime of manslaughter cannot be predicated on destruction of foetus before period of quickening; *Mitchell v. Com.* 78 Ky. 206, 39 Am. Rep. 229, holding procuring abortion of consenting woman not yet quick with child, not offense at common law; *Evans v. People*, 49 N. Y. 90, holding that conviction for manslaughter of unborn child by attempting abortion cannot be had without averring and proving its quickening.

Cited in note in 31 A. R. 149, as to whether it is an offense to take life of unborn child before quickening.

Distinguished in *Eggart v. State*, 40 Fla. 532, 25 So. 144, holding that under statute punishing mere procuring abortion, indictment need not allege woman to be quick with child.

— Resulting in death of woman.

Distinguished in *Peoples v. Com.* 87 Ky. 490, 9 S. W. 509, holding that indictment for causing death of woman by means of abortion need not allege she

was quick with child; *State v. Dickinson*, 41 Wis. 299, to point that commission of an abortion upon a consenting woman not quick with child was murder at common law if it resulted in her death; *State v. Meyer*, 64 N. J. L. 385, 45 Atl. 779, holding that death of woman not being essential element of crime, her dying declarations are inadmissible against abortionist.

— **Criminal liability of woman on whom abortion committed.**

Cited in *State v. Hyer*, 39 N. J. L. 600, holding that, under statute punishing persons advising or procuring abortion, woman voluntarily taking potion administered is not accomplice; *Abrams v. Foshee*, 3 Iowa, 279, 66 Am. Dec. 77; *Smith v. Gaffard*, 31 Ala. 51,—holding words charging woman with procuring abortion on herself before quickening, not actionable *per se*.

Attempt to commit crime.

Cited in reference note in 20 A. S. R. 745, on attempt to procure abortion.

Cited in note in 9 L.R.A.(N.S.) 264, on charge of attempt to commit offense based on attempt to do an act under mistaken belief in existence of fact without which the act, if consummated, would not have constituted the offense.

Effect of consent of other party on criminality of act.

Cited in reference note in 54 A. D. 582, on indictability of procurement of abortion with mother's consent.

Cited in note in 72 A. S. R. 700, on effect of consent to crime by persons injured thereby.

Status and rights of unborn infant.

Cited in *Dietrich v. Northampton*, 138 Mass. 16, 52 Am. Rep. 242, holding child prematurely born through mother's falling on defective highway, not "person" whose administrator can enforce town's statutory liability; *Quinlen v. Welch*, 69 Hun, 586, 23 N. Y. Supp. 963, holding child in womb, if subsequently born alive, within statute giving every "child" right of action for father's death from intoxication.

51 AM. DEC. 253, DEN EX DEM. TRUMBULL v. GIBBONS, 22 N. J. L. 117.

Unequal or unjust disposition of property as invalidating will.

Cited in *Collins v. Osborn*, 34 N. J. Eq. 511, holding inequality in disposition of property, not ground for setting aside will; *Dale v. Dale*, 36 N. J. Eq. 269, holding that testator's unequal or capricious disposition of property will not invalidate will; *Smith v. Smith*, 48 N. J. Eq. 566, 25 Atl. 11, holding that testator possessing capacity may lawfully make unjust will.

Void or impossible condition in will.

Cited in *Feit v. Richards*, 64 N. J. Eq. 16, 53 Atl. 824, holding condition in restraint of alienation of estate in fee simple, void; *Howe v. Hodge*, 152 Ill. 252, 38 N. E. 1083, holding that if subsequent condition or limitation over is void, first taker takes estate discharged of condition or limitation over; *McDonogh v. Murdoch*, 15 How. 367, 14 L. ed. 732, holding that conditions subsequent impossible of performance do not invalidate bequest.

Cited in reference note in 36 A. S. R. 619, on conditions subsequent in devise.

Taking of absolute estate under will.

Cited in reference notes in 62 A. D. 315, as to when estate is absolute;

63 A. D. 741, on first taker's right to absolute estate where limitation over is void for remoteness.

Insanity of testator as invalidating will.

Cited in *Boardman v. Woodman*, 47 N. H. 120, holding mere moral insanity unaccompanied by insane delusion, insufficient to invalidate will; *Blough v. Parry*, 144 Ind. 463, 40 N. E. 70; *Teegarden v. Lewis*, 145 Ind. 98, 40 N. E. 1047; *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333,—holding that unsoundness of mind not affecting testamentary capacity does not invalidate will.

Cited in reference notes in 55 A. D. 717, on testamentary capacity; 56 A. D. 429, on what constitutes testamentary capacity; 71 A. D. 153, on insanity, imbecility, or dotage to invalidate will; 44 A. S. R. 687, on effect of partial insanity on testamentary capacity; 61 A. D. 85, on partial insanity as ground for invalidating will.

Cited in notes in 37 L.R.A. 267, on prejudice or ill-will, as insane delusion; 63 A. S. R. 96, on insane delusion affecting testamentary capacity; 37 L.R.A. 278, on insane delusions as to misconduct of heirs.

Presumption and burden of proof as to insanity of testator.

Cited in *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L.R.A. 101, 15 Atl. 391, holding that burden of proof rests on party denying testamentary capacity, but shifts if insanity shown prior to making will; *Prentiss v. Bates*, 93 Mich. 234, 17 L.R.A. 494, 53 N. W. 153 (dissenting opinion), on burden of proof to show insanity and incapacity of testator.

Cited in reference notes in 99 A. D. 709, on burden of proof of insanity of testator; 54 A. D. 423, on evidence necessary to establish testamentary capacity.

Cited in notes in 36 L.R.A. 724, on presumption of sanity with relation to wills; 17 L.R.A. 496, on burden of proof of testamentary capacity in ejectment cases.

Nonexpert testimony as to insanity.

Cited in *State v. Pike*, 49 N. H. 399, 6 A. R. 533 (dissenting opinion), on admissibility of testimony of witness not an expert as to insanity of a person.

Admissibility of declarations of testator.

Cited in *Dinges v. Branson*, 14 W. Va. 100, holding declarations of testator made prior or subsequent to execution of will, admissible on question of mental capacity; *Boylan v. Meeker*, 28 N. J. L. 274, holding declarations of testator inadmissible to show he did not execute will.

Effect of testator's motive on validity of will.

Cited in reference note in 61 A. D. 84, on motive of testator as ground for setting aside will.

What is undue influence invalidating will.

Cited in *Waddington v. Buzby*, 43 N. J. Eq. 154, 10 Atl. 862, holding secret execution of will of aged woman by procurement of favored parties, *indicia* of undue influence; *Re Gleespin*, 26 N. J. Eq. 523, holding suspicious circumstances, insufficient to show undue influence invalidating will; *Dumont v. Dumont*, 46 N. J. Eq. 223, 19 Atl. 467, holding undue influence, not shown by fact that person discriminated against was denounced to testatrix by favored legatee; *Rusling v. Rusling*, 36 N. J. Eq. 603, holding that will was drawn by favored legatee does not of itself invalidate it.

Cited in reference notes in 56 A. D. 430, on undue influence affecting validity

of wills; 58 A. D. 272, on what constitutes undue influence invalidating will.

— **Influence destroying free agency.**

Cited in *Re DeBaun*, 2 Connoly, 304, 9 N. Y. Supp. 807; *White v. Starr*, 47 N. J. Eq. 244, 20 Atl. 875,—holding that whatever destroys free agency of testator constitutes undue influence; *Fritz v. Turner*, 46 N. J. Eq. 515, 22 Atl. 125; *Elkinton v. Brick*, 44 N. J. Eq. 154, 1 L.R.A. 161, 15 Atl. 391,—holding that undue influence must be such as to destroy free agency, and amount to moral or physical coercion; *Lynch v. Clements*, 24 N. J. Eq. 431, holding will invalid when made by aged and feeble man under control and dictation of one of his sons.

— **Excessive importunity.**

Cited in *Westcott v. Sheppard*, 51 N. J. Eq. 315, 30 Atl. 428; *Hampton v. Westcott*, 49 N. J. Eq. 522, 25 Atl. 254,—holding that excessive importunity may amount to coercion.

— **Influence acquired by kindness.**

Cited in *Seguine v. Seguine*, 3 Keyes, 663, 35 How. Pr. 336; *Seguine v. Seguine*, 4 Abb. App. Dec. 191; *Re Darst*, 34 Or. 58, 54 Pac. 947; *White v. Starr*, 47 N. J. Eq. 244, 20 Atl. 875,—holding influence acquired by kindness and affection, not undue; *Clifton v. Clifton*, 47 N. J. Eq. 227, 21 Atl. 333, holding affection and kind offices unconnected with fraud or connivance not undue influence, though inducing testamentary recompense.

Submission of issue without evidence.

Cited in *Royster v. Stallings*, 124 N. C. 55, 32 S. E. 384, holding that court should not submit issue to jury without evidence.

51 AM. DEC. 262, VANDEGRIFT v. REDIKER, 22 N. J. L. 185.

Liability of railroad company for killing of animal on track.

Cited in *Walsh v. Virginia & T. R. Co.* 8 Nev. 110, holding railroad company, not liable for killing animal on track in absence of negligence; *Case v. Central R. Co.* 59 N. J. L. 471, 59 A. S. R. 617, 37 Atl. 65, holding railroad company negligently running down trespassing animals, not liable; *Price v. New Jersey R. & Transp. Co.* 31 N. J. L. 229, denying liability of railroad company for engineer's failure to abate speed of train running down horses on track.

Cited in reference notes in 63 A. D. 625, on railroad's liability for killing animals on track; 58 A. D. 198; 75 A. D. 240,—on liability of railroad company for injuring cattle trespassing upon track; 96 A. D. 681, on liability of railroad company for killing animals trespassing on track.

Cited in note in 1 L.R.A. 449, on railroad company's liability where animals injured on trespassing on track.

Disapproved in *Moses v. Southern P. R. Co.* 18 Or. 385, 8 L.R.A. 135, 23 Pac. 498; *Washington v. Baltimore & O. R. Co.* 17 W. Va. 190; *Bostwick v. Minneapolis & P. R. Co.* 2 N. D. 440, 51 N. W. 781,—holding that railroad company must exercise ordinary care to prevent injury to animals trespassing on track.

— **Wanton and reckless negligence.**

Cited in *Stucke v. Milwaukee & M. R. Co.* 9 Wis. 202, holding railroad company liable if it wantonly runs down trespassing cattle; *Vanhorn v. Burlington, C. R. & N. R. Co.* 63 Iowa, 67, 18 N. W. 679; *Maynard v. Boston & M. R. Co.* 115 Mass. 458, 15 A. R. 119; *Louisville & F. R. Co. v. Ballard*, 2 Met. (Ky.) 177,—

holding railroad not liable for injury to animal trespassing on track in absence of wanton and reckless negligence.

Liability of owner of trespassing animal.

Cited in *Lorance v. Hillyer*, 57 Neb. 266, 77 N. W. 755, holding owner of trespassing animal escaping without negligence on his part, liable for damage committed by it.

Cited in notes in 81 A. S. R. 446, on liability of owners of trespassing animals; 49 A. D. 248, on common-law rule as to liability for trespasses of animals; 49 A. D. 249, on applicability in the United States of common-law rule as to liability for trespasses of animals.

Contributory negligence as bar to recovery.

Cited in *Moore v. Central R. Co.* 24 N. J. L. 268, denying right of person at fault to recover for injuries sustained at railroad crossing; *New Jersey Exp. Co. v. Nichols*, 33 N. J. L. 434, 97 A. D. 722, holding that person injured because of his own negligence cannot recover unless act of party complained of amounted to wilful trespass or intentional wrong.

Cited in reference note in 59 A. S. R. 619, on negligence of owner of stock killed on railroad track.

Cited in note in 53 A. D. 388, on effect of contributory negligence of party injured on his right of action.

Liability of corporation for agent's torts.

Cited in *State v. Baltimore & O. R. Co.* 15 W. Va. 362, 36 A. R. 803, holding corporation liable for wilful torts of agent.

51 AM. DEC. 265, RANDOLPH v. GWYNNE, 7 N. J. EQ. 88.

What are fixtures.

Cited in reference notes in 56 A. D. 501, on what are fixtures; 59 A. D. 658, as to when chattels are covered by mortgage on building; 59 A. D. 658, on machinery as fixture; 66 A. D. 426, on engines and boilers firmly fixed to freehold as fixtures.

Cited in note in 8 L.R.A.(N.S.) 381, on engine as fixture when placed on the land by owner of the realty.

51 AM. DEC. 267, DOUGHTY v. SOMERVILLE & E. R. CO. 7 N. J. EQ. 629.

Discretion as to granting injunction.

Cited in reference note in 77 A. S. R. 345, on discretion of court as to granting or refusing injunction.

Denial in answer operating to dissolve injunction.

Cited in note in 53 A. D. 391, as to whether special injunction will be dissolved by defendant's simple denial in answer.

Appealability of order appertaining to injunction.

Cited in *Morgan v. Rose*, 22 N. J. Eq. 583, holding order granting, refusing, sustaining, or dissolving injunction, appealable.

Effect of appeal upon injunction.

Cited in *Pennsylvania R. Co. v. National Docks & N. J. Junction Connecting R. Co.* 54 N. J. Eq. 647, 35 Atl. 433 (reversing 54 N. J. Eq. 167, 33 Atl. 936), holding injunctive provisions of decree without force pending appeal; *State ex rel.*

Carroll v. Campbell, 25 Mo. App. 635, holding that appeal with supersedeas from judgment dissolving injunction continues injunction in force.

Staying action by party pending appeal.

Cited in *Cohen v. L'Engle*, 24 Fla. 542, 5 So. 235, refusing to enjoin prosecution of suit of law pending appeal from order unless indispensable to protect rights of party; *People's Traction Co. v. Central Passenger R. Co.* 67 N. J. Eq. 370, 58 Atl. 597, restraining railroad from constructing its tracks pending appeal in an action in which its right to do so is challenged; *Woodward v. Wilkes-Barre*, 4 Kulp, 138, holding that court will not stay action by defendant pending complainant's appeal from order denying injunction unless latter will suffer irreparable injury.

Cited in note in 67 A. S. R. 717, 719, on implied power of courts to issue writs of supersedeas.

—Continuing injunction in force.

Cited in *Kimball v. Alcorn*, 45 Miss. 145, upholding suspension of order dissolving injunction pending appeal; *State ex rel. South Missouri Pine Lumber Co. v. Dearing*, 180 Mo. 53, 79 S. W. 454, holding that circuit court may continue injunction in force pending appeal from order dissolving it; *Godey v. Godey*, 39 Cal. 157, holding that determination of court below to continue injunction until hearing will not be disturbed in absence of abuse of discretion; *Harrison v. Yerby*, 87 Ala. 185, 6 So. 3, holding that appellate court will allow injunction to remain in force until final hearing, if irreparable mischief would follow its dissolution; *Delaware, L. & W. R. Co. v. Breckenridge*, 55 N. J. Eq. 159, 35 Atl. 821, refusing to continue injunction pending appeal from order modifying it.

—Reinstating injunction.

Cited in *Neiser v. Thomas*, 46 Mo. App. 47, upholding power of appellate court to reinstate injunction pending appeal from judgment dissolving it.

51 AM. DEC. 272, HALL v. LAMBERT, 7 N. J. EQ. 651.

Who entitled to be subrogated.

See *Union Mortg. B. & T. Co. v. Peters*, 72 Miss. 1058, 30 L.R.A. 829, 18 So. 497, holding one advancing money to debtor to be used in payment of prior security, entitled to remedy of subrogation.

51 AM. DEC. 275, VAN RENSSELAER v. JEWETT, 2 N. Y. 135.

When nonsuit or dismissal of complaint will be granted.

Cited in *Gans v. Woolfolk*, 2 Mont. 450, holding nonsuit improperly granted when a cause of action is proved or admitted by the pleadings; *People v. Metropolitan Teleph. & Teleg. Co.* 64 How. Pr. 120; *People v. Metropolitan Teleph. & Teleg. Co.* 11 Abb. N. C. 304,—holding nonsuit properly denied if plaintiff entitled to recover even nominal damages; *Mallory v. Tioga R. Co.* 36 How. Pr. 202, 5 Abb. Pr. N. S. 420, 1 N. Y. Trans. App. 204, 3 Abb. App. Dec. 139, 3 Keyes, 354, holding nonsuit improper where evidence sufficient to enable jury to determine extent and amount of claim; *Mallory v. Tioga R. Co.* 3 Abb. App. Dec. 139, holding nonsuit improper where there is evidence as to services rendered by plaintiff, and their value; *Nilsson v. De Haven*, 47 App. Div. 537, 62 N. Y. Supp. 506, holding dismissal of complaint, erroneous, if plaintiff entitled to recover nominal damages.

Cited in reference notes in 56 A. D. 48, on directing compulsory nonsuit; 60 A. D. 711, on grant of nonsuit where there is not sufficient evidence to justify

verdict; 66 A. D. 217, on refusal of nonsuit where there is any evidence to support a verdict; 64 A. D. 631, on ordering nonsuit where there is evidence upon which any verdict could be rendered for plaintiff.

Right to interest.

Cited in *Gray v. Central R. Co.* 157 N. Y. 483, 52 N. E. 555 (dissenting opinion), on whether interest discretionary or matter of right; *Dana v. Fiedler*, 12 N. Y. 40, 62 A. D. 130, holding that right to interest in actions upon contract depends not upon discretion, but upon legal right; *Godbe v. Young*, 1 Utah, 55, holding interest allowable as matter of right and as essential to legal indemnity in action of contract.

Cited in reference notes in 15 A. S. R. 556, on right to recover interest; 13 A. S. R. 488, as to allowance of interest; 1 A. S. R. 831; 40 A. S. R. 920,—as to when interest is allowable on debts; 31 A. R. 498, as to when interest is allowable on damages for breach of contract.

Cited in notes in 14 E. R. C. 562, on right to collect interest; 6 A. D. 195, on recovery of interest on liquidated accounts; 87 A. D. 750, as to whether interest can be recovered on penal bond beyond penalty.

— On equitable lien.

Cited in *Renwick v. Renwick*, 1 Bradf. 234, allowing interest on unsecured equitable lien payable out of the proceeds of real estate.

— On balance of bid.

Cited in *Atkinson v. Richardson*, 15 Wis. 595, requiring purchaser at sheriff's sale to pay interest on unpaid balance of bid.

— On state tax.

Cited in *People v. Myers*, 66 Hun, 167, 21 N. Y. Supp. 79, 48 N. Y. S. R. 880, upholding allowance of interest on state tax due from county.

— On rents and profits.

Cited in *Scott v. Guernsey*, 60 Barb. 103, holding cotenant receiving rents, liable to his cotenants for their shares with interest; *Cowing v. Howard*, 46 Barb. 579, holding one receiving, under claim of right, rents and profits belonging to another, liable for interest.

— On unliquidated demand.

Cited in *Sipperly v. Stewart*, 50 Barb. 62; *Kuhn v. McKay*, 7 Wyo. 42, 51 Pac. 205,—holding interest allowable on unliquidated demand, computable by reference to market values; *McMahon v. New York & E. R. Co.* 20 N. Y. 463; *Gray v. Central R. Co.* 157 N. Y. 483, 52 N. E. 555,—holding interest not allowable on claim for unliquidated damages, not capable of computation by reference to market values; *Hewes v. Germain Fruit Co.* 106 Cal. 441, 39 Pac. 853, holding interest not allowable on recovery by seller against buyer for breach of contract in absence of fixed market price for goods sold; *Kervin v. Utter*, 120 App. Div. 610, 104 N. Y. Supp. 1061, holding debtor chargeable with interest on past due account the amount of which is ascertainable by computation.

Cited in reference notes in 106 A. S. R. 494, on interest on unliquidated claim; 68 A. D. 493, on interest on unliquidated demands; 53 A. S. R. 247, on allowance of interest on unliquidated demand.

Distinguished in *Holmes v. Donihugh*, 17 Barb. 454, holding interest not recoverable on uncertain and unliquidated claim for board; *Gallup v. Perue*, 10 Hun, 625, holding interest not allowable on unliquidated claim for professional services.

— As damages.

Cited in *McCreery v. Green*, 38 Mich. 172, holding allowance of interest by way of damages, not erroneous; *Re Burke*, 117 App. Div. 479, 102 N. Y. Supp. 785, holding that arbitrators may award interest on sum found due, although question not expressly submitted; *Sommer v. Huber*, 14 Lanc. L. Rev. 121, upholding allowance of interest on recovery of damages by discharged employee for breach of contract; *Kelly v. Fall Brook Coal Co.* 67 Barb. 183, upholding allowance of interest on recovery of damages for breach of contract to load boat, which was kept waiting.

Cited in notes in 28 A. R. 314; 47 A. R. 74,—on right to interest as damages. Distinguished in *Mansfield v. New York C. & H. R. R. Co.* 114 N. Y. 331, 4 L.R.A. 566, 21 N. E. 735, holding interest not recoverable on amount of damages for breach of contract by reason of inconvenience and extra work; *Cox v. McLaughlin*, 76 Cal. 60, 9 A. S. R. 164, 18 Pac. 100, holding interest not allowable upon amount recovered for services upon a *quantum meruit*; *Dana v. Fiedler*, 1 E. D. Smith, 463, holding that allowance of interest rests in discretion of jury in action to recover damages for breach of contract to deliver goods.

Time or event from which interest is allowable — Maturity of claim.

Cited in *Livingston v. Miller*, 11 N. Y. 80, holding interest recoverable on rent from time it becomes due; *Goulds Mfg. Co. v. Munckenbeck*, 20 App. Div. 612, 47 N. Y. Supp. 325, holding that interest runs on claim for goods sold on expiration of term of credit; *Esterly v. Cole*, 3 N. Y. 502, holding interest allowable after six months on open running account for goods sold, when such is custom of neighborhood; *Christie v. Iowa L. Ins. Co.* 111 Iowa, 177, 82 N. W. 499, allowing interest from time money should have been paid under terms of mutual insurance certificate; *Glaser v. New York Physicians Mut. Aid Asso.* 32 Misc. 67, 66 N. Y. Supp. 152, holding mutual aid association liable for interest on claim remaining unpaid for thirty days after proof of death.

— Completion of contract.

Cited in *Sullivan v. McMillan*, 37 Fla. 134, 53 A. S. R. 239, 19 So. 340, upholding recovery of interest on unliquidated claim for breach of contract, computed from time contract would have been completed.

— Delivery or refusal to accept goods.

Cited in *Atlantic Phosphate Co. v. Grafflin*, 114 U. S. 492, 29 L. ed. 221, 5 Sup. Ct. Rep. 967, holding interest allowable upon delivery of goods sold in absence of other terms; *General Electric Co. v. National Contracting Co.* 178 N. Y. 369, 70 N. E. 928, holding interest allowable from time of purchaser's refusal to receive property.

— Tortious taking.

Cited in *Derby v. Gallup*, 5 Minn. 119, Gil. 85, holding in trover for attached property plaintiff entitled to interest on value of goods from time of taking.

— Demand or default.

Cited in *Beers v. Reynolds*, 11 N. Y. 97, holding interest chargeable from demand in absence of precise time of credit; *Sweeny v. New York*, 173 N. Y. 414, 66 N. E. 101, holding that interest on claim for goods sold or services rendered runs from time of demand for payment; *Marsh v. Fraser*, 37 Wis. 149, holding that open unliquidated claim for goods or services does not carry interest in absence of demand for payment; *Laycock v. Parker*, 103 Wis. 161, 79 N. W. 327, allowing interest from time of demand on unliquidated claim computable by reference to market values; *United States v. Mexican International R. Co.*

154 Fed. 519, holding interest allowable after demand for unpaid duties reliquidated by collector of customs; *Blakely v. Jacobson*, 9 Bosw. 140, holding *del credere* factor liable to principal for interest without demand on failure of purchaser to make stipulated payment; *Lyon v. Clark*, 8 N. Y. 148, holding interest allowable in action on indemnity bond from time when obligors, after having been notified, made default; *Mygatt v. Wilcox*, 1 Lans. 55; *Campbell v. Bruen*, 1 Bradf. 224,—holding interest allowable only from time of default; *De Lavallette v. Wendt*, 75 N. Y. 579, 31 A. R. 494, holding interest allowable on failure to pay fixed sum on agreed date; *Adamis v. Ft. Plain Bank*, 36 N. Y. 255, holding interest recoverable from time principal ought to be paid; *Barrow v. Reab*, 9 How. 366, 13 L. ed. 177, holding interest due on accounts or unliquidated claims from time debtor is put in default for payment of principal; *Jackson v. New York C. R. Co.* 2 Thomp. & C. 653, holding interest allowable on demand due and for which claim has been made, although formal account not made out.

Distinguished in *Currie v. White*, 37 How. Pr. 330, 6 Abb. N. C. 352, 1 Sweeny, 166, holding interest not allowable in absence of default.

— **Date of bond to obtain discharge of vessel.**

Cited in *Fitch v. Livingston*, 4 Sandf. 492, allowing interest on claim for damages sustained by vessel in collision from date of bond given to obtain discharge of colliding vessel.

— **Date of writ.**

Cited in *United States v. Hills*, 4 Cliff. C. C. 618, Fed. Cas. No. 15,369, holding surety on official bond liable for interest from date of writ.

— **Commencement of action.**

Cited in *Gallun v. Seymour*, 76 Wis. 251, 45 N. W. 115, upholding allowance of interest from commencement of action to recover damages for breach of contract; *Bremer v. Burgess*, 2 Wash. Terr. 290, 5 Pac. 840, upholding allowance of interest from commencement of action when debt liquidated at that time; *McCollum v. Seward*, 62 N. Y. 316, holding interest properly allowed on unliquidated claim from time of commencement of suit; *White v. Miller*, 78 N. Y. 393, 34 A. R. 544, holding that claim not drawing interest before suit will not thereafter unless interest could be set running by demand.

— **Date of judgment.**

Cited in *Booth v. Ableman*, 20 Wis. 602, holding that judgment rendered in United States district court for a penalty draws interest from time it is docketed; *Re Lerrian*, 44 How. Pr. 216, holding interest allowable on unsecured contract debt up to date of adjudication of bankruptcy, when there are individual and copartnership creditors.

Right to maintain ejectment for nonpayment of rent.

Cited in *Main v. Green*, 32 Barb. 448, holding that ejectment will lie between subsequent parties to lease upon breach of covenant to pay rent; *People v. Van Rensselaer*, 9 N. Y. 291, holding that state, after receiving for over a century the rent reserved in a patent, cannot maintain ejectment founded on defect in grant; *Martin v. Rector*, 118 N. Y. 476, 23 N. E. 893 (reversing 43 Hun, 371), holding statutory notice of fifteen days, not essential to right of action in ejectment for nonpayment of rent, where right of re-entry reserved in lease.

Distinguished in *Horton v. New York C. & H. R. R. Co.* 12 Abb. N. C. 30, holding that lessor may maintain ejectment after forfeiture, although lease does not reserve right of re-entry.

Liability of assignee for rent reserved in conveyance.

Cited in *Van Rensselaer v. Hays*, 19 N. Y. 68, 75 A. D. 278, holding assignee of grantee liable to grantor and his representatives for rent reserved in conveyance in fee.

Cited in reference note in 88 A. D. 331, on liability of lessee's assignee for rent.

51 AM. DEC. 279, HAY v. COHOES CO. 2 N. Y. 159.**Liability for injury to persons or property upon neighboring premises or highway.**

Cited in *McKeon v. See*, 4 Robt. 449, sustaining right to damages for injuries to buildings caused by propulsion of certain machines by steam; *Sadlier v. New York*, 40 Misc. 78, 81 N. Y. Supp. 308, holding city liable for injuries to building resulting from dirty water and sewage falling thereon from bridge; *Jutte v. Hughes*, 67 N. Y. 267, holding one liable for damage caused by filth escaping into cellar because drain pipes are not large enough and not kept in repair; *Sheldon v. Sherman*, 42 Barb. 368, holding owner of logs secured by boom, but carried down stream by unusual freshet, liable for allowing them to remain upon meadow of riparian owner unreasonable period; *Riegler v. Tribune Assn.* 40 App. Div. 324, 57 N. Y. Supp. 989, holding master liable for act of servant in emptying benzine out of window upon roof of adjoining building.

Cited in reference notes in 86 A. S. R. 844, on right to use one's own land; 88 A. S. R. 804, on extent of right to use one's own land; 31 A. S. R. 860, on liability for injuries to adjacent lands; 51 A. D. 285, 286; 79 A. D. 446; 80 A. D. 583; 91 A. D. 83,—on owner's liability for acts upon his own land causing injury to another; 76 A. S. R. 282, on duty of owner so to use property as not to interfere with rights of others; 44 A. S. R. 366, on liability of owner of real property for injuries caused by unsafe constructions.

Cited in notes in 42 A. S. R. 540, on duty to so use one's own property as not to injure another; 51 A. D. 284, on liability for damages to others from acts done on one's own land; 28 A. R. 103, on liability for malicious use of one's own property; 118 A. S. R. 870, on negligence as element of liability for maintaining or creating private nuisance; 9 L.R.A. 712, as to when conduct of business is a nuisance; 1 E. R. C. 272, 273, on liability for injury due to escape of anything likely to do harm; 61 L.R.A. 862, on injury by construction and use of canals; 22 L.R.A. 831, on principles sustaining personal liability of highway officers for negligence; 53 A. D. 368, on right to recover for consequential injuries through work authorized by law.

Distinguished in *Rotter v. Goerlitz*, 16 Daly, 484, 12 N. Y. Supp. 210, holding owner of two adjoining buildings not liable to tenant under lease containing no covenant that premises shall remain in same condition, for injury to latter's goods by contractor's removal of walls of other building leaving leased premises exposed.

— By explosions or vibrations generally.

Cited in *Heeg v. Licht*, 80 N. Y. 579, 36 A. R. 654, 8 Abb. N. C. 355, holding one maintaining powder magazine, liable for damages due to its explosion, whether negligent or not; *Rafter v. Tagliabue*, 29 Abb. N. C. 1, 21 N. Y. Supp. 107, enjoining blasting without proper safeguards to prevent injury; *Com. v. Parks*, 155 Mass. 531, 30 N. E. 174, sustaining ordinance prohibiting blasting of rock with gunpowder within city limits without consent of board of aldermen; *Parrott v. Barney*, 2 Abb. (U. S.) 197, Fed. Cas. No. 10,773, denying expressmen's liability

for damage caused by explosion of nitroglycerin which they had received for transportation at distant point without knowing or asking what it was, and which, after some had leaked out, they took to their office for examination, where it exploded; *Van Norden v. Robinson*, 45 Hun, 567, 10 N. Y. Supp. 638, holding explosion of steamboat boiler, presumed to be result of negligence in having it inspected; *McAndrews v. Collier*, 42 N. J. L. 189, 36 A. R. 508, sustaining liability for damages resulting from explosion of dynamite stored within city limits to be used in blasting for railroad tunnel; *White v. Colorado C. R. Co.* 5 Dill. 428, Fed. Cas. No. 17,543, holding it negligence for railroad company to store 160 kegs of powder in same warehouse with quantity of dry goods.

Cited in reference notes in 53 A. S. R. 585, on negligence in blasting; 31 A. S. R. 844, on injury by blasting; 32 A. S. R. 793, on negligence when blasting causing injury; 123 A. S. R. 579, on duty and liability to adjoining proprietors as to blasting which throws rocks and *débris*; 66 A. D. 799, on powder magazines as nuisances.

Cited in notes in 5 A. S. R. 538, on liability of railroad for damage by blasting; 29 L.R.A. 719, 725, on negligence in manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives; 65 L.R.A. 753, on employer's liability for blasting operations of independent contractor which will necessarily cause injury.

Distinguished in *Tucker v. Mack Paving Co.* 61 App. Div. 521, 70 N. Y. Supp. 688, sustaining right of owners of trap rock to blast out same, where blasting necessary and done in proper manner, although adjoining owners are affected by noise and jar.

— Injury to property generally by explosions, blasting, etc.

Cited in *Central Iron & Coal Co. v. Vandenheuk*, 147 Ala. 546, 119 A. S. R. 102, 6 L.R.A. (N.S.) 570, 41 So. 145, 11 A. & E. Ann. Cas. 346, enjoining casting of *débris* upon complainant's land by blasting; *Thurmond v. Ash Grove White Lime Asso.* 125 Mo. App. 73, 102 S. W. 617, holding that owner of farm occupied by another cannot recover because rocks are cast on premises by blasting in absence of injury to freehold; *Lersner v. McDonald*, 38 Misc. 734, 78 N. Y. Supp. 1125, sustaining right to recover for damages to property by bursting of water main by explosion of blast in street; *Buddin v. Fortunato*, 16 Daly, 195, 10 N. Y. Supp. 115, holding contractor liable for subcontractor's negligent injury to premises caused by blasting in street; *Laffin & R. Powder Co. v. Tearney*, 131 Ill. 322, 19 A. S. R. 34, 7 L.R.A. 262, 23 N. E. 389, sustaining right to recover for damages to property from explosion of powder magazine, where locality, quantity, and circumstances constituted nuisance *per se*.

Cited in reference note in 48 A. S. R. 155, on liability for injury to adjoining property caused by explosions.

Distinguished in *McCafferty v. Spuyten Duyvil & P. M. R. Co.* 61 N. Y. 178, 19 A. R. 267, 48 How. Pr. 44, holding railroad company constructing road, not liable for injury to property caused by rocks hurled by blast fired by subcontractor.

— Injury to buildings by explosions, blasting, etc.

Cited in *Longtin v. Persell*, 30 Mont. 306, 104 A. S. R. 723, 65 L.R.A. 655, 76 Pac. 699, 2 A. & E. Ann. Cas. 198, holding one injuring dwelling by vibrations caused by blasting, liable for damage inflicted; *Tiffin v. McCormack*, 34 Ohio St. 638, 32 A. R. 408, holding owner of quarry hiring one to quarry stone, latter

to furnish explosives, liable for damage to buildings and trees by fire thrown by blast, regardless of employee's use of care; *Frazier v. Pennypack Trap Rock Co.* 17 Montg. Co. L. Rep. 105, enjoining blasting operations in quarry which cause stones to be thrown into highway and upon buildings; *Gomdier v. Cormack*, 2 E. D. Smith, 200, holding one blasting on his own land, liable to tenant of adjoining lot for injuries to house by rocks; *Locklin v. Beckwith*, 6 N. Y. S. R. 583, holding contractors assuming liability for damages, liable for injuries to house caused by rocks being thrown against it by blasts; *Morgan v. Bowes*, 42 N. Y. S. R. 791, 17 N. Y. Supp. 22, holding one blasting rock, liable for injuries to neighboring house, caused by continuous concussions; *Holland House Co. v. Baird*, 169 N. Y. 136, 62 N. E. 149, denying liability for injuries to vault of building constructed under sidewalk, caused by blasting in trench in street as allowed by ordinance, and without negligence; *Fitz Simons & C. Co. v. Braun*, 94 Ill. App. 533, holding contractor using explosives to blast in construction of tunnel, liable for damages to brick building regardless of use of care; *Georgetown, B. & L. R. Co. v. Eagles*, 9 Colo. 544, 13 Pac. 696, holding railroad company removing rocks by blasting, liable for damages to buildings by rocks falling on them, and for loss of rents; *Colton v. Onderdonk*, 69 Cal. 155, 158 A. R. 556, 10 Pac. 395, holding owner blasting out rocks on city lot, liable for damages to adjoining dwelling, regardless of use of skill in setting off blasts; *Carman v. Steubenville & I. R. Co.* 4 Ohio St. 399, holding railroad company, jointly liable with contractor working under contract to remove rock which "must be removed by blasting," for injuries to adjoining dwelling caused by being hit by fragments thrown by blast; *Watts v. Norfolk & W. R. Co.* 39 W. Va. 196, 45 A. S. R. 894, 23 L.R.A. 674, 19 S. E. 521, denying right to recover for injuries to buildings by rocks blasted from right of way by railroad company, as such damage is simply incidental to construction of road, and presumed to have been considered when land condemned; *Rudder v. Koopman*, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, holding that storage of large quantities of dynamite and gunpowder in wooden store in thickly settled district creates liability for burning of building set on fire by firebrands thrown upon it by explosion caused by fire originating on premises of third person; *Bradford Glycerine Co. v. St. Marys' Woolen Mfg. Co.* 60 Ohio St. 560, 71 A. S. R. 740, 45 L.R.A. 660, 54 N. E. 528, holding one storing nitroglycerin on own premises, liable for injuries to surrounding property by its exploding, although no provision of law violated and negligence absent.

Cited in note in 17 L.R.A. 220, on liability for injuries to buildings and land from blasting.

Distinguished in *Page v. Dempsey*, 184 N. Y. 245, 77 N. E. 9, holding one injuring house of another by jarring or vibration due to blasting, not liable in absence of negligence; *New York Steam Co. v. Foundation Co.* 123 App. Div. 254, 108 N. Y. Supp. 84, denying liability for consequential damages resulting from vibrations caused by construction of lawful improvement in absence of negligence; *Losee v. Saratoga Paper Co.* 42 How. Pr. 385; *Losee v. Buchanan*, 51 N. Y. 476, 10 A. R. 623 (reversing 61 Barb. 86),—denying liability for injuries to property by boiler being thrown onto building as result of explosion not caused by negligence; *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 30 A. S. R. 649, 17 L.R.A. 220, 31 N. E. 328, holding that injuries to house from blasting caused by shaking of earth or pulsations of air give no right of action, in absence of negligence, where work was done under government contract to remove rocks from harbor; *Booth v. Rome, W. & O. Terminal R. Co.* 140 N. Y.

267, 37 A. S. R. 552, 24 L.R.A. 105, 35 N. E. 592, denying liability for injury to house by jarring of earth or concussion, no rocks being thrown, occasioned by blasting in railroad cut, such means being only way to accomplish work.

— **Injury to persons by explosions, blasting, etc.**

Cited in *Cary Bros. v. Morrison*, 65 L.R.A. 659, 63 C. C. A. 267, 129 Fed. 177, holding contractor liable where rocks are thrown by blasting upon persons rightfully on adjoining premises; *Hoffman v. Walsh*, 117 Mo. App. 278, 93 S. W. 853, holding contractor blasting rock, although not negligent, liable for injury inflicted on person at a distance; *Smith v. Day*, 86 Fed. 62, holding contractors blasting on government lands for river improvements, not liable to passenger on river boat hit by rock, where boat owners allowed to land near where blasting carried on, on their assuming all liability; *St. Peter v. Denison*, 58 N. Y. 416, 17 A. R. 258, sustaining right of recovery by one injured by being hit by earth and rock blasted from canal bed by contractor with state engaged in enlarging Erie Canal; *Lounsbury v. Foss*, 80 Hun, 296, 30 N. Y. Supp. 89, holding manufacturer liable for death caused by negligent explosion of dynamite; *Sullivan v. Dunham*, 161 N. Y. 290, 76 A. S. R. 274, 47 L.R.A. 715, 55 N. E. 923 (affirming 10 App. Div. 438, 41 N. Y. Supp. 1083), holding one exploding blast on own land thereby causing piece of wood to fall upon person lawfully in highway, liable as trespasser, although blast fired for lawful purpose and without negligence; *Beauchamp v. Saginaw Min. Co.* 50 Mich. 163, 45 A. R. 30, 15 N. W. 65, sustaining liability for death of boy, while on private road, from being hit on head by stone thrown by mining blast; *Wright v. Compton*, 53 Ind. 337, sustaining liability of one setting off in quarry blast which threw fragments against traveler in highway, regardless of use of care in firing.

Cited as limited in *Klepsch v. Donald*, 4 Wash. 436, 31 A. S. R. 936, 30 Pac. 991, holding that death by being hit by rock thrown by blast nearly 1200 feet constitutes only prima facie evidence of negligence, which may be rebutted by proof of due care.

— **By débris or falling objects generally.**

Cited in *Sadlier v. New York*, 104 App. Div. 82, 93 N. Y. Supp. 579 (affirmed in 185 N. Y. 408, 78 N. E. 272), holding city liable for sweeping débris from bridge upon property beneath; *McCahill v. John H. Parker Co.* 49 Misc. 258, 97 N. Y. Supp. 398, holding contractor letting bricks and mortar fall upon adjoining premises, liable for damages sustained; *Jarvis v. Baxter*, 20 Jones & S. 109, holding one liable to adjoining owner for injuries to building and furniture by fall of former's building by reason of improper construction and use of inferior materials; *Dillon v. Hunt*, 11 Mo. App. 243, holding owner liable for nuisance by permitting dangerous walls and chimney to remain after fire and allowing their removal by dangerous method; *Seabrook v. Hecker*, 2 Robt. 291, holding one erecting unsafe wall, liable for injuries resulting from its fall.

— **By pollution of air or escaping gases.**

Cited in *Robinson v. Smith*, 3 Silv. Sup. Ct. 490, 7 N. Y. Supp. 38, 25 N. Y. S. R. 647, holding that livery business so conducted as to pollute air upon neighboring premises constitutes nuisance; *Caro v. Metropolitan Elev. R. Co.* 14 Jones & S. 138, holding company authorized to construct railroad, liable for polluting air by noisome gases; *Gould v. Winona Gas Co.* 100 Minn. 258, 10 L.R.A. (N.S.) 889, 111 N. W. 254, on liability in trespass of company permitting gas to escape to the injury of trees; *Pickard v. Collins*, 23 Barb. 444, holding that one cannot erect barn in such way as to be nuisance, and allow manure and dirty water to

accumulate, casting noxious smells into adjoining house; *Hutchins v. Smith*, 63 Barb. 251, denying right of owner of limekilns to pollute air with smoke and gases to detriment of enjoyment and health of neighboring owner; *Bohan v. Port Jervis Gaslight Co.* 122 N. Y. 18, 9 L.R.A. 711, 25 N. E. 246, holding company manufacturing gas in such manner as to be nuisance, liable to adjoining owner.

—By pollution of water.

Cited in *O'Riley v. McChesney*, 3 Lans. 278, holding owner of flax mill located upon stream, liable for allowing shives to escape and pass down stream, impairing value of millpond; *Carhart v. Auburn Gaslight Co.* 22 Barb. 297, holding gas company allowing tarry and oily substances to escape into stream, liable for injury to wool of carpet manufacturers who had right to use stream; *Prentice v. Geiger*, 9 Hun, 350, denying right of upper riparian owner to deposit sawdust and rubbish in stream, thereby choking water power of lower mill owner; *Washburn v. Gilman*, 64 Me. 163, 18 A. R. 246, sustaining riparian owner's right to recover for injury to farm by driftwood thrown into stream by mill owner and carried to farm by freshets; *Whitney v. Bartholomew*, 21 Conn. 213, holding one erecting carriage and blacksmith shop close to dividing line, liable to adjoining owner for rendering water unfit and house untenable by reason of smoke and cinders.

Cited in note in 13 L.R.A. 117, on pollution of waters.

—By flooding lands or premises generally.

Cited in *Wheeler v. Norton*, 92 App. Div. 368, 86 N. Y. Supp. 1095, holding contractor breaking water pipe, liable to adjoining owner whose premises were flooded; *Duerr v. Consolidated Gas Co.* 86 App. Div. 14, 83 N. Y. Supp. 714, holding gas company and contractors, liable to one working in adjacent factory and injured by bursting of large gas tank when filled with water to test for leaks; *Selden v. Delaware & H. Canal Co.* 24 Barb. 302, holding owner entitled to recover for damages caused by water soaking through raised canal bank and flooding adjoining lands; *Pixley v. Clark*, 35 N. Y. 520, 91 A. D. 72 (reversing 32 Barb. 268), holding riparian owners liable for flooding adjoining lands by percolation of water resulting from increased pressure caused by raising artificial embankment; *Haines v. Welch*, 14 Or. 319, 12 Pac. 502, sustaining riparian owner's right to recover for injuries to land by flood caused by logs lodging in stream; *Eaton v. Boston, C. & M. R. Co.* 51 N. H. 504, 12 A. R. 147, holding railroad company removing natural bank of stream and which protected lands from freshets, liable for damages to lands from floods carrying sand and gravel; *Cahill v. Eastman*, 18 Minn. 324, Gil. 292, 10 A. R. 184, holding one constructing tunnel under portion of river, liable for damage to mill and machinery caused by water rushing through tunnel during freshet, without proof of negligence in its construction; *Peiser v. Schauning*, 14 Daly, 399, holding that negligent overflow of water on upper floor creates liability for damages to goods on lower floor; *Cotes v. Davenport*, 9 Iowa, 227, holding municipal corporation liable for negligence of officers in leaving pile of earth so as to obstruct flow of water causing it to flood adjoining lot.

Distinguished in *Gordon v. Ellensville & R. R. Co.* 119 App. Div. 797, 104 N. Y. Supp. 702, holding railroad not liable for damage to lands flooded, when its embankment gave way after heavy rainfall.

—By turning surface water on adjoining premises.

Cited in *Pohlman v. Chicago, M. & St. P. R. Co.* 131 Iowa, 89, 6 L.R.A. (N.S.)

146, 107 N. W. 1025, holding one draining surface water in such manner as to increase flow from adjoining property, not liable in trespass; *Mairs v. Manhattan Real Estate Asso.* 89 N. Y. 498 (affirming 15 Jones & S. 31), holding one flooding adjoining premises with surface water while making improvements on his own property, liable irrespective of negligence; *Ladd v. Redle*, 12 Wyo. 362, 75 Pac. 691, holding that one may erect embankments to protect his premises from overflow, but has no right to cast the water upon lands of another; *Short v. Baltimore City Pass. R. Co.* 50 Md. 73, 33 A. R. 298, denying right of street car company clothed with franchise from state to throw snow into gutter, obstructing flow of surface water and flooding house; *Brink v. Kansas City, St. J. & C. B. R. Co.* 17 Mo. App. 177, holding company constructing bridge over stream so that freshet waters are obstructed, liable for damage to crops by flood.

— **By maintenance of mill and dam.**

Cited in *Head v. Amoskeag Mfg. Co.* 113 U. S. 9, 28 L. ed. 889, 5 Sup. Ct. Rep. 441, sustaining statute authorizing erection and maintenance on one's own land of water mill and dam upon non-navigable stream.

— **By escape of electricity.**

Cited in *Cumberland Teleph. & Teleg. Co. v. United Electric R. Co.* 12 L.R.A. 544, 42 Fed. 273, holding that telephone company cannot enjoin, as nuisance, operation of electric railway, to prevent damage sustained by escape of electricity from rails.

— **By excavations generally.**

Cited in reference note in 68 A. D. 126, on owner's right to excavate on his land.

Cited in notes in 33 A. S. R. 469, on liability for negligent excavations; 13 L.R.A. 570, on duty of owner in making excavations.

— **By removal of lateral support.**

Cited in *Gillies v. Eckerson*, 97 App. Div. 153, 89 N. Y. Supp. 609, holding that owner of land which slid into pit dug on premises of another cannot recover, where excavations made by him contributed to result; *People ex rel. Barlow v. Canal Board*, 2 Thomp. & C. 275, sustaining right to recover damages for fall of building caused by excavations made in repairing Erie Canal; *Farrand v. Marshall*, 19 Barb. 380; *Farrand v. Marshall*, 21 Barb. 409,—denying right of owner to carry away so much clay to be used in making brick as will cause adjoining owner's land to fall away; *Morrison v. Latimer*, 51 Ga. 519, holding owner entitled to improve his property by grading and excavating, providing he does not displace neighbor's soil; *Moody v. McClelland*, 39 Ala. 45, 84 A. D. 770, holding that action on case will lie for cotenant's negligence in excavating near party wall causing it to settle and crack; *McGuire v. Grant*, 25 N. J. L. 356, 67 A. D. 49, holding chairman of street committee, not liable for slipping of soil into excavation made by laborers removing gravel under immediate direction of street commissioner; *Wheeler v. Wilder*, 61 N. H. 2, holding that grant of right to dig canal, if done properly, relieves of liability for natural consequences of proper construction such as removal of lateral support; *Gilmore v. Driscoll*, 122 Mass. 199, 23 A. R. 312, holding one who removes soil on own land liable for causing soil of adjoining owner to slip into pit through action of elements, but not also liable for destruction of fence and shrubbery; *Richardson v. Vermont C. R. Co.* 25 Vt. 465, 60 A. D. 283, sustaining right to damages for injury to land which slipped into excavation which

railroad company made on own land too near line; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 A. D. 357, holding city not liable in absence of negligence, for loss of land and fixtures resulting from grading street and removing bank which was natural support of premises of adjoining owner; *Ketcham v. Cohn*, 2 Misc. 427, 22 N. Y. Supp. 181, holding one employing contractor to shore up another's wall to prevent it from falling into excavation, liable for any damage as work was necessarily injurious.

Cited in reference note in 7 A. D. 65, on right to lateral support of soil.

Cited in notes in 10 E. R. C. 161, 163, on right of lateral support of land; 68 L.R.A. 685, on nature of "right to support" of land in its natural condition; 66 A. D. 648, on right to lateral support of land from adjacent land as incident to ownership; 68 L.R.A. 690, on necessity of damage to cause of action for infringement of right to lateral or subjacent support of land; 66 A. D. 650, on prescriptive right to support of buildings.

— **By removal of subjacent support.**

Distinguished in *Marvin v. Brewster Iron Min. Co.* 55 N. Y. 538, 14 A. R. 322, holding grantee of minerals in lands, not bound to support buildings subsequently erected.

— **By filling in school yard.**

Cited in *Miles v. Worcester*, 154 Mass. 511, 26 A. S. R. 264, 13 L.R.A. 841, 28 N. E. 676, holding municipal corporation liable for nuisance created by filling in school yard several feet above natural level, thereby pushing over retaining wall so as to encroach upon adjoining premises.

— **By changing street grade.**

Cited in *Hendershott v. Ottumwa*, 46 Iowa, 658, 26 A. R. 182, holding municipal corporation liable for injury to adjacent lot by dirt rolling thereon when city is engaged in raising street; *Vanderlip v. Grand Rapids*, 73 Mich. 522, 16 A. S. R. 597, 3 L.R.A. 247, 41 N. W. 677, holding municipal corporation liable for destruction of property by raising grade of street so that dirt falls upon adjoining lands covering up portion of dwelling house; *Hoffman v. St. Louis*, 15 Mo. 651, denying liability of city for damages resulting from alteration of street grade of which has been established.

— **By cutting line trees.**

Cited in *Relyea v. Beaver*, 34 Barb. 547, holding adjoining owner liable to another for cutting trees standing on line.

— **By encroachment of building.**

Cited in *Hofferberth v. Myers*, 42 App. Div. 183, 59 N. Y. Supp. 88, holding owner entitled to recover for injuries to his building by gradual encroachment of adjoining building erected by lessee on leased land.

— **By spread of fire.**

Cited in *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 298, 25 L.R.A. 161, 24 S. W. 591, upholding statute making railroad companies liable for fires set by engines without regard to negligence.

Distinguished in *Miller v. Martin*, 16 Mo. 508, 57 A. D. 242, denying liability of one setting fire to stubble on own land, which high wind carried to adjoining lands.

Liability for negligence generally.

Cited in *Mastin v. Levagood*, 47 Kan. 36, 27 A. S. R. 277, 27 Pac. 122, holding owner of threshing machine leaving bevel wheel and cogs uncovered, liable

to workman whose hand is injured while he is oiling cylinder without knowing condition of wheel and cogs.

Cited in notes in 51 A. D. 204, on employer's liability for contractor's acts if acts authorized necessarily work harm; 76 A. S. R. 399, on employer's liability for negligence and other torts of independent contractor where work causes a nuisance.

Duty of seller of explosive to warn of danger.

Cited in *Waters Pierce Oil Co. v. Davis*, 24 Tex. Civ. App. 508, 60 S. W. 453, holding one selling 87-degree gasoline, required to warn purchaser of its dangerous character.

Extent of recovery for injury.

Distinguished in *Taylor v. Metropolitan Elev. R. Co.* 18 Jones & S. 311, holding diminution in rental value of abutting property, measure of damages for erection of elevated railroad.

51 AM. DEC. 284, TREMAIN v. COHOES CO. 2 N. Y. 163.

Injury to persons or property upon neighboring premises.

Cited in notes in 118 A. S. R. 870, on negligence as element of liability for maintaining or creating private nuisance; 53 A. D. 368, on right to recover for consequential injuries through work authorized by law; 42 A. S. R. 540, on liability for injury to neighboring land from use of one's own; 13 L.R.A. 117, on pollution of waters; 61 L.R.A. 862, on injury by construction and use of canals; 90 A. D. 730, on liability of canal contractor and superintendent for failure to perform duty imposed by law.

— By excavations.

Cited in *Gildersleeve v. Hammond*, 109 Mich. 431, 33 L.R.A. 46, 67 N. W. 519 (dissenting opinion), on liability of landowner making excavation for injury to adjacent building; *Radcliff v. Brooklyn*, 4 N. Y. 195, 53 A. D. 357, denying liability of city for undermining natural bank while laying out street with due care.

Cited in reference note in 68 A. D. 126, on owner's right to excavate on his land.

— Explosions.

Cited in *Lounsbury v. Foss*, 80 Hun, 296, 30 N. Y. Supp. 89, holding one keeping explosives in place where they may cause damage, liable for resulting injury irrespective of negligence; *Heeg v. Licht*, 80 N. Y. 579, 36 A. R. 654, 8 Abb. N. C. 355 holding one maintaining powder magazine, liable for injuries due to explosion irrespective of negligence; *McAndrews v. Collerd*, 42 N. J. L. 189, 36 A. R. 508, holding contractor constructing tunnel, liable for damage to property from explosion of magazine, although not negligent; *Rudder v. Koopman*, 116 Ala. 332, 37 L.R.A. 489, 22 So. 601, holding one keeping large quantities of dynamite and gunpowder in wooden building in village, liable for damage due to explosion; *Bradford Glycerine Co. v. St. Marys Woolen Mfg. Co.* 60 Ohio St. 560, 71 A. S. R. 740, 45 L.R.A. 658, 54 N. E. 528, holding one maintaining magazine of nitroglycerin, liable for injuries caused by its exploding, although not chargeable with negligence; *Loosee v. Buchanan*, 61 Barb. 86, on liability of manufacturing company for damage caused by explosion of boiler in absence of negligence.

Cited in notes in 29 L.R.A. 725, on negligence in storage of gunpowder, nitroglycerin, dynamite and other explosives; 29 L.R.A. 719, on negligence in manufacture and storage of gunpowder, nitroglycerin, dynamite, and other explosives.

— Vibrations.

Distinguished in *Benner v. Atlantic Dredging Co.* 134 N. Y. 156, 30 A. S. R. 649, 17 L.R.A. 220, 31 N. E. 328; *Page v. Dempsey*, 184 N. Y. 245, 77 N. E. 9,—holding injury to property due to vibrations caused by blasting, not actionable in absence of negligence.

Disapproved in *Fitz Simons & C. Co. v. Braun*, 94 Ill. App. 533, holding contractor causing injury to building by vibrations due to blasting liable irrespective of negligence.

— Blasting.

Cited in *Hoffman v. Walsh*, 117 Mo. App. 278, 93 S. W. 853, holding contractor blasting rock, liable for injury to one struck by rock while working upon neighboring premises; *St. Peter v. Denison*, 58 N. Y. 416, 17 A. R. 258, holding contractor enlarging canal, liable for injury inflicted by blast upon person on adjoining premises; *Buddin v. Fortunato*, 16 Daly, 195, 10 N. Y. Supp. 115, holding contractor liable for damages caused by subcontractor's negligence in blasting; *Sullivan v. Dunham*, 161 N. Y. 290, 76 A. S. R. 274, 47 L.R.A. 715, 55 N. E. 923, holding one inflicting injury on traveler in highway by missile hurled by blast, liable irrespective of negligence; *Wright v. Compton*, 53 Ind. 337, holding owner of quarry, liable for injury to traveler in highway by stones hurled in air by blast; *Georgetown B. & L. R. Co. v. Eagles*, 9 Colo. 544, 13 Pac. 696, holding company constructing railroad, liable for injury to property by falling rock hurled in air by blast; *Thurmond v. Ash Grove White Lime Asso.* 125 Mo. App. 73, 102 S. W. 617, holding that owner of farm occupied by another cannot recover for rocks cast on land by blasting in absence of injury to inheritance; *Locklin v. Beckwith*, 6 N. Y. S. R. 583, holding contractor liable for injury to house from rocks thrown upon it by blasts; *Kratzer v. Saratoga Springs*, 8 App. Div. 613, 40 N. Y. Supp. 47 (dissenting opinion), on liability for casting rock upon premises by means of blasting; *Forrester v. O'Rourke Engineering Constr. Co.* 48 Misc. 390, 95 N. Y. Supp. 600, holding one liable for injury to neighboring premises by stones hurled by blast without proof of negligence.

Cited in reference note in 76 A. S. R. 282, on liability for injury by blasting.

Cited in notes in 17 L.R.A. 220, on liability for injuries to buildings and land from blasting; 65 L.R.A. 753, on employer's liability for blasting operations of independent contractor which will necessarily cause injury.

Criticized in *Klepsch v. Donald*, 4 Wash. 436, 31 A. S. R. 936, 30 Pac. 991, holding that liability for injury inflicted by falling rock thrown by blast depends upon negligence.

— Flooding premises.

Cited in *Lersner v. McDonald*, 38 Misc. 734, 78 N. Y. Supp. 1125, holding contractor breaking water main by blast, liable for damage due to consequent flooding of neighboring premises; *Wheeler v. Norton*, 92 App. Div. 368, 86 N. Y. Supp. 1095, holding contractor breaking water pipe and flooding premises, liable as trespasser irrespective of negligence; *Pixley v. Clark*, 35 N. Y. 520, 91 A. D. 72, holding one building dam and flowing another's land, liable irrespective of negligence; *Cotes v. Davenport*, 9 Iowa, 227, holding city liable for negligence of its agents constructing an embankment so as to flood neighboring premises.

— Fire.

Cited in *Tiffin v. McCormack*, 34 Ohio St. 638, 32 A. R. 408, holding owner of quarry, liable for damage to neighboring premises due to fire cast upon it by blast irrespective of negligence; *Mathews v. St. Louis & S. F. R. Co.* 121 Mo. 298,

25 L.R.A. 161, 24 S. W. 591, upholding statute making railroad company liable for damages caused by fire from locomotive.

— **Refuse material.**

Cited in *O'Riley v. McChesney*, 3 Lans. 278, holding mill owner casting refuse in stream, liable to lower mill owner whose pond is filled up thereby; *Riegler v. Tribune Asso.* 40 App. Div. 324, 57 N. Y. Supp. 989, holding one casting material upon his neighbor's property, liable for damages irrespective of negligence.

— **Falling wall or building.**

Cited in *Miles v. Worcester*, 154 Mass. 511, 26 A. S. R. 264, 13 L.R.A. 843, 28 N. E. 676, holding city liable for filling school yard so as to push over retaining wall upon adjoining premises; *Dillon v. Hunt*, 11 Mo. App. 246, holding landowner liable for injury to adjoining property by negligent manner in which contractor removed walls left standing after fire, *Jarvis v. Baxter*, 20 Jones & S. 109, holding owner, architect, and builder, liable for damage caused by fall of building in process of construction.

— **Destroying line trees.**

Cited in *Relyea v. Beaver*, 34 Barb. 547, holding that cutting and destruction of line trees may be restrained.

Degree of care as affecting liability.

Cited in *McAndrews v. Collierd*, 42 N. J. L. 189, 36 A. R. 508, holding that no degree of care relieves from liability for damages arising from public nuisance; *Mastin v. Levagood*, 47 Kan. 36, 27 A. S. R. 277, 27 Pac. 122, holding one performing act naturally dangerous to others, liable for injury regardless of motive or degree of care.

Validity of ordinance as to blasting.

Cited in *Com. v. Marks*, 155 Mass. 531, 30 N. E. 174, upholding ordinance forbidding blasting in city without written consent from board of aldermen.

51 AM. DEC. 286, SHORTER v. PEOPLE, 2 N. Y. 193.

Right of self-defense.

Cited in reference notes in 40 A. S. R. 732, on self-defense in cases of homicide; 62 A. D. 714, on right to commit homicide in self-defense.

Cited in notes in 6 L.R.A. 424, on right of self-defense; 3 L.R.A.(N.S.) 544, on rule that standard of determination as to danger and necessity to kill in self-defense is that of a reasonably courageous and prudent man.

— **Right to act upon appearances.**

Cited in *Owens v. United States*, 64 C. C. A. 525, 130 Fed. 279, holding that one exercising right of self-defense may act on facts as they appear to him; *State v. Ferguson*, 9 Nev. 106; *State v. Howard*, 14 Kan. 173,—holding party assailed, justified in acting upon the facts as they appear to him; *Wiggins v. United States*, 2 Cowen Crim. Rep. 443; *Evers v. People*, 3 Hun, 716, 6 Thomp. & C. 156, 2 Cowen Crim. Rep. 127; *Logue v. Com.* 38 Pa. 265, 80 A. D. 481; *Com. v. Ellenger*, 1 Brewst. (Pa.) 352,—holding that one assailed may act on reasonable appearance of imminent danger, although appearance false; *People v. McGrath*, 47 Hun, 325, 6 N. Y. Crim. Rep. 151, holding person not justified in striking another, unless it appear to be necessary for his own defense and protection; *Morris v. Platt*, 32 Conn. 75, holding one justified by appearances in attempting to kill assailant, not liable in damages, if appearances prove false.

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— Reasonable belief of danger.

Cited in *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 18, 35 L. ed. 919, 12 Sup. Ct. Rep. 109, holding that law of self-defense justifies act done in honest and reasonable belief of immediate danger; *People v. Cantor*, 71 App. Div. 185, 16 N. Y. Crim. Rep. 375, 75 N. Y. Supp. 688, holding that reasonable belief in imminent danger justifies person in acting upon appearances.

Cited in note in 3 L.R.A.(N.S.) 535, on standpoint of determination as to danger and necessity to kill in self-defense.

— Duty to decline combat.

Cited in *State v. Gibson*, 43 Or. 184, 73 Pac. 333, holding that one should avoid attack, if he can do so without danger or peril, before exercising right of self-defense; *State v. Spears*, 46 La. Ann. 1524, 16 So. 467, holding that one engaging in mutual combat cannot plead self-defense until he has declined the combat and retreated as far as he could safely.

Cited in note in 8 E. R. C. 57, on necessity of retreating to make self-defense available.

Justifiable or excusable homicide.

Cited in *People v. Webster*, 68 Hun, 11, 22 N. Y. Supp. 634, holding homicide excusable if necessary to defend life or to protect one's person from serious injury.

Cited in reference notes in 58 A. D. 254; 60 A. D. 452; 61 A. D. 58; 68 A. D. 486; 80 A. D. 400; 9 A. S. R. 308,—as to when homicide is justifiable on ground of self-defense; 15 A. S. R. 262, on self-defense to justify homicide; 52 A. D. 736, on felonious intent shown by wilful use of deadly weapon without excuse or provocation; 67 A. D. 286, on killing of assailant as justifiable homicide; 72 A. D. 201, as to whether using dangerous weapon to return blow with naked hand is justifiable; 52 A. D. 737, as to when homicide in mutual combat is manslaughter and when murder.

— Right to act on appearances.

Cited in *People v. Herbert*, 61 Cal. 544; *United States v. King*, 34 Fed. 302,—holding that apparently imminent danger of death or grievous bodily harm to person assailed entitles him to act upon appearances and kill his assailant.

— Reasonable belief of danger.

Cited in *Gladden v. State*, 12 Fla. 562; *State v. Thompson*, 9 Iowa, 188, 74 A. D. 342; *State v. Shippey*, 10 Minn. 223, Gil. 178, 88 A. D. 70; *People v. Lamb*, 2 Keyes, 360, 2 Abb. Pr. N. S. 148, 1 Cowen Crim. Rep. 423,—holding that belief of imminent danger must be reasonable to justify homicide; *Magness v. State*, 67 Ark. 594, 50 S. W. 554, holding that one assailed and having reasonable ground to believe himself in imminent danger may lawfully kill his assailant; *People v. Sullivan*, 7 N. Y. 396, 11 N. Y. Leg. Obs. 23, 2 Edm. Sel. Cas. 294, upholding charge that killing under reasonable apprehension of imminent danger was not murder; *People v. Johnson*, 139 N. Y. 358, 10 N. Y. Crim. Rep. 531, 34 N. E. 920, holding taking life in self-defense, not justifiable in absence of apparent necessity, and reasonable belief of great peril; *Wiggins v. Utah*, 93 U. S. 465, 23 L. ed. 941 (dissenting opinion), on reasonable belief in imminent danger as justifying homicide by one assailed.

— Falsity of appearances.

Cited in *Meridith v. Com.* 18 B. Mon. 49; *Holloway v. Com.* 11 Bush, 344; *State v. Sloan*, 47 Mo. 604; *Nichols v. Winfrey*, 79 Mo. 544,—holding that reasonable apprehension of imminent danger justifies homicide, although appearances

false; *People v. Taylor*, 177 N. Y. 237, 18 N. Y. Crim. Rep. 92, 69 N. E. 534, holding that reasonable apprehension of personal injury justifies homicide whether appearances prove to be true or false; *Patterson v. People*, 46 Barb. 625; *People v. Stout*, 3 Park. Crim. Rep. 670; *Uhl v. People*, 5 Park. Crim. Rep. 410,—holding homicide committed by one reasonably believing himself in danger of loss of life or great bodily harm, excusable, although danger does not actually exist.

— **Fear.**

Cited in *Creek v. State*, 24 Ind. 151, holding that actual fear of great bodily harm will not excuse homicide unless reasonable; *Harris v. State*, 47 Miss. 318, holding that fear arising from prior threats does not excuse homicide, unless effort being made to carry threat into execution.

Cited in reference note in 26 A. S. R. 85, on slayer's fear as excusing homicide.

Words as justifying assault.

Cited in *Keyes v. Derlin*, 3 E. D. Smith, 518, holding that mere words do not justify an assault.

Pursuit of retreating adversary.

Cited in *People v. Shay*, 4 Park. Crim. Rep. 344, sustaining conviction of murder, where accused cut deceased with knife, pursued him, and threatened to stab one who interfered.

Use of deadly or dangerous weapon.

Cited in *State v. Cain*, 20 W. Va. 679, holding use of deadly weapon, excusable when one has reasonable ground to believe life or person in imminent danger; *Scales v. State*, 96 Ala. 69, 11 So. 121, holding that blow with fist does not generally justify resort to deadly weapon; *People v. Filkins*, 1 Sheld. 504, holding one not entitled to attack unarmed and unresisting trespasser with dangerous weapon to protect property left in his charge.

Proof of threats, vindictiveness, or character of deceased.

Cited in *State v. Dodson*, 4 Or. 64, holding proof of threats by deceased, admissible to show defendant's fear of him; *State v. Dee*, 14 Minn. 35, Gil. 27, holding proof of vindictive feelings of deceased toward accused, admissible to show latter's apprehension of danger, reasonable; *Chase v. State*, 46 Miss. 683, holding character of deceased for peace or violence generally, inadmissible.

Cooling time as question for jury.

Cited in *People v. Kerrigan*, 147 N. Y. 210, 9 N. Y. Crim. Rep. 555, 41 N. E. 494, holding whether sufficient time elapsed between original quarrel and homicide for defendant's passions to cool, question for jury.

Liability of one breaking into house.

Cited in *Struve v. Droge*, 62 How. Pr. 233, 10 Abb. N. C. 142, holding one breaking into house under erroneous belief that it is on fire, liable in damages.

Review on appeal.

Cited in *People v. Trezza*, 128 N. Y. 529, 8 N. Y. Crim. Rep. 291, 28 N. E. 533, holding order denying motion for new trial on ground of newly discovered evidence, not reviewable on appeal or certiorari.

— **Presuming error.**

Cited in *O'Kelly v. Territory*, 1 Or. 51, holding that alleged error not disclosed by record will not be presumed.

— **Necessity or availability of exceptions.**

Cited in *Smith v. People*, 1 Colo. 121, holding instructions not excepted to, not

reviewable on appeal; *Crounse v. Fitch*, 14 Abb. Pr. 346, 23 How. Pr. 350, holding exception to erroneous exclusion of evidence, unavailable when appellant not prejudiced.

— **What constitutes reversible error generally.**

Cited in *Fry v. Bennett*, 28 N. Y. 324; *Lewis v. Hoyer*, 41 N. Y. S. R. 617, 16 N. Y. Supp. 5,—holding errors not prejudicial, not ground for reversal; *Messner v. People*, 45 N. Y. 1, 1 Cowen Crim. Rep. 348 (dissenting opinion), on reversal for error not prejudicial; *People v. Gonzales*, 35 N. Y. 49, holding error not affecting result nor working injury or injustice to accused, not ground for reversal; *Gardiner v. People*, 6 Park. Crim. Rep. 155, holding technical error not prejudicial, not ground for reversal; *People v. Burns*, 33 Hun, 296, 2 N. Y. Crim. Rep. 415, holding that erroneous rulings should be disregarded on appeal, if not prejudicial; *Buck v. Waterbury*, 13 Barb. 116, holding that error will not lie for an erroneous decision, when no harm was done by it; *Shaw v. People*, 3 Hun, 272, 2 Cowen Crim. Rep. 200, 5 Thomp. & C. 439, reversing conviction because of absence for one day of one of the justices of the sessions.

Cited in reference notes in 59 A. D. 630, on effect of nonprejudicial error on right to reversal; 60 A. D. 440, on refusal to reverse for nonprejudicial errors.

— **Erroneous admission of evidence.**

Cited in *Taylor v. People*, 6 Park. Crim. Rep. 347, holding erroneous admission of evidence, not ground for reversal when not prejudicial; *People v. Gaffney*, 1 Sheld. 304, holding erroneous admission of irrelevant, but not prejudicial evidence, not ground for setting aside verdict; *Ashley v. Marshall*, 29 N. Y. 494, holding admission of improper evidence not bearing on the issues, not ground for new trial; *Eggler v. People*, 3 Thomp. & C. 796, holding erroneous admission of opinion of physician making post mortem examination as to cause of death, not ground for reversal.

— **Erroneous charge generally.**

Cited in *State v. Church*, 6 S. D. 89, 60 N. W. 143, holding erroneous instruction, not ground for reversal, if not misleading; *Luby v. State*, 102 Ga. 633, 29 S. E. 494, holding erroneous instruction, not ground for new trial, where verdict manifestly right on evidence.

Cited in reference notes in 55 A. D. 105, on questions for jury and instructions in criminal cases; 53 A. D. 419, as to when erroneous instructions will warrant reversal of judgment.

— **Erroneous, but not prejudicial, charge.**

Cited in *Mackey v. People*, 2 Colo. 13, holding erroneous charge, not ground for new trial, unless prejudicial; *People v. White*, 55 Barb. 606, refusing to set aside verdict because of erroneous, but not prejudicial, charge; *Stearnes v. State*, 21 Tex. 692, refusing to set aside conviction justified by evidence because of erroneous, but not prejudicial, charge.

Cited in note in 99 A. D. 131, on harmless instructions a ground for new trial or reversal.

— **Abstract charge.**

Cited in *State v. Waterman*, 1 Nev. 543; *People v. Horton*, 4 Mich. 67,—holding erroneous charge upon immaterial and abstract propositions, not ground for reversal; *People v. Marble*, 38 Mich. 117, holding ineffective instruction on abstract question, not ground for new trial; *Dows v. Rush*, 28 Barb. 157, holding charge which is immaterial or inapplicable to the facts, not ground for reversal; *Horner v. Wood*, 16 Barb. 386; *Brown v. Lillie*, 6 Nev. 244,—holding erroneous

instruction inapplicable to issues, not reversible error; *State v. Weaver*, 35 Or. 415, 58 Pac. 109, holding erroneous charge not based upon the evidence, not ground for reversal; *People v. Cochran*, 61 Cal. 548, holding erroneous instruction not based upon facts in evidence, not presumptively prejudicial; *O'Connell v. State*, 18 Tex. 343, holding omission of court to charge upon subject not called for by evidence, not ground for reversal; *Berry v. State*, 8 Tex. App. 515, holding that whether particular charge required or not depends on evidence adduced.

— **Giving of requested charge.**

Cited in *State v. Watson*, 63 Me. 128, holding substantial compliance with request to charge, sufficient; *Carpenter v. State*, 43 Ind. 371, holding that requested specific instruction as to justifiable homicide, applicable to the evidence, should be given; *Knickerbocker v. People*, 43 N. Y. 177, 1 Cowen Crim. Rep. 287, holding refusal of hypothetical charge, not erroneous; *State v. Maloy*, 44 Iowa, 104, holding court justified in refusing to submit to jury question not based on evidence.

Office of bill of exceptions.

Cited in note in 99 A. D. 137, on office of bill of exceptions.

51 AM. DEC. 294, CANDEE v. LORD, 2 N. Y. 269.

Conclusiveness of judgment.

Cited in reference note in 55 A. D. 571, on conclusiveness of judgment of court of concurrent jurisdiction between the same parties on the same matter.

Cited in note in 53 A. D. 337, on conclusiveness of judgment upon parties and privies.

— **As to creditors.**

Cited in *Mowry v. Davenport*, 6 Lea, 80, holding judgment obtained against debtor on compromise without fraud or collusion, binding on creditors; *Pray v. Hegeman*, 98 N. Y. 351, holding judgment denying right of party to accumulations of trust estate, binding upon his judgment creditors; *Herring v. New York, L. E. & W. R. Co.* 105 N. Y. 340, 12 N. E. 763, holding judgment in foreclosure action against railroad corporation, binding on unsecured creditors; *Vincent v. Philips*, 48 La. Ann. 351, 19 So. 143, holding creditors of succession, bound by judgment rendered against administratrix; *Bank v. Hasbrouck*, 6 N. Y. 216, holding decree of surrogate directing payment on particular demand to certain person, not conclusive upon creditor not appearing; *Voorhees v. Seymour*, 26 Barb. 569, holding judgment establishing lien by way of pledge on bank stock, binding on judgment creditor and receiver in supplementary proceedings.

Cited in reference note in 56 A. S. R. 883, on conclusiveness of judgment as to other creditors of defendant.

— **As to grantee or assignee.**

Cited in *Carpenter v. Osborn*, 102 N. Y. 552, 7 N. E. 823, holding judgments recovered against fraudulent grantor, binding on his grantees; *Johnson v. Stebbins-Thompson Realty Co.* 177 Mo. 581, holding judgment against grantor, conclusive upon voluntary grantee; *Ludington's Petition*, 5 Abb. N. C. 307; *Merchants' Nat. Bank v. Hagemeyer*, 4 App. Div. 52, 38 N. Y. Supp. 626, 25 N. Y. Civ. Proc. Rep. 332,—holding judgment against assignor for benefit of creditors, binding on assignee whether recovered before or after assignment.

— **As to third persons generally.**

Cited in *Railroad Equipment Co. v. Blair*, 145 N. Y. 607, 39 N. E. 962,

holding judgment admissible against third persons to show transfer of rights thereunder; *Bowe v. McNab*, 11 App. Div. 386, 42 N. Y. Supp. 938, holding judgment determining title to personal property, admissible in action by county treasurer to recover taxes thereon; *Atkins v. Hosley*, 3 Thomp. & C. 322, holding judgment depriving purchaser of chattel, admissible in action for breach of warranty; *Compton v. Jesup*, 15 C. C. A. 397, 31 U. S. App. 486, 68 Fed. 263, on conclusiveness upon mortgagee of decree binding upon mortgagor or his privies with reference to ownership of equity of redemption.

—To establish relation of creditor and debtor.

Cited in *Hall v. Stryker*, 27 N. Y. 596, holding that judgment establishes conclusively the relation of creditor and debtor; *Breen v. Henry*, 34 Misc. 232, 69 N. Y. Supp. 627, holding that judgment recovered upon note establishes fact that debtor made it; *Westervelt v. Smith*, 2 Duer, 449, 12 N. Y. Leg. Obs. 78, holding judgment establishing liability of deputy to sheriff for neglect of duty, binding on bondsmen of deputy; *Salemonson v. Thompson*, 13 N. D. 182, 101 N. W. 320; *Union Nat. Bank v. International Bank*, 22 Ill. App. 652; *Acker v. Leland*, 109 N. Y. 5, 15 N. E. 743; *Townslly-Myrick Dry Goods Co. v. Fuller*, 58 Ark. 181, 41 A. S. R. 97, 24 S. W. 108,—holding judgment obtained without fraud or collusion, conclusive against creditors of judgment debtor as to fact and amount of indebtedness; *First Nat. Bank v. Oldham*, 6 Lea, 718, holding judgment not impeached for fraud, conclusive on third person as to fact and amount of indebtedness; *Ledoux v. Bank of America*, 24 App. Div. 123, 48 N. Y. Supp. 771, holding judgment establishing fact and amount of indebtedness, conclusive against strangers in absence of fraud or collusion; *Sidensparker v. Sidensparker*, 52 Me. 481, 83 A. D. 527, holding judgment conclusive against third persons as to fact and amount of indebtedness in absence of fraud, collusion, want of jurisdiction, or error of law; *Wild v. Porter*, 59 App. Div. 350, 69 N. Y. Supp. 839, holding that judgment by confession establishes fact and amount of indebtedness, and can only be impeached for fraud or collusion; *Jackson v. Holbrook*, 36 Minn. 494, 1 A. S. R. 683, 32 N. W. 852, holding judgment prima facie evidence of fact and amount of indebtedness, which may be supplemented by evidence *aliunde*; *Seymour v. Berg*, 127 Ill. App. 369, holding judgment for wages, conclusive against third parties as to its existence, amount, and nature; *Ayres v. Cone*, 71 C. C. A. 144, 138 Fed. 778; *Re Henry Ulfelder Clothing Co.* 98 Fed. 409,—holding adjudication in proceeding in involuntary bankruptcy of indebtedness of bankrupt to petitioning creditor, conclusive upon other creditors; *Swihart v. Shaum*, 24 Ohio St. 432; *Strong v. Lawrence*, 58 Iowa, 55, 12 N. W. 74,—holding judgment conclusive as to fact and amount of indebtedness in suit to set aside conveyance by debtor as fraudulent; *Forist v. Bellows*, 59 N. H. 229, holding decree determining person not chargeable with proceeds of lands, binding on creditor seeking to charge such person as trustee in foreign attachment; *Lawson v. Alabama Warehouse Co.* 73 Ala. 289; *Pickett v. Pipkin*, 64 Ala. 520,—holding judgment against donor or grantor, conclusive evidence of debt existing at time of its rendition; *Schmitt v. Dahl*, 88 Minn. 506, 67 L.R.A. 590, 93 N. W. 665, holding judgment entered subsequent to conveyance, not proof of prior existence of claim upon which it is based; *Nicholas v. Lord*, 118 App. Div. 800, 103 N. Y. Supp. 681, holding indebtedness at time of execution of deed of trust, conclusively established against trustee by judgment subsequently recovered against debtor; *Newman v. Home Ins. Co.* 20 Minn. 422, Gil. 378, holding that judgment determining that plaintiff is equitable mortgagee establishes

relation of debtor and creditor at date of mortgage; *Jarvis v. Sewall*, 40 Barb. 449, holding record of recovery against sureties on appeal, competent evidence in action on indemnity bond given them; *Hersey v. Benedict*, 15 Hun, 282, holding judgments, conclusive evidence of indebtedness upon questions affecting title to judgment debtor's property.

Cited in reference note in 90 A. D. 299, on judgment against debtor as proof of indebtedness in creditors' suit.

Cited in notes in 42 L. ed. U. S. 358, on judgment as evidence in favor of judgment creditor as to fact and amount of claim; 67 L.R.A. 593, on conclusive effect of judgment on which action to set aside alleged fraudulent conveyance is based; 67 L.R.A. 601, on conclusiveness of judgment on which action to set aside alleged fraudulent conveyance is based as to defense of forgery; 67 L.R.A. 596, on effect of time of alleged fraudulent conveyance on conclusive effect of judgment on which action to set aside conveyance is based.

— Effect of fraud or collusion.

Cited in *Alkire Grocery Co. v. Richesin*, 91 Fed. 79, holding judgment procured without fraud or collusion, binding on debtor and codefendants in creditors' bill; *Minnesota Thresher Mfg. Co. v. Schaack*, 10 S. D. 511, 74 N. W. 445, upholding conclusiveness as against fraudulent grantee of judgment rendered against grantor, in absence of fraud or collusion; *Peyser v. Myers*, 56 Hun, 175, 9 N. Y. Supp. 239, holding judgment designed to transfer property of insolvent debtor in fraud of creditors, not conclusive; *Stimson v. Wrigley*, 86 N. Y. 332, holding that judgment conclusive between parties may be assailed by creditor for fraud; *Raymond v. Richmond*, 78 N. Y. 351, holding that judgment conclusive against debtor may be assailed by execution creditor as fraudulent; *Allen v. Morris*, 34 N. J. L. 159, holding purchaser at sheriff's sale pending foreclosure of fraudulent mortgage, not concluded by decree therein; *McParland v. Bain*, 26 Hun, 38, holding that judgment creditor may attack as collusive and fraudulent judgment recovered against corporation; *Sweet v. Converse*, 88 Mich. 1, 49 N. W. 899, holding foreclosure decree fraudulently used to acquire assets of mortgagor for nominal consideration, not conclusive against creditors.

Limited in *Brooks v. Wilson*, 125 N. Y. 256, 26 N. E. 258 (reversing 53 Hun, 173), holding foreclosure judgment, not conclusive of bona fides of mortgage as against judgment creditor of mortgagor.

— Collateral impeachment.

Cited in *McAlpine v. Sweetser*, 76 Ind. 78, holding creditors not entitled to collaterally impeach valid judgment rendered against their debtor; *McCanless v. Smith*, 51 N. J. Eq. 505, 25 Atl. 211, holding that alleged fraudulent grantee cannot impeach judgment against grantor except for fraud and collusion; *Reid v. Brown*, Wilson Super. Ct. (Ind.) 312, holding that alleged fraudulent grantee of debtor cannot attack judgment of his creditor for want of valid consideration; *Wells v. O'Connor*, 27 Hun, 426, holding that judgment on which action to set aside alleged fraudulent conveyance is based may be attacked as collusive; *Dreyfuss v. Charles Seale & Co.* 18 Misc. 551, 41 N. Y. Supp. 875, holding judgment upon which creditor's suit is founded, not impeachable for irregularity; *Hogg v. Link*, 90 Ind. 346, holding purchaser of land with notice of judgment lien, without right to impeach judgment for fraud practised against debtor in its procurement.

Cited in reference notes in 59 A. D. 622, on whether judgment in creditor's

suit is impeachable; 40 A. S. R. 634, on right to go behind judgment in suit by judgment creditor to set aside conveyances; 90 A. D. 298, on collateral attack upon judgment on which creditors' bill is founded.

Conclusiveness of claim before judgment.

Cited in *Hall v. Stryker*, 27 N. Y. 596, on whether plaintiff in suit for attaching property entitled to controvert attaching creditor's debt.

Creditor's rights as coextensive with those of debtor.

Cited in *State Nat. Bank v. Bryant*, 49 La. Ann. 467, 22 So. 89, holding that ordinary creditors, in absence of fraud, hold under rights of their debtor; *Miller v. Lewis*, 4 N. Y. 554, holding debtor's contracts made in good faith, for valuable consideration, binding on creditors existing or subsequent who have not obtained liens; *Murray v. Judson*, 9 N. Y. 73, 57 A. D. 516, holding general assignment, not invalidated by preference of usurious judgment; *Hamilton T. Co. v. Clemes*, 17 App. Div. 153, 45 N. Y. Supp. 141, holding mortgage and bonds issued by corporation, valid against subsequent lienors in absence of fraud; *Curtis v. Leavitt*, 15 N. Y. 9, holding that receiver cannot repudiate for the benefit of creditors trusts valid as against corporation.

Debtor's estate as trust fund.

Cited in *Re Callaghan*, 69 Hun, 161, 23 N. Y. Supp. 378, holding decedent's debts and funeral expenses, payable out of surplus moneys arising from foreclosure sale of his real estate within four years; *Holmes v. Davenport*, 27 Abb. N. C. 341, 18 N. Y. Supp. 56, holding that insolvent husband may pay premium on insurance policy for benefit of wife.

Conveyance in fraud of intending creditor.

Cited in *Bishop v. Redmond*, 83 Ind. 157, holding that conveyance made prior to contracting indebtedness, for the purpose of escaping liability may be set aside as fraudulent.

Defense in action for wrongful levy.

Cited in *Masters v. Teller*, 8 Okla. 271, 56 Pac. 1067, holding that officer taking property of third person under execution must plead and prove valid execution and judgment.

Right of person in equal fault to relief.

Cited in *Kerrison v. Kerrison*, 60 How. Pr. 51, 8 Abb. N. C. 450, refusing to annul marriage contracted with divorced person without state to evade prohibition in divorce decree.

Appealability of order.

Cited in *Lansing v. Russell*, 2 N. Y. 563, 4 How. Pr. 213, holding that appeal will not lie from order of chancellor granting new trial of issues tried at law; *Wood v. New York*, 4 Abb. Pr. N. S. 152, denying appealability of order settling issues for trial by jury; *Wesson v. Chamberlain*, 3 N. Y. 331, holding order granting motion to set aside receiver's sale of real estate, not appealable; *Howell v. Mills*, 53 N. Y. 322, holding order denying motion for a resale, not discretionary and appealable.

Distinguished in *Newark & N. Y. R. Co. v. Newark*, 23 N. J. Eq. 515, holding that appeal lies from order for trial by jury.

Special issues of fact.

Cited in *Devin v. Patchin*, 26 N. Y. 441, holding that court of appeals would not attempt to control discretion of supreme court in awarding issue to be tried at circuit; *State v. Sunapee Dam Co.* 72 N. H. 114, 55 Atl. 899, holding that

chancellor may in his discretion inform his conscience by personal hearing, reference, or framing issues for jury.

— **Conclusiveness of finding on.**

Cited in *Clark v. Brooks*, 2 Abb. Pr. N. S. 385, 1 Abb. App. Dec. 355, holding that court awarding trial of special issues may accept or discard result; *Hegeman v. Cantrell*, 50 How. Pr. 188, holding findings of jury on special issues of fact, merely for information of court.

51 AM. DEC. 299, PITT v. CONGDON, 2 N. Y. 352.

Accommodation indorser or acceptor as surety.

Cited in *Vose v. Florida R. Co.* 50 N. Y. 369; *Boyd v. Finnegan*, 3 Daly, 222, 39 How. Pr. 389,—holding that accommodation indorser stands in character of surety; *Morrison v. Citizens' Nat. Bank*, 65 N. H. 253, 23 A. S. R. 39, 9 L.R.A. 282, 20 Atl. 300, assuming indorser of note, entitled to rights of surety; *New York First Nat. Bank v. Morris*, 1 Hun, 680, 4 Thomp. & C. 182, holding accommodation acceptor of draft, surety for its payment.

Cited in reference notes in 55 A. D. 159, on accommodation indorser or acceptor as surety of principal debtor as to all persons with notice; 56 A. D. 68, on accommodation indorser or acceptor as surety for principal.

Discharge of surety or guarantor.

Cited in *Wells v. Mann*, 45 N. Y. 327, 6 A. R. 93, holding surety discharged by payee's failure upon request to collect from makers while solvent; *Powers v. Silberstein*, 19 Jones & S. 321, holding accommodation indorser who offered to pay note, discharged by holder's failure to collect from makers while solvent; *Converse v. Cook*, 25 Hun, 44, holding accommodation indorser, not discharged by holder's failure, on request, to proceed against solvent maker; *Deck v. Works*, 18 Hun, 266, 57 How. Pr. 292, holding guarantor of note, not discharged by holder's omission to give indorser notice of nonpayment.

Cited in reference note in 70 A. S. R. 893, on discharge of bona fide indorser.

— **By waste or surrender of security.**

Cited in *Lamoille County Nat. Bank v. Hunt*, 72 Vt. 357, 47 Atl. 1078, holding surety executing renewal note as comaker, not discharged because payee wasted securities; *Artisans' Bank v. Backus*, 31 How. Pr. 242, holding accommodation indorser, not discharged by redelivery to maker of mortgage securing note, if time of payment not extended.

Rights and liabilities of acceptor, indorser, maker, or surety.

Cited in *Toronto v. Hunter*, 4 Bosw. 646, 20 How. Pr. 292, holding accommodation acceptor, entitled, on payment, to be subrogated to position of holder of bill; *Cassebeer v. Kalbfleisch*, 11 Hun, 19, holding that accommodation indorser paying note in good faith may recover from maker who discounted it at usurious rate; *Spies v. National City Bank*, 174 N. Y. 222, 61 L.R.A. 193, 66 N. E. 736, holding liability of indorser, not preserved by reservation of claim against him by holder when releasing judgment against maker on payment of less sum than due; *Williams v. Townsend*, 1 Bosw. 411, holding that taking collateral note and mortgage from debtor does not operate to suspend remedy against surety.

Cited in reference notes in 65 A. D. 372; 74 A. D. 432,—on rights of accommodation indorsers; 55 A. D. 159; 53 A. D. 68; 61 A. D. 294,—on rights and

liabilities of accommodation indorsers, acceptors, and makers; 71 A. D. 695, on liability to holder of maker of accommodation note.

Cited in note in 58 A. D. 211, on accommodation acceptor's liabilities.

Duty of bank to apply deposit to indebtedness.

Cited in *National Bank v. Smith*, 66 N. Y. 271, 23 A. R. 48 (affirming 5 Hun, 183), holding bank not obliged as against indorser to apply sum deposited by maker upon note; *Van Winkle Gin & Mach. Co. v. Citizens' Bank*, 89 Tex. 147, 33 S. W. 862, holding that it is optional with bank whether it will offset its indebtedness to depositor against indebtedness of latter.

Recovery of judgment on indorsement as bar to suit on bond.

Cited in *Walden Nat. Bank v. Birch*, 130 N. Y. 221, 14 L.R.A. 211, 29 N. E. 127, holding recovering judgment against bank cashier on his indorsement of note secured by stock, not bar to action on his bond for misappropriation of stock.

Sufficiency of answer to raise defense.

Cited in *Howard County v. Baker*, 119 Mo. 397, 24 S. W. 200, holding that answer by sureties on contractor's bond averring change in contract does not raise defense of overpayment or premature payment.

51 AM. DEC. 303, POST v. KEARNEY, 2 N. Y. 394.

Covenants running with land.

Cited in *Turner v. Walker*, 40 Misc. 379, 82 N. Y. Supp. 340, holding that grantee's covenant to pay taxes runs with land; *Commercial Bldg. & L. Asso. v. Robinson*, 90 Md. 615, 45 Atl. 449, on covenant to pay rent and taxes as running with land.

Cited in reference note in 32 A. S. R. 654, as to whether covenant of tenant to pay assessments runs with land.

Cited in note in 82 A. S. R. 383, on covenants as to paying taxes and assessments running with the land.

Scope and effect of covenants in lease—To pay taxes and assessments.

Cited in *Garner v. Hannah*, 6 Duer, 262, holding that covenant in lease to pay "all ordinary yearly taxes" includes water rents; *Simonds v. Turner*, 120 Mass. 328, holding that covenant to pay all taxes and duties levied during term includes assessment for betterments; *Ten Eyck v. Albany*, 65 Hun, 194, 20 N. Y. Supp. 28, 29 Abb. N. C. 150, holding lessee covenanting to pay assessments for paving except for public purposes of extraordinary character or for permanent improvements, not bound to pay assessment for granite-block pavement.

Cited in note in 15 E. R. C. 714, on effect of covenant to pay assessments and taxes.

— To obey municipal orders.

Cited in *Palmieri v. Autinozzi*, 47 Misc. 237, 95 N. Y. Supp. 865, holding that lessees covenant to obey all orders from municipal departments includes subsequently created department.

Transfer of lessee's interest—By assignment.

Cited in *Constantine v. Wake*, 1 Sweeney, 239, holding that transfer of whole estate of lessee is an assignment.

Cited in reference note in 68 A. D. 529, on assignment of leases.

Cited in note in 10 A. S. R. 558, on the assignable quality of leases.

Distinguished in *Herzig v. Blumenkrohn*, 122 App. Div. 756, 107 N. Y. Supp. 570, holding that transfer by lessee without reservation of any part of term is an assignment; *Stewart v. Long Island R. Co.* 102 N. Y. 601, 55 A. R. 844, 8 N. E. 200, holding that transfer of whole term by lessee with covenant to surrender is an assignment, where no vestige of term or reversion remains in lessee.

Criticized in *Woodhull v. Rosenthal*, 61 N. Y. 382, holding that transfer by lessee of whole term in a portion of demised premises is an assignment *pro tanto*.

— Sublease.

Cited in *Tuttle v. Leiter*, 82 Fed. 947; *Shumer v. Hurwitz*, 49 Misc. 121, 96 N. Y. Supp. 1026,—holding that transfer reserving delivery of possession at end of term is sublease, and not assignment; *Collins v. Hasbrouck*, 56 N. Y. 157, 15 A. R. 407, holding that instrument disposing of unexpired term, and containing covenant for surrender to lessee, is sublease, and not an assignment; *People ex rel. Elston v. Robertson*, 39 Barb. 1, holding underlease for twelve hours less than whole term, not an assignment; *Martin v. O'Conner*, 43 Barb. 514; *Linden v. Hepburn*, 3 Sandf. 668, 3 N. Y. Code, 165, 5 How. Pr. 188,—holding that transfer of term with right of re-entry for breach of covenants is sublease.

Cited in reference notes is 16 A. S. R. 282; 16 A. S. R. 430; 86 A. D. 405,—distinguishing between assignment of lease and subletting.

Cited in note in 15 E. R. C. 500, on what creates lease as distinguished from assignment.

Liability under lease — Of lessee.

Cited in *Pardee v. Steward*, 37 Hun, 259, holding lease executed and recorded before mortgage, not affected by foreclosure, and lessee bound by its covenants running with land.

— Assignee or sublessee.

Cited in *Salisbury v. Shirley*, 66 Cal. 223, 5 Pac. 104; *Trask v. Graham*, 47 Minn. 571, 50 N. W. 917,—holding assignee of lease, liable on covenant to pay rent and taxes; *State v. Martin*, 14 Lea, 92, 52 A. R. 167, holding liability of assignee of lease on covenant to pay rent taxes, and assessments during time of his enjoyment, not divested by new assignment; *Peck v. Christman*, 94 Ill. App. 435, holding assignee of lessee, liable on covenant to yield up premises in good repair; *McLean v. Caldwell*, 107 Tenn. 138, 64 S. W. 16, holding assignee of lease liable beyond actual possession by holding over after yearly rental is due before he assigns and abandons.

Cited in notes in 15 E. R. C. 510, on liability of assignee of lease to lessor; 15 A. D. 545, on remedies by lessor against sublessees; 14 L.R.A. 156, on form of remedy against assignee of leasehold for rent.

51 AM. DEC. 307, *WILSON v. LITTLE*, 2 N. Y. 443.

What property may be pledged.

Cited in *Wright v. Ross*, 36 Cal. 414, holding negotiable instrument, proper subject of pledge; *Travelers' Ins. Co. v. Healey*, 19 Misc. 584, 44 N. Y. Supp. 1043, 25 App. Div. 53, holding non-negotiable chose in action proper subject of pledge; *Campbell v. Parker*, 9 Bosw. 322, holding that bond and mortgage may be pledged as security for debt.

Cited in reference note in 42 A. D. 93, on pledge of corporate stock.

Cited in note in 49 A. D. 734, on what articles may be pledged.

What constitutes a pledge.

Cited in *Gay v. Moss*, 34 Cal. 125, holding that assignment and delivery of contract as security for payment of note constitute pledge; *West v. Crary*, 47 N. Y. 423, holding that absolute transfer may be shown to have been intended as a security; *Barber v. Hathaway*, 47 App. Div. 165, 62 N. Y. Supp. 329, holding that assignment of mortgage as security for a loan may be treated as a pledge, although absolute in form; *Haskins v. Kelly*, 1 Abb. Pr. N. S. 63, 1 Robt. 160, holding that assignment of chattel mortgage to secure payment of note constitutes pledge; *Atlantic F. & M. Ins. Co. v. Boies*, 6 Duer, 583, holding note given by parties liable for original debt to secure extension of time of payment, not pledge.

— Of corporate stock.

Cited in *Nabring v. Bank of Mobile*, 58 Ala. 204, holding transaction a pledge and not a mortgage, where stockholder as security for money borrowed causes the stock to be transferred to lender on books of the company; *Brewster v. Hartley*, 37 Cal. 15, 99 A. D. 237, holding that transfer of shares of stock to trustee by corporation to be retransferred upon payment of money advanced constitutes pledge; *Newton v. Fay*, 10 Allen, 505, holding transfer of stock as collateral security, pledge rather than mortgage.

Distinguished in *Murdock v. Columbus Ins. & Bkg. Co.* 59 Miss. 152, holding assignment of stocks and bonds to agent with power to sell to pay notes, not a pledge.

Delivery of pledge.

Cited in *Third Nat. Bank v. Buffalo German Ins. Co.* 193 U. S. 581, 48 L. ed. 801, 24 Sup. Ct. Rep. 524, holding pledge of stock not effectual in absence of delivery to and possession by pledgee; *Re Wiley*, 4 Biss. 171, Fed. Cas. No. 17,655, upholding pledge of note when actual delivery impossible; *Goldstein v. Hort*, 30 Cal. 372, holding delivery of possession of pledged property to pledgee, essential; *State ex rel. Koons v. First Nat. Bank*, 89 Ind. 302; *Koons v. First Nat. Bank*, 89 Ind. 178,—holding possessor of certificate for bank stock not transferred upon books of bank, not pledgee; *Mott v. Newark German Hospital*, 55 N. J. Eq. 722, 37 Atl. 757, holding making and delivery of assignment of mortgage, valid pledge of the debt without manual delivery of the mortgage; *Buffalo German Ins. Co. v. Third Nat. Bank*, 162 N. Y. 163, 48 L.R.A. 107, 56 N. E. 521, holding agreement by borrower that stock may be considered as collateral, executory until it is in fact pledged by delivery; *Milliman v. Neher*, 20 Barb. 37, holding delivery essential to constitute a pledge; *Miller v. Condir*, 6 Lans. 472, holding possession of bills of exchange essential to validity of pledge of same; *Freeman v. Rich*, 64 Hun, 478, 19 N. Y. Supp. 498, holding pledge of accounts by written transfer, valid, although books containing them not formally delivered; *Clark v. Costello*, 79 Hun, 588, 29 N. Y. Supp. 937, holding pledgee's possession of property under lease or loan, sufficient; *First Nat. Bank v. Bacon*, 113 App. Div. 612, 98 N. Y. Supp. 717, holding that pledge of stock may be created by written transfer without delivery of scrip; *Sykes v. Hannawalt*, 5 N. D. 335, 65 N. W. 682, holding assignment of future earnings of threshing machine, not valid pledge; *Hunt v. Bode*, 66 Ohio St. 255, 64 N. E. 126, upholding written transfer of remaining interest in warehouse receipts in possession of prior pledgee.

Cited in note in 49 A. D. 733, on necessity for delivery of a pledge.

Delivery of gift.

Cited in *Reed v. Copeland*, 50 Conn. 472, 47 A. R. 663, upholding gift of stock accompanied with actual delivery of certificates.

Rights and remedies of pledgeor and pledgee generally.

Cited in *Nabring v. Bank of Mobile*, 58 Ala. 204, holding pledgee entitled to demand pledge on payment of debt; *Gotwalt v. Neal*, 25 Md. 434, holding that pledgeor may maintain bill in equity to redeem against pledgee, and will not be remitted to his remedy by assumpsit; *Tome v. Parkersburg Branch R. Co.* 39 Md. 36, 17 A. R. 540 (dissenting opinion), on right of bona fide pledgee to hold as against principal stock pledged by fraudulent agent; *Farwell v. Importers' & T. Nat. Bank*, 90 N. Y. 483, holding, upon payment of loan, pledgeor, entitled to possession of pledged property; *Pray v. Todd*, 71 App. Div. 391, 75 N. Y. Supp. 947, holding demand for statement of affairs of corporation made by pledgee of stock, insufficient basis for action to recover penalty for refusal; *Re Argus Printing Co.* 1 N. D. 434, 26 A. S. R. 639, 12 L.R.A. 781, 48 N. W. 347, holding that pledgee of stock in whose name it stands on corporate records has right to vote stock; *Surber v. McClintic*, 10 W. Va. 236, holding remedy at law, adequate for the recovery of pledged property not sought to be redeemed.

Cited in reference note in 89 A. D. 791, on remedies of pledgees and stockbroker.

Cited in notes in 49 A. D. 735, on duties and liability of pledgee; 4 L.R.A. 587, on rights of pledgee in negotiable instruments pledged as collateral.

Title to pledged or mortgaged property.

Cited in *Hasbrouck v. Vandervoort*, 4 Sandf. 74, holding that legal title passes on pledge of stock as collateral security; *Parshall v. Eggert*, 54 N. Y. 18, holding that title of chattel mortgagee becomes absolute on default of mortgagor; *Morgan's Estate*, 30 W. N. C. 509, 1 Pa. Dist. R. 402, 11 Pa. Co. Ct. 536, holding pledgee transferring stock into his own name under power of attorney, not actual owner; *White River Sav. Bank v. Capital Sav. Bank & T. Co.* 77 Vt. 123, 107 A. S. R. 754, 59 Atl. 197, holding that general property in stock remains in pledgeor, although legal title is transferred to pledgee.

Right or duty of pledgee or mortgagee to sell property.

Cited in *Jennings v. Moon*, 135 Ind. 168, 34 N. E. 996, holding that property pledged by grantor to secure discharge of mechanics' liens should on default be sold, and its proceeds applied to that purpose; *Kilpatrick v. Dean*, 19 N. Y. S. R. 837 (affirmed in 15 Daly, 182, 4 N. Y. Supp. 708), holding that sale contrary to terms of pledge constitutes a conversion of the property.

Cited in reference notes in 79 A. D. 499, on power of pledgee to sell in case of default; 80 A. D. 521, on right of pledgee to foreclose in equity or sell article pledged without judicial process.

Cited in notes in 47 A. D. 252, on right of pawnee to sell or dispose of pledge; 69 A. D. 242, on pledgee's power to sell pledge; 66 A. D. 758, on power of bailees to make absolute sale of property bailed; 21 E. R. C. 330, on pledgee's right to assign or sell goods pledged.

Demand and notice as prerequisite to sale of pledged or mortgaged property.

Cited in *Wright v. Ross*, 36 Cal. 414, upholding right of pledgee to sell property after default and upon due notice to pledgeor; *Chouteau v. Allen*, 70 Mo. 290, holding demand upon pledgeor before sale, unnecessary, where contract fixes time for payment of debt; *Campbell v. Parker*, 9 Bosw. 322, holding that assignment of pledged mortgage without demand or notice constitutes conversion; *Wheeler v. Newbould*, 5 Duer, 29, holding sale of pledge, invalid, unless demand of payment has been made, and notice of time and place of sale given; *Ketchum*

v. Stevens, 6 Duer, 463, holding that property pledged for payment of note cannot be sold until after payment has been demanded; Taylor v. Ketchum, 5 Robt. 507, holding pledgee not entitled to sell securities without notice or demand in absence of waiver; Torrey v. Harris, 12 Daly, 385, holding notice to pledgeor to redeem and of intended sale, necessary; Farwell v. Importers' & Traders' Nat. Bank, 15 Jones & S. 409, holding notice to pledgeor to redeem, necessary before application of proceeds of pledge to debt; Taylor v. Ketchum, 35 How. Pr. 289, holding demand and notice, essential to validity of sale of securities; Lewis v. Graham, 4 Abb. Pr. 106, holding sale of pledge without previous demand of payment and notice to pledgeor, invalid; Sheridan v. Presas, 18 Misc. 180. 41 N. Y. Supp. 451, holding that title of pledgeor in default can be extinguished only by sale of the pledge after due notice; Toplitz v. Bauer, 34 App. Div. 526. 55 N. Y. Supp. 29, holding demand and notice, necessary, where no time is fixed for the redemption of the pledge; Farwell v. Importers' & T. Nat. Bank. 90 N. Y. 483, holding that before pledgee has power to apply proceeds of securities held as collateral, he must give pledgeor notice to redeem; Bates v. Wiles, 1 Handy (Ohio) 532, holding that pledgee undertaking to sell without a judicial order must first demand payment, and give notice of time and place of sale; Indiana & I. C. R. Co. v. McKernan, 24 Ind. 62, holding that sale of stock or bonds pledged for debt can only be made after default upon demand of payment and notice to pledgeor; Andrews v. Clarke, 3 Bosw. 585, holding sale of stock without notifying pledgeor of time and place, invalid; Lewis v. Varnum, 12 Abb. Pr. 305, holding pledgee of certificates to secure payment of notes, not entitled to sell until after demand and refusal of payment of note; McNeil v. Tenth Nat. Bank, 55 Barb. 59, holding pledgee of stock as collateral security for contingent liability, not entitled to sell without first demanding payment; Usher v. Van Vranken, 48 App. Div. 413, 63 N. Y. Supp. 104, holding that pledgee's transfer of stock without first demanding payment from pledgeor or giving notice of sale amounts to a conversion; Porter v. Parks, 49 N. Y. 564, holding that sale of pledged stock without notice to pledgeor constitutes conversion.

Cited in note in 121 A. S. R. 203, on sale of corporate stock under power, without demand and notice, by pledgee.

Distinguished in Hyatt v. Argenti, 3 Cal. 151, holding that holder of securities as indemnity for advances, with power of sale, may dispose of them without demand or notice; Huggans v. Fryer, 1 Lans. 276, holding chattel mortgagee authorized to sell at private sale, not required to give notice of sale to mortgagor; Franklin Nat. Bank v. Newcombe, 1 App. Div. 294, 37 N. Y. Supp. 271, holding demand of payment, unnecessary, where contract expressly fixes time for payment of debt.

— Waiver of notice.

Cited in Durant v. Einstein, 35 How. Pr. 223, holding pledgeor entitled to demand of payment, and notice of sale, in absence of waiver; Mowry v. Wood, 12 Wis. 414, holding waiver of notice of sale, not waiver of notice to redeem.

Mode of sale of pledged or mortgaged property.

Cited in Wilson v. Brannan, 27 Cal. 258, holding that mode of subjecting security to sale for payment of debt may be same, whether regarded as pledge or mortgage.

Unauthorized sale or pledge.

Cited in Scott v. Rogers, 4 Abb. App. Dec. 163, on validity of factor's sale in violation of instructions; Marfield v. Goodhue, 3 N. Y. 62, holding that factor

directed by principal not to sell goods on which former has made advances may sell on giving reasonable notice.

Cited in reference note in 73 A. D. 303, on bailee's unauthorized pledge or sale of another's property as conversion.

Distinguished in *Milliken v. Dehon*, 27 N. Y. 364 (reversing 10 Bosw. 325), holding that consignee of cotton making advances and given right to sell if decline in price, is not covered by consignor may sell without giving notice.

Necessity of tender.

Cited in *Talty v. Freedman's Trust Co.* 1 Mac Arth. 522 (dissenting opinion), on tender of amount paid as necessary condition to maintenance of suit to recover security from bona fide purchaser; *Boies v. Vincent*, 24 Iowa, 387, holding action maintainable for breach of agreement to deliver cattle, although price is not tendered.

Cited in reference note in 60 A. D. 200, on necessity, validity, and effect of tender.

— By pledgeor.

Cited in *Cox v. Albert*, 78 Ind. 241, holding that pledgeor need not tender indebtedness before suing to recover pledged property converted by pledgee; *Cum-nock v. Newburyport Inst. for Savings*, 142 Mass. 342, 56 A. R. 679, 7 N. E. 869, holding that pledgeor may maintain bill to redeem, after unconditional offer to pay debt, although no formal tender is made; *Read v. Lambert*, 10 Abb. Pr. N. S. 428, holding action for conversion of bonds, maintainable against broker, although tender is not alleged; *Kilpatrick v. Dean*, 15 Daly, 182, 4 N. Y. Supp. 708 (affirming 19 N. Y. S. R. 837), on tender unnecessary where pledgee has made unauthorized sale of pledged property; *New York, L. E. & W. R. Co. v. Davies*, 38 Hun, 477, holding that conversion of pledged stock renders demand and tender by pledgeor unnecessary; *Glidden v. Mechanics' Nat. Bank*, 53 Ohio St. 588, 43 L.R.A. 737, 42 N. E. 995, holding pledgee making unauthorized disposition of pledged property, liable for conversion without demand or offer of performance by pledgeor; *Austin v. Vanderbilt*, 48 Or. 206, 120 A. S. R. 800, 6 L.R.A. (N.S.) 298, 85 Pac. 519, 10 A. & E. Ann. Cas. 1123, holding tender of amount due, not necessary to enable pledgeor to maintain trover against pledgee who has wrongfully sold property.

Cited in notes in 43 L.R.A. 752, on necessity of demand and notice to pledgee converting pledged property where term for payment is indefinite; 6 L.R.A. (N.S.) 299, on effect of unauthorized sale or disposal of pledge by pledgee to dispense with tender as a condition of trover against him.

Measure of damages.

Cited in note in 51 A. D. 351, on measure of damages for sale by factor at price below instructions.

Criticized in *Smith v. Dunlap*, 12 Ill. 184, holding that measure of damages on breach of contract to pay certain amount in certificates of state indebtedness is their cash value when delivery should have been made.

— For conversion.

Cited in *Romaine v. Van Allen*, 26 N. Y. 309, holding measure of damages for conversion of stock is its highest market value at any time between the conversion and the close of the trial.

Cited in reference notes in 73 A. D. 308, on measure of damages in trover; 56 A. D. 673, on measure of damages when bailee sues for conversion of property bailed.

Cited in note in 43 L.R.A. 769, on measure of damages for pledgee's conversion of stocks, bonds, and other securities by invalid sale.

Distinguished in *Baltimore M. Ins. Co. v. Dalrymple*, 25 Md. 269, holding actual value of stock at time of conversion, less amount of debt, proper measure of damages in trover.

Limited in *Atkins v. Gamble*, 42 Cal. 86, 10 A. R. 282, holding pledgeor of shares of stock which pledgee converted, entitled only to nominal damages, if equivalent number of similar shares returned to him.

Distinction between pledge, mortgage, and conditional sale.

Cited in reference notes in 89 A. D. 791, on distinction between pledge and mortgage; 58 A. S. R. 904, on distinction between pledge and mortgage.

Cited in notes in 4 L.R.A. 305, on distinction between pledge and chattel mortgage; 94 A. S. R. 240, on distinction between conditional sale and pledge or security.

Distinguished in *Warren v. Emerson*, 1 Curt. C. C. 239, Fed. Cas. No. 17,195, holding assignment of note secured by mortgage to indemnify acceptor, not legal mortgage.

Nature of stock certificates.

Cited in note in 12 L.R.A. 781, on nature of stock certificates.

Corporate stock as subject of conversion.

Cited in *Kuhn v. McAllister*, 1 Utah, 273, holding that shares of stock are a subject of conversion.

What is a conversion of stock.

Cited in *Re Pierson*, 19 App. Div. 478, 46 N. Y. Supp. 557, holding that pledge by broker of stock purchased on margin for customer amounts to a conversion.

Cited in note in 43 L.R.A. 741, on what sales of corporate stock amount to a conversion by pledgee.

Extinction of mortgage lien by conversion.

Cited in *Everett v. Buchanan*, 2 Dak. 249, 8 N. W. 31, holding lien of chattel mortgage, extinguished, if mortgagee converts mortgaged property.

Broker's right to sell stock.

Cited in *Tuell v. Paine*, 39 Misc. 712, 80 N. Y. Supp. 956, holding, in absence of specific agreement, broker without right to sell stock when margin is exhausted without demand or notice; *Markham v. Jaudon*, 41 N. Y. 235, holding that sale of stock by brokers without demand or notice after customer's margin is exhausted constitutes conversion.

Cited in note in 75 A. D. 320, on necessity of stockbroker keeping identical stock purchased.

Transfer of stock on corporate books.

Cited in *New York & N. H. R. Co. v. Schuyler*, 38 Barb. 534, holding that transfer of stock upon books of company to bona fide holder passes title, although certificate previously issued was not surrendered; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, holding purchaser of stock, not entitled to have it transferred on books of company as against subsequent bona fide purchaser first procuring transfer.

Cited in note in 12 L.R.A. 782, on method of transferring stock.

Levy on stock.

Cited in *Nabring v. Bank of Mobile*, 58 Ala. 204, holding levy on shares of stock pledged to third person, invalid.

Suit as demand of payment.

Cited in *Kendall v. Brownson*, 47 N. H. 186, holding that bringing suit constitutes demand of payment.

51 AM. DEC. 315, VANDERBILT v. RICHMOND TURNP. CO. 2 N. Y. 479.**Liability for torts of agents or servant.**

Cited in *Courtney v. Baker*, 5 Jones & S. 249, holding principal not liable where agent, not acting within regular duties, recklessly pushes bale of cotton over on carmen's assistant; *Fraser v. Freeman*, 43 N. Y. 566, 3 A. R. 740, holding master not liable where servant wilfully shoots person while endeavoring to enter premises with master under claim of right; *Sagers v. Nuckolls*, 3 Colo. App. 195, 32 Pac. 187, holding that where servants are supplied with arms to defend cattle ranch, owners are not liable for killing by volunteer of person proceeding through same; *Weisser v. Denison*, 10 N. Y. 68, 61 A. D. 731, holding that where bank pays checks forged by depositor's clerk and returns balanced pass book to clerk, depositor is not chargeable with knowledge; *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169, holding principal not ratifying agent's act in arresting customer, while liable for compensatory damages, not liable for punitive; *Welsh v. Cochran*, 63 N. Y. 181, 20 A. R. 519, holding creditors not liable for acts of marshal in seizing wrong goods under direction of general agent of creditors.

Cited in reference notes in 41 A. S. R. 109, on master's liability for servant's torts; 30 A. S. R. 585, on test of master's liability for acts of servant.

Cited in notes in 54 A. S. R. 87, on master's liability for servant's wilful, malicious, or criminal acts, torts, or frauds; 27 L.R.A. 183, on liability of owner of vessel for acts of master in collision cases; 51 L.R.A. 469, on liability of partnership for torts; 73 A. D. 139, on ratification or adoption of trespass for one's benefit as making one a cotrespasser; 73 A. D. 143, on liability of attorneys and clients as cotrespassers in regard to judgments and other writs; 4 L.R.A. 859, on right of indemnity as between wrongdoers.

Distinguished in *Welsh v. Cochran*, 63 N. Y. 181, 20 A. R. 519, holding where evidence is slight of creditors' receiving wrong goods seized by marshal under bankruptcy warrant, creditors not liable; *Althorf v. Wolfe*, 22 N. Y. 355, holding principal directing servant, who has friend assist, to remove snow from roof, liable for injury received by pedestrian from same.

— Of private corporations generally.

Cited in *Thames S. B. Co. v. Housatonic R. Co.* 24 Conn. 40, 63 A. D. 154, holding corporation, not liable for act of watchman in drifting burning boat cabled to freight house, while fire could have been extinguished; *Scofield Rolling Mill Co. v. State*, 54 Ga. 635, as to whether corporation is liable for fraudulent conduct of agent, where act passes verge of civil wrong and becomes public crime.

Cited in reference notes in 50 A. S. R. 320, on liability of corporation for acts of agents; 65 A. D. 210, on liability of corporation for torts of agents or contractors; 64 A. D. 86, on liability of corporation for negligence of agent within scope of employment.

Distinguished in *Bank of California v. Western U. Teleg. Co.* 52 Cal. 280, holding that where telegraph agent, with power, employs another, who sends false message whereby bank loses money, telegraph company is liable; *Me-*

chanics' Bank v. New York & N. H. R. Co. 4 Duer, 480, holding that where railroad's transfer agent fraudulently issues certificate of stock to one who obtains bank loan thereon, corporation is liable; Mott v. Consumers' Ice Co. 73 N. Y. 543, holding corporation liable for act of servant in driving ice cart against carriage in course of employment; Van Sieten v. Jamaica Electric Light Co. 45 App. Div. 1, 61 N. Y. Supp. 210, holding corporation liable for acts of servants in cutting branches from trees while stringing wires under directions of managing agent.

Not followed in *Waters v. West Chicago Street R. Co.* 101 Ill. App. 265, holding corporation liable for act of general counsel and vice president in maliciously prosecuting lawyer upon advice of counsel.

— Of banks.

Cited in *Thomson v. Sixpenny Sav. Bank*, 5 Bosw. 293, holding that where vice president of bank forbade removal from bank's property of tools and machinery by purchaser under foreclosure, bank is not liable for such conversion.

Distinguished in *Goodspeed v. East Haddam Bank*, 22 Conn. 531, 58 A. D. 439, majority holding banking corporation liable for act of directors in prosecuting, with malicious intent, vexatious suit for alleged fraudulent representations.

— Of railroad companies generally.

Cited in *Waalder v. Great Northern R. Co.* 18 S. D. 420, 112 A. S. R. 794, 70 L.R.A. 731, 100 N. W. 1097, denying liability of railroad company for assault by servant, under foreman's direction, of one remonstrating against erection of snow fence; *Stewart v. Cary Lumber Co.* 146 N. C. 47, 59 S. E. 545 (dissenting opinion), on liability of owner of logging railroad for personal injury through servant's wanton blowing of whistle to scare mule; *Gilliam v. South & North Ala. R. Co.* 70 Ala. 268, holding that where railroad conductor stops train, pursues boy to father's house with pistol, and seizes and carries boy off, corporation is not liable; *New Orleans, J. & G. N. R. Co. v. Harrison*, 48 Miss. 112, 12 A. R. 356, holding that where conductor ordered boy to uncouple cars, and in so doing boy was injured, railroad corporation is not liable:

Distinguished in *DeCamp v. Mississippi & M. R. Co.* 12 Iowa, 348, holding railroad corporation liable, if agents negligently ran over and killed horses, but not if act was criminal and wilful.

— Of carriers.

Cited in *Isaacs v. Third Ave. R. Co.* 47 N. Y. 122, 7 A. R. 418, holding that where railroad conductor wilfully and violently throws passenger from car while in motion, corporation not liable; *Central R. Co. v. Brewer*, 78 Md. 394, 27 L.R.A. 63, 28 Atl. 615, holding railway corporation, not liable for act of superintendent in causing arrest of passenger for placing counterfeit coin in fare box.

Cited in notes in 17 E. R. C. 280, on liability of carrier for servant's tort; 8 A. R. 317, on liability of carrier for torts of its servants towards passengers; 14 L.R.A. 740, on carrier's liability for employee's assault on passenger resulting in death.

Distinguished in *Baldwin v. New York & H. Nav. Co.* 4 Daly, 314, holding corporation liable, where deck hand negligently withdraws plank extending from pier to boat, thereby throwing passenger into water; *Rounds v. Delaware, L. & W. R. Co.* 64 N. Y. 129, 21 A. R. 597, holding that where railroad rules forbid persons riding on baggage cars, corporation is liable for act of baggage man

in kicking boy therefrom; *Evansville & C. R. Co. v. Baum*, 26 Ind. 70; *Brokaw v. New Jersey R. & Transp. Co.* 32 N. J. L. 328; *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353,—holding railroad corporation liable for act of train men in assaulting and battering passengers while removing them from train; *Weed v. Panama R. Co.* 17 N. Y. 362, 72 A. D. 474, 5 Duer, 193, holding that where conductor wilfully detained train over night in stormy weather, thereby injuring passenger's health, railroad corporation is liable; *Sanford v. Eighth Ave. R. Co.* 7 Bosw. 122, holding that where railroad conductor ejects passenger from car, thereby causing death of passenger, corporation is liable if decedent was not negligent; *Goddard v. Grand Trunk R. Co.* 57 Me. 202, 2 A. R. 39, holding that where railroad corporation retains brakeman after knowledge of his assaulting and grossly insulting passenger, corporation is liable.

— Of public corporations.

Cited in *Costich v. Rochester*, 68 App. Div. 623, 73 N. Y. Supp. 835, holding city not liable in punitive damages, where creek receiving storm overflow from city sewer inundates abutting property; *Estep v. Keokuk County*, 18 Iowa, 199, holding county not liable to taxpayer for money fraudulently collected by treasurer, without authority, as taxes.

51 AM. DEC. 319, *LEWIS v. WOODWORTH*, 2 N. Y. 512.

Representative powers as between persons having common interest.

Cited in *Re Baird*, 47 Hun, 77, on admissibility of legatee's admission as to undue influence over testator, to affect rights of other legatees and devisees; *Simpson v. McKay*, 3 Hun, 316 (dissenting opinion), on admissibility of mortgagee's declarations against subsequent owners, as affected by fact that he and they were codefendants in foreclosure suit; *Hodnett v. Pace*, 84 Va. 873, 6 S. E. 217, holding admissions of principal obligor in bond that it had not been paid, inadmissible against surety, when not made in his presence; *Pearis v. Covilland*, 6 Cal. 617, holding tenants in common, not bound by act of cotenant in accepting balance of purchase money and promising deed after forfeiture of right thereto.

— Joint obligors.

Cited in *Thompson v. Richards*, 14 Mich. 172, holding one of two joint obligors in contract to pay partnership debts, not bound by other's admission that retiring partner had performed conditions; *Dunham v. Dodge*, 10 Barb. 566; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 A. D. 95,—holding that payment on note by one of joint and several makers does not affect statute of limitation as to other; *Merritt v. Scott*, 3 Hun, 657, 6 Thomp. & C. 160, holding that commencement of action against one of two joint defendants in judgment does not affect statute of limitation as to other.

Cited in notes in 51 A. D. 331, on effect of admissions by one of several joint obligors as to other; 40 A. D. 354, as to how notice of dishonor must be given to joint indorsers, not partners.

Distinguished in *Ferguson v. Hamilton*, 35 Barb. 427, holding maker bound by representations of agent whom he authorized to negotiate note to pay their joint debts, that note was business paper; *Lounsbury v. Depew*, 28 Barb. 44, holding maker of note not estopped to deny validity of transfer by making part payment to indorsee.

51 AM. DEC. 322, VAN KEUREN v. PARMELEE, 2 N. Y. 523.**Operation and general effect of statutes of limitation.**

Cited in *White's Bank v. Ward*, 35 Barb. 637, holding that statute of limitations begins to run against demand note on day of date; *Waltermire v. Westover*, 14 N. Y. 16, on statute barring action on judgment after six years, as affecting lien of judgment.

Cited in note in 95 A. S. R. 657, on effect of bar of limitations.

— Suspension of statute and general effect thereof.

Cited in *Cleveland v. Harrison*, 15 Wis. 671, holding that part payment of debt will arrest statute of limitations; *Anthony v. Herzberg*, 2 N. Y. City Ct. Rep. 165, holding that part payment revives debt, whether made before or after statute attaches; *Wakeman v. Sherman*, 9 N. Y. 85, holding that debtor's promise made to stranger to pay barred debt did not revive it; *Commercial Mut. Ins. Co. v. Brett*, 44 Barb. 489, holding answer alleging that notes sued on were premium notes, that loss had occurred, and that payment would be made from insurance money, insufficient acknowledgment to remove bar against notes; *De Freest v. Warner*, 30 Hun, 94, holding provision in deed that grantees should pay debt of grantor, sufficient to prevent bar of action by creditor after deed was declared void as to other creditors; *Howell v. Howell*, 15 Wis. 55, holding that a plaintiff relying upon revival of barred debt may sue on new promise as supported by original consideration; *Sands v. St. John*, 23 How. Pr. 140, 36 Barb. 628, holding that where there is new promise to pay barred note, action may be brought on original demand.

Cited in reference notes in 60 A. D. 367; 76 A. D. 431,—on essentials of new promise to take case out of statute of limitations; 97 A. D. 571, on sufficiency of promise or acknowledgment to take debt out of statute of limitations; 76 A. D. 431, on requisites of acknowledgment sufficient to remove bar of statute of limitations; 60 A. D. 79, on necessity of acknowledgment of debt and expression of willingness to pay to remove bar of limitations; 55 A. D. 557, on effect of acknowledgment of debt and promise to stranger to pay it to remove bar of limitations; 62 A. D. 102, as to whether cause of action is new or old promise when new promise is relied upon to raise bar of statute of limitations.

Cited in notes in 62 A. D. 101, on necessity and essentials of promise or acknowledgment to take debt out of statute of limitations; 10 A. D. 697, on new promise by debtor.

Distinguished in *Steven v. Lord*, 84 Hun, 353, 32 N. Y. Supp. 309, holding that payment of interest by maker of note interrupted statute; *National State Bank v. Rowland*, 1 Colo. App. 468, 29 Pac. 465, holding that payment on note by maker's agent in pursuance of letter of attorney stopped running of statute against maker; *Barger v. Durvin*, 22 Barb. 68, holding that where joint makers direct their assignees for creditors to pay note, latter's payment thereon will arrest statute as to former.

Representative powers as between persons having common interest.

Cited in *Harper v. Fairley*, 53 N. Y. 442, holding that where maker of note transferred another note in part payment, payment of latter note by obligor therein did not arrest running of statute in former's favor; *Smith v. Ryam*, 66 N. Y. 352, 23 A. R. 60, holding that where debtor transferred note in part payment, payment on note by maker thereof did not arrest statute as to debtor; *Pickett v. Leonard*, 34 N. Y. 175 (affirming 34 Barb. 193), holding that part payment of assignor's note by assignee for creditors did not stop running of

statute; *Murdock v. Waterman*, 145 N. Y. 55, 27 L.R.A. 418, 39 N. E. 829, holding that payment on mortgage by heirs of mortgagor did not arrest running of statute against lien on premises conveyed by mortgagor in his lifetime to another; *Princeton Sav. Bank v. Martin*, 53 N. J. Eq. 463, 33 Atl. 45, on payment on mortgage debt by grantee of mortgaged premises, as affecting operation of statute of limitations against obligors in mortgage bond; *Wallis v. Randall*, 81 N. Y. 164, holding statements of one of the joint purchasers of land that mortgage on other land was given as security, and not in payment, inadmissible against other purchaser; *Brisbin v. Farmer*, 16 Minn. 215, holding declarations of one of two plaintiffs in judgment tending to show that part payment would not be accepted as satisfaction, inadmissible on issue as to statutory bar.

Distinguished in *Phillips v. Peters*, 21 Barb. 351, holding that promise made by indorser to stranger after maturity of note, to pay the holder, arrested statute as to subsequent transferee of such holder; *New York L. Ins. & T. Co. v. Covert*, 6 Abb. Pr. N. S. 154, 3 Abb. App. Dec. 350, 3 N. Y. Trans. App. 124 (reversing 29 Barb. 435), holding that mortgagor may, after conveying equity of redemption, arrest running of statute in favor of grantees by making payment on mortgage debt.

—Joint or common obligors, generally.

Cited in *Thompson v. Richards*, 14 Mich. 172, holding one of two joint obligors in contract to pay partnership debts, not bound by other's admission that retired partner had performed conditions.

Cited in note in 51 A. D. 321, on effect of admissions by one of several joint obligors as to others.

—Power of, to suspend statutes of limitations.

Cited in *Merritt v. Scott*, 3 Hun, 657, 6 Thomp. & C. 160, holding that commencement of action against one of two joint debtors in judgment does not arrest statute as to other; *Stubblefield v. McAuliff*, 20 Wash. 442, 55 Pac. 637, holding that husband's payment on note secured by mortgage on community realty did not arrest statute of limitations as to wife.

Cited in reference notes in 53 A. S. R. 276, on new promise or payment by joint debtor as tolling statute of limitations; 86 A. D. 84, on effect of new promise by one of joint debtors to take case out of operation of statute of limitations; 61 A. D. 557, on revival of debt by acknowledgment of joint debtors; 82 A. D. 757, on effect of acknowledgment by one joint and several promisor to revive debt barred by statute of limitations.

Cited in notes in 55 A. R. 52, as to whether payment by one joint debtor will avoid the effect of statute of limitations as to another; 62 A. D. 102, on promise, acknowledgment, or payment by joint debtor, partner, etc., as taking case out of statute of limitations; 65 A. S. R. 686, on part payment or acknowledgment of barred claim by one joint debtor; 65 A. S. R. 688, 689, 690, on payment or acknowledgment by one joint debtor before statute of limitations has run.

Distinguished in *Berlin v. Hall*, 48 Barb. 442, holding, in statutory proceeding to have one adjudged bound by a default judgment against his co-obligor for barred debt, that statute precluded him from setting up bar.

—Powers of partners, generally.

Cited in *Huntington v. Potter*, 32 Barb. 300, holding that former member of dissolved firm may settle debts due to firm; *Comstock v. Buchanan*, 57 Barb. 146, denying power of partners as such to transfer to himself individually, stock held by firm; *Martine v. International L. Ins. Co.* 53 N. Y. 339, 13 A. R. 520,

denying right of surviving member of firm of insurance agents to accept payment of premium after death of other member; *Marietta & C. R. Co. v. Mowry*, 28 Hun, 70, holding, where one partner turned over bonds in winding up dissolved firm, that his copartner was chargeable with knowledge that former unlawfully acquired them as director of company issuing them.

Cited in reference notes in 62 A. D. 280; 63 A. D. 707; 28 A. S. R. 338,—on power of partner after dissolution of partnership; 49 A. S. R. 309, on power of partner to bind firm after dissolution; 2 A. S. R. 763, on effect of renewal of partnership note by one partner after dissolution of firm.

Cited in note in 18 A. D. 515, on power of partner after dissolution of firm.

Distinguished in *Gates v. Beecher*, 60 N. Y. 518, 19 A. R. 207, holding presentment of firm note to one of the former members after dissolution in bankruptcy, sufficient to charge indorser.

— **Power of partner to suspend statute of limitations.**

Cited as leading case in *Payne v. Slate*, 39 Barb. 634, holding that promise of partner retaining business of dissolved firm, to pay firm debts, did not arrest statute as to retired partner.

Cited in *Whitney v. Reese*, 11 Minn. 138, Gil. 87, holding that one partner cannot waive statute after dissolution so as to revive barred debt against other; *Bloodgood v. Bruen*, 8 N. Y. 362 (reversing 4 Sandf. 427), holding that acknowledgment of barred debt of firm by surviving partner, who was executor of deceased partner, in answer to third person's bill in equity, did not revive debt; *Hixson v. Rodbourn*, 67 App. Div. 424, 73 N. Y. Supp. 779, holding that surviving partner's payment on barred note of firm will not revive it against estate of deceased partner; *Tate v. Clements*, 16 Fla. 339, 26 A. R. 709, holding that promise to pay by one partner after dissolution, and before statute had run, did not renew debt as to other; *Payne v. Gardiner*, 29 N. Y. 146 (dissenting opinion), on partner's promise after dissolution, to pay firm debt, as affecting operation of statute of limitations; *Conkey v. Barbour*, 22 Ind. 196; *Graham v. Selover*, 59 Barb. 313; *Mayberry v. Willoughby*, 5 Neb. 368, 25 A. R. 491,—holding that one partner's payment on firm note or bill after dissolution did not stop statute as to other; *Payne v. Slate*, 39 Barb. 634, holding that payment of interest on debts of dissolved firm by partner retaining business did not arrest statute as to retired partner; *Kerper v. Wood*, 48 Ohio St. 613, 15 L.R.A. 656, 29 N. E. 501, holding execution of note by liquidating partner for debt of dissolved firm, insufficient to take debt out of statute as to other members; *Newman v. Marvin*, 12 Hun, 236, holding that action against one partner after dissolution for money received by firm does not arrest statute as to other.

Cited in reference notes in 40 A. S. R. 561, on acknowledgments and new promises by partner after dissolution; 60 A. D. 79, on effect of acknowledgment or new promise by one partner to remove bar as to other partners.

Cited in notes in 6 A. D. 576, on partner's power to revive liabilities after dissolution; 15 L.R.A. 658, on power of partner after dissolution to interrupt statute of limitations as to firm debt; 40 A. S. R. 566, on acknowledgments and new promises by partners after dissolution in connection with the statute of limitations.

Distinguished in *McClurg v. Howard*, 45 Mo. 365, 100 A. D. 378, holding that one partner's payment, after dissolution, on firm debt not yet barred, took debt

out of statute as to other; *Burr v. Williams*, 20 Ark. 171, holding same as to note.

Disapproved in *Merritt v. Day*, 38 N. J. L. 32, 20 A. R. 362, holding that payment by one partner, after dissolution, on note not yet barred, arrested operation of statute.

— Creation of obligations by partner.

Cited in *Waters v. Harris*, 28 Jones & S. 192, 17 N. Y. Supp. 370, 28 Abb. N. C. 89, holding that one partner cannot after dissolution of firm create debt binding on his former copartner; *Lusk v. Smith*, 8 Barb. 570, holding that former member of dissolved firm, authorized to adjust debts and settle firm concerns, could not bind former associates by giving note; *Morrison v. Perry*, 11 Hun, 33, denying power of remaining partner, contracting to pay debts, to bind retired partner by note for firm debt made in firm name; *Willis v. Morrison*, 44 Tex. 27, holding one partner not liable on draft executed by his copartner after dissolution, in firm name and for firm debt; *Durant v. Pierson*, 58 Hun, 190, 11 N. Y. Supp. 842, holding that note given by surviving partner, signed with firm name and by himself as survivor, created no claim against firm assets; *Hart v. Woodruff*, 24 Hun, 510, holding that statement of account due from firm to another, made out by one partner after dissolution, did not bind others; *City Nat. Bank v. Phelps*, 86 N. Y. 484, holding that one partner's assent after dissolution to renewal of firm obligation, while concededly not binding other, bound himself.

— Representations and covenants of partners.

Cited in *Hitchcock v. Peterson*, 14 Hun, 389, saying that partner is not liable for the false representations of his copartner as to firm's solvency; *Bennett v. Buchan*, 61 N. Y. 222, 5 Abb. Pr. N. S. 412 (reversing on another point, 53 Barb. 578), holding that partner's assignment, after dissolution, of firm judgment, while not binding his copartner on covenants, passed firm's title to judgment; *Cookingham v. Lasher*, 38 Barb. 656, holding that partner selling and warranting firm property in his own name may be sued on warranty without joinder of copartner.

— Admissions and declarations of partner.

Cited in *Pennoyer v. David*, 8 Mich. 407, holding admission of firm debt by one partner after dissolution, not admissible against other in absence of proof that alleged creditor had dealings with firm; *Feigley v. Whitaker*, 22 Ohio St. 606, 10 A. R. 778 (dissenting opinion), on admissibility to charge surviving partner, of deceased partner's admissions of firm debt after dissolution; *Beatty v. Amba*, 11 Minn. 331, Gil. 234, denying judgment on admissions in answers of joint liability of defendants as members of dissolved firm; *Burns v. McKenzie*, 23 Cal. 101, holding, where partner signed firm name to note, that his declaration after dissolution that it was made for firm purposes was inadmissible against copartner; *Klock v. Beekman*, 18 Hun, 502 (dissenting opinion), on admissibility, in action against surviving partner for money lent deceased partner, of latter's declarations that it was for firm purposes; *Thompson v. Bowman*, 6 Wall. 316, 18 L. ed. 736, holding that partner's declarations made after termination of partnership did not bind his copartners.

— Suspension of limitations by joint makers of note, other than partners.

Cited in *Bogert v. Vermilya*, 10 Barb. 32, holding that payment on barred note by one of the joint and several makers did not remove bar as to other; *Chrisman v. Irwin*, 37 Mo. 169, 90 A. D. 375, holding that allowance of barred

note against estate of one of the joint makers and payments thereon by administrator did not affect bar as to other makers; *Adams v. Tucker*, 6 Colo. App. 393, 40 Pac. 783, holding that payment on note by one of the joint makers would not remove bar as to others; *Miller v. Miller*, *McArth. & M.* 109, 48 A. R. 738; *Oleson v. Wilson*, 20 Mont. 544, 63 A. S. R. 639, 52 Pac. 372; *Shoemaker v. Benedict*, 11 N. Y. 176, 62 A. D. 95; *Dunham v. Dodge*, 10 Barb. 566; *Cowhick v. Shingle*, 5 Wyo. 87, 63 A. S. R. 17, 25 L.R.A. 608, 37 Pac. 689; *Bender v. Blessing*, 82 Hun, 320, 31 N. Y. Supp. 481,—holding that payment on note by one of the joint makers did not arrest statute as to other; *Shutts v. Fingar*, 100 N. Y. 539, 53 A. R. 231, 3 N. E. 588, holding that payment of interest on demand note by one of the joint makers who were not partners did not stop statute so that presentment to others charged indorser; *Grovenor v. Signor*, 10 N. D. 503, 88 N. W. 278, holding that where complaint in action against one of the joint makers of note alleged payments by him, answer setting up bar of statute and denying payments stated defense; *Willoughby v. Irish*, 35 Minn. 63, 27 N. W. 379, holding that part payment by one of the joint makers of note did not arrest statute as to others, and citing annotation also on this point.

Distinguished in *Haight v. Avery*, 16 Hun, 252, holding that payment on note by one of the joint makers at direction of other arrested statute as to such other; *Sutherland v. Roberts*, 4 Or. 378, holding that payment on note by administrator of one of two joint makers arrested statute as to other; *Partlow v. Singer*, 2 Or. 307, holding that, under Oregon statute, payment on note by one of the joint makers will prevent bar as to others; *White's Bank v. Ward*, 35 Barb. 637, holding that commencement of action against two or three joint makers of note arrested statute as to other.

— Of principal to bind surety.

Cited in *Hodnett v. Pace*, 84 Va. 873, 6 S. E. 217, holding admissions of principal obligor in bond that it had not been paid, inadmissible against surety, when not made in his presence. *Steele v. Souder*, 20 Kan. 39; *Smith v. Caldwell*, 15 Rich. L. 365; *Mozingo v. Ross*, 150 Ind. 688, 65 A. S. R. 387, 41 L.R.A. 612, 50 N. E. 867,—holding that payment on note by principal maker did not arrest statute of limitations as to surety.

Distinguished in *Whitaker v. Rice*, 9 Minn. 13, Gil. 1, 86 A. D. 78, holding that part payment of note by principal maker stopped running of statute as to surety; *Winchell v. Hicks*, 18 N. Y. 558 (affirming 21 Barb. 448), holding that where sureties on note sent holder to maker for payment, his payment arrested statute as to them.

— Of cosureties.

Cited in *Dickerson v. Turner*, 12 Ind. 223, holding admissions of liability as surety and of justness of obligation, by one of the joint drawers of bill, binding on others; *Cocke v. Hoffman*, 5 Lea, 105, 40 A. R. 23, holding surety paying barred note, not entitled to contribution from his cosurety.

51 AM. DEC. 333, *LEAVITT v. PALMER*, 3 N. Y. 19.

Nature and effect of restrictions on corporations and associations.

Cited in *Beers v. Phoenix Glass Co.* 14 Barb. 358, saying that corporation not having express power to borrow money may do so for purposes essential to conduct of ordinary affairs; *Buffett v. Troy & B. R. Co.* 40 N. Y. 168 (dissenting opinion),

on right of corporation to avoid contract on ground that it was made in violation of statute; *Johnston v. Dahlgren*, 31 App. Div. 204, 52 N. Y. Supp. 555, holding plumbers failing to register with board of health as required, not entitled to recover for work done.

Cited in reference notes in 78 A. D. 676, on validity of contract of corporation forbidden by charter or statute; 73 A. S. R. 39, on recovery on contract made by city council in disregard of city charter; 34 A. S. R. 823, on acts done by corporations in excess of power conferred by charter; 66 A. D. 518, on invalidity of contracts prohibited by penal statute; 42 A. S. R. 511, on when estoppel arises against pleading that contract was *ultra vires*; 19 A. S. R. 487, on effect of plea of *ultra vires*.

— Banks.

Cited in *New York Bank v. St. Lawrence Bank*, 7 N. Y. 513, holding notes of bank on time and upon interest, void under statute making such notes void unless payable on demand and without interest; *Bank of Chillicothe v. Dodge*, 8 Barb. 233, holding draft issued by bank payable at future date, void by statute; *Gillet v. Phillips*, 13 N. Y. 114, holding void, transfer of notes by banking corporation without assent of board of directors as required by statute; *Seneca County Bank v. Lamb*, 26 Barb. 595, holding note discounted by bank at rate of interest exceeding statutory limit, void in its hands; *Palmer v. Yates*, 3 Sandf. 137, holding that under statute requiring assent of board of directors to transfer of mortgage by banking association assent was properly given by committee of directors on finance; *Medill v. Collier*, 16 Ohio St. 599, on right to recover on certificate of deposit from bank doing business as corporation without complying with statutory requisites.

Cited in note in 12 L.R.A.(N.S.) 611, on validity of contract as to circulating notes and token currency in violation of particular statute.

Questioned in *Oneida Bank v. Ontario Bank*, 21 N. Y. 490, doubting that banking association issuing draft in violation of statute should be permitted to repudiate it and escape liability thereunder.

Nature of instruments issued by bank.

Distinguished in *Leavitt v. Blatchford*, 17 N. Y. 521, holding non-negotiable bond of banking association for payment of money or, at option of obligee, stock of association, at named date and with interest, not bill or note; *Hogg's Appeal*, 22 Pa. 479, holding notes of bank issued for loan and payable at future day, with interest, not past notes as not intended as part of circulation.

— Certificate of deposit as note or bill.

Cited in *Poorman v. Mills*, 35 Cal. 118, 95 A. D. 90, holding certificate of deposit payable to one or order on deposit of certificate properly indorsed to be promissory note; *Bank of Peru v. Farnsworth*, 18 Ill. 563, holding certificate of deposit payable on return thereof duly indorsed, four months after date, to be a note; *Tracy v. Talmage*, 14 N. Y. 162, 67 A. D. 132, holding negotiable certificates of deposit payable with interest at future day to be promissory notes; *Pardee v. Fish*, 60 N. Y. 265, 19 A. R. 176 (affirming 67 Barb. 407), holding that certificate of deposit payable to order in bank notes, with interest, on return of certificate, was in nature of promissory note.

Cited in reference notes in 60 A. D. 581, on certificate of deposit as promissory note; 78 A. D. 399, on certificate of deposit as negotiable instrument.

Cited in notes in 69 A. D. 691; 75 A. S. R. 46,—on certificates of deposit.

Validity or repudiation of contracts made in relation to unlawful agreements.

Cited in *Porter v. Havens*, 37 Barb. 343, holding void, notes given for compounding of crime; *Dewitt v. Brisbane*, 16 N. Y. 508, holding void, an assignment to secure performance of agreement void for illegality; *Hardin v. Hyde*, 40 Barb. 435 (dissenting opinion), on invalidity of one of the debts secured by mortgage as affecting its security for valid debts; *Burke v. Chicago*, 127 Ill. App. 161, holding that officer's unlawful pledge to city to secure alleged deficits, may, while executory, be rescinded by him; *Jackson v. Shawl*, 29 Cal. 267, holding that pledge of chattels contracting to pay usurious interest may recover chattels upon tender of principal and lawful interest.

Cited in reference note in 33 A. S. R. 293, on construction of notes and collateral mortgage together.

Distinguished in *Pelham v. Adams*, 17 Barb. 384, holding that invalidity of certificate of deposit did not preclude action on demand which it evidenced; *Curtis v. Leavitt*, 15 N. Y. 9 (modifying 17 Barb. 309), upholding pledge of bonds by banking corporation to secure valid loan; *Reineman v. Covington*, C. & B. H. R. Co. 7 Neb. 310, holding county vote for railroad aid in excess of authorized amount, wholly void; *Stewart v. National Union Bank*, 2 Abb. (U. S.) 424, Fed. Cas. No. 13,435, holding that, although loan by bank exceeded statutory limit, equity would not, where transaction was executed, compel return of securities at suit of borrower's creditor; *Bissell v. Michigan*, S. & N. I. R. Co. 22 N. Y. 258, holding that railroads joining to do business outside limits of charter of either, are jointly liable for negligence.

Enforceability of valid provisions in unlawful agreements.

Cited in *Saratoga County Bank v. King*, 44 N. Y. 87, holding contract for payment of money containing covenants in restraint of trade, wholly void; *Emery v. Piscataqua F. & M. Ins. Co.* 52 Me. 322 (dissenting opinion), on enforcement of lawful stipulations in contract containing unlawful but severable stipulations; *Towle v. Smith*, 2 Robt. 489, holding that statute invalidating grant of land held adversely by another did not invalidate grant of other lands in same conveyance; *Allen v. Affleck*, 10 Daly, 509, 64 How. Pr. 380, holding that invalidity of provision in separation agreement, for custody of children, did not affect provision for support of wife; *Arnot v. Pittston & E. Coal Co.* 2 Hun. 591, 5 Thomp. & C. 143, holding that invalidity of promise to sell coal to none but named person did not preclude recovery for coal delivered to him.

Cited in note in 4 L.R.A. 156, on devisibility of contracts partly valid and partly invalid.

Distinguished in *Farmers' Bank v. Burchard*, 33 Vt. 346, holding bank loan affected with usury, inoperative only to extent of excess over legal interest; *Spring v. Quance*, 3 How. Pr. N. S. 65, holding void, a note not disclosing that it was given for patent, as required by statute.

Reformation and avoidance of instruments for mistake.

Cited in *Garnar v. Bird*, 57 Barb. 277, holding that bond will not be reformed to correct error made through mistake of law; *Beers v. Hendrickson*, 6 Robt. 53, holding that satisfaction piece drawn in precise form intended, will not be reformed; *Willis v. Sanders*, 19 Jones & S. 384, holding that, to warrant the reformation of deed, proof of mistake must be full, clear, and decisive; *Ranney v. McMullen*, 5 Abb. N. C. 246, holding that, to warrant reformation of mortgage, mistake must be mutual and must be clearly proved; *Fellows v. Heermans*, 4

Lans. 230, holding that deed cannot be set aside for mistake of law; **Upton v. Tribilcock**, 91 U. S. 45, 23 L. ed. 203, holding that corporate agent's misrepresentation as to liability of stock to assessment was misrepresentation of law, not vitiating subscription.

Cited in reference notes in 59 A. D. 604; 11 A. S. R. 45,—on reformation of instruments; 60 A. D. 543; 63 A. D. 714,—on equitable relief for mistake of law; 63 A. D. 365, on reformation of instrument for mistake; 56 A. D. 108, 317, 331, as to when mistake will be relieved against in equity; 56 A. D. 706, as to when equity will relieve against fraud, mistake, or surprise; 55 A. D. 442, on power of courts of equity to construe devises and correct mistakes in written instruments; 55 A. D. 141, on power of courts of equity to correct mistakes in defective conveyances.

Cited in note in 65 A. S. R. 488, on reformation of contracts.

Distinguished in **Lambert v. Leland**, 2 Sweeny, 218, holding that action may be maintained to cancel satisfaction piece on ground of fraudulent concealment.

Powers of receiver in insolvency.

Cited in **Porter v. Williams**, 9 N. Y. 142, 59 A. D. 519, 12 How. Pr. 107, upholding right of receiver to impeach debtor's assignment in fraud of creditors; **Industrial Mut. Deposit Co. v. Taylor**, 118 Ky. 851, 82 S. W. 574, upholding power of receiver of insolvent corporation to sue it and creditor whom it has illegally preferred, and citing annotation also on this point.

Distinguished in **Hyde v. Lynde**, 4 N. Y. 387, holding that receiver of corporation cannot impeach lawful corporate acts; **Palmer v. Smith**, 10 N. Y. 303, on effect of assignment to special receiver under court order, of mortgage held by trustees to secure corporate creditors.

51 AM. DEC. 345, BLOT v. BOICEAU, 3 N. Y. 78.

Right, as between principal and factor, to control sale.

Cited in **Howard v. Smith**, 56 Mo. 314, holding that after factor has made advances consignor cannot control sale except as to surplus not necessary for repayment of advances; **Scott v. Rogers**, 4 Abb. App. Dec. 163, on right of factor instructed to sell on certain day to make offer of sale on that day, to be accepted on next.

Cited in reference notes in 1 A. S. R. 665; 34 A. S. R. 766,—on factor's power of sale after making advances.

Cited in note in 58 A. D. 160, on factor's duty being to obey instructions.

Distinguished in **Mooney v. Musser**, 45 Ind. 115, holding factor instructed to sell for certain price, who has made advances exceeding value of goods, entitled, after waiting reasonable time for response to offer to return them, to sell for best price obtainable; **Marr v. Barrett**, 41 Me. 403, holding that trover will lie against factor who, without making advances, ships goods and sells them at place other than that directed.

Rules as to measure of damages.

Cited in **Mills v. Gould**, 10 Jones & S. 119; **Devendorf v. Wert**, 42 Barb. 227,—holding that plaintiff proving breach of valid contract may recover at least nominal damages; **Romaine v. Van Allen**, 26 N. Y. 309, holding measure of damages for conversion of corporate stock to be highest price between conversion and trial; **Leonard v. New York, A. & B. Electro Magnetic Teleg. Co.** 41 N. Y. 544, 1 A. R. 446, holding measure of damage for mistake in telegram, causing wrong

goods to be shipped, to be difference between market prices at shipping point and destination, plus cost of transportation.

— In action by principal against agent, generally.

Cited in *Borup v. Mininger*, 5 Minn. 523, Gil. 417, holding that depository of note for collection, sued for not notifying indorser of dishonor, may show, in mitigation of damages, solvency of maker, insolvency of indorser, or that paper was secured; *Morange v. Mix*, 44 N. Y. 315, holding that one sued for negligence in searching for tax encumbrances, and relying on plaintiff's protection under covenant against them has burden of establishing that plaintiff has remedy thereunder.

Cited in notes in 51 A. D. 315, on measure of damages for wrongful sale by pledgee; 1 L.R.A. (N.S.) 249, on damages for negligence as to collection of check.

Distinguished in *Minneapolis Trust Co. v. Mather*, 181 N. Y. 205, 73 N. E. 987, holding pledgee of notes who, at foreclosure of mortgage securing them, bids more for property than instructed, liable for difference between market value and amount of bid.

— Principal against factor.

Cited in *Hinde v. Smith*, 6 Lans. 464, holding that measure of damage for sale by factor for less than instructed is actual damage sustained; *Bell v. Maximos*, 85 Tex. 140, 19 S. W. 1070, holding factor selling cotton without instructions, liable for selling price, less advances and agreed compensation; *Sinnette v. Hoddick*, 10 Misc. 586, 31 N. Y. Supp. 453, holding that factor selling for less than agreed price, goods having no market value, liable for agreed price, except where principal sues in conversion; *Dalby v. Stearns*, 132 Mass. 230, holding measure of damage for sale by consignee for less than price fixed by consignor to be difference between market and selling prices, less advances; *Rollins v. Duffy*, 18 Ill. App. 398, holding that factor sued for selling at less than agreed price may prove actual market value as basis of damages.

Cited in reference notes in 57 A. D. 514; 72 A. D. 502; 54 A. S. R. 100,—on measure of damages for wrongful sale by factors.

Distinguished in *Pugh v. Porter Bros.* 118 Cal. 628, 50 Pac. 772, holding factor liable on guaranty that principal's goods should yield certain price.

51 AM. DEC. 352, HARRIS v. CLARK, 3 N. Y. 93.

Requisites of gifts.

Cited in *Brink v. Gould*, 7 Lans. 425, 43 How. Pr. 289, holding that gift is made perfect and irrevocable only by delivery and acceptance; *Curry v. Powers*, 70 N. Y. 212, 26 A. R. 577, holding delivery indispensable to validity of gift; *Farian v. Wiegel*, 76 Hun, 462, 31 Abb. N. C. 159, 28 N. Y. Supp. 95, holding that one claiming title to property through gift must establish it by clear and convincing evidence; *Geary v. Page*, 9 Bosw. 290, holding that, to constitute gift either *in præsenti* or *in futuro*, donor must part with dominion over property; *Crook v. First Nat. Bank*, 83 Wis. 31, 35 A. S. R. 17, 52 N. W. 1131, holding that with respect to subjects of gift and delivery rules as to gift *inter vivos* apply to gift *causa mortis*; *Kirk v. McCusker*, 3 Misc. 277, 22 N. Y. Supp. 780, holding delivery essential to gift *causa mortis*; *Van Vleet v. McCarn*, 18 N. Y. S. R. 73, holding that, to sustain gift *causa mortis*, there must be such delivery as vests dominion over property in donee; *Re Hall*, 16 Misc. 174, 38 N. Y. Supp. 1135, 1 Gibbons, Sur. Rep. 563, holding that, to sustain gift *causa mortis*, there must be clear proof of donor's intention and of the execution thereof; *Bray v.*

O'Rourke, 89 App. Div. 400, 85 N. Y. Supp. 907, holding that, to support gift *causa mortis*, thing given must be placed in donee's hands, or placed in his power by delivery of means of obtaining it.

Cited in reference notes in 85 A. D. 638; 94 A. D. 55, 129,—on essential requisites of *donatio causa mortis*; 92 A. D. 483, on when delivery essented to validity of gift.

Cited in notes in 99 A. S. R. 895, on necessity of parting with possession and control of gift *causa mortis*; 99 A. S. R. 915, on necessity of clear and convincing evidence of gift *causa mortis*.

Validity and sufficiency of gifts.

Cited in Dodge v. Pond, 23 N. Y. 69, holding mere promise to make future gift, void; Kenney v. Public Administrator, 2 Bradf. 319, holding that gifts *causa mortis* are against policy of law; Allen v. Cowan, 28 Barb. 99, holding words "I give you this property," unaccompanied by delivery or words of acceptance, not valid gift; Delmotte v. Taylor, 1 Redf. 417, holding expression of desire in last illness, that another shall have certain chattels, without delivery, not valid gift *causa mortis*; Brock v. Barnes, 40 Barb. 521, saying that paper giving annuity was, as gift, void and unenforceable against donor's estate; Williams v. Fitch, 18 N. Y. 546, on trustee's promise to hold trust for *cestui que trust's* intended legatee, made to prevent execution of will, as taking effect as gift *causa mortis*; Hunter v. Hunter, 19 Barb. 631, upholding deed of assignment delivered to third person for delivery to donee as valid gift *inter vivos*; Waite v. Grubbe, 43 Or. 406, 73 Pac. 206, holding that where father informed daughter in last illness, of places where money was buried, there was sufficient delivery to support gift; Wilbur v. Warren, 40 Hun, 203, holding one receiving from her father deed of gift of mortgaged premises, with covenant against encumbrances, entitled to recover against his executor payments made by her on mortgage; Selover v. Lockwood, 50 N. Y. S. R. 228, 21 N. Y. Supp. 661, on enforceability of mortgage as testamentary gift; Johnson v. Spies, 5 Hun, 468, on assignment of mortgage as gift *causa mortis*; Re James, 146 N. Y. 78, 48 A. S. R. 774, 40 N. E. 876 (affirming 78 Hun, 121, 28 N. Y. Supp. 992), holding bonds executed and delivered by husband to wife as gift, unenforceable after his death.

Cited in reference notes in 85 A. D. 638, on disfavor of gifts *causa mortis*; 99 A. S. R. 890, on gifts *causa mortis*; 72 A. S. R. 713, on delivery of gift; 37 A. S. R. 878, on sufficiency of delivery of gift *causa mortis*; 92 A. D. 483, on when negotiable instrument given *causa mortis* passes by delivery.

Cited in notes in 26 A. R. 684, on what constitutes gift of savings bank deposit; 48 A. R. 509, on delivery of gift *causa mortis*; 11 L.R.A. 687, on gift of choses in action.

Distinguished in Williams v. Guile, 117 N. Y. 343, 6 L.R.A. 366, 22 N. E. 1071, holding bill of sale containing power of revocation but executed in view of death and delivered to donor's attorney, with instructions to deliver to named person after donor's death, valid gift *causa mortis*.

—Of promissory notes.

Cited in Holmes v. Roper, 141 N. Y. 64, 36 N. E. 180, holding note without consideration, payable specified time after death of maker, unenforceable as gift after death; Hamor v. Moore, 8 Ohio St. 239, holding note payable after death, not valid gift *causa mortis*; Re Pinkerton, 49 Misc. 363, 99 N. Y. Supp. 492, holding promissory note unenforceable as gift against maker's estate; Gourley v. Linsenbighler, 51 Pa. 345, holding undorsed notes subjects of gift *causa mortis*

by payee; *Hadley v. Reed*, 34 N. Y. S. R. 949, 12 N. Y. Supp. 163, holding natural love and affection insufficient consideration to support promissory note; *Walsh's Appeal*, 122 Pa. 177, 9 A. S. R. 83, 1 L.R.A. 535, 15 Atl. 470, on validity of donor's note as gift *causa mortis*; *Howland v. Ft. Edward Paper Mill Co.* 8 How. Pr. 505, on enforceability of promissory note as gift; *Whitaker v. Whitaker*, 52 N. Y. 368, 11 A. R. 711, on note unsupported by consideration as subject of gift *causa mortis*; *Re Swade*, 65 App. Div. 592, 72 N. Y. Supp. 1030, holding proof that one, three days before her death, handed another a package of notes, bonds, and bank book, to do with as she saw fit, sufficient to sustain gift *causa mortis*.

Cited in reference note in 66 A. D. 743, on donor's own note as subject of valid *donatio causa mortis*.

Cited in notes in 26 L.R.A. 306, on validity of gift by promissory note; 99 A. S. R. 910, on gift *causa mortis* of donor's own promissory note; 9 E. R. C. 864, on note as subject of gift *causa mortis*.

Distinguished in *Fulton v. Fulton*, 48 Barb. 581, holding written declarations of grantor of land, that purchase-money notes, made payable to his children, should be considered by them as their share of his property, satisfactory evidence of delivery to support gift; *Re Flagg*, 27 Misc. 401, 59 N. Y. Supp. 167, holding mere inadequacy of consideration no defense to note given by aged father to son for services, payable after former's death.

— Of checks or orders.

Cited in *Pennell v. Ennis*, 126 Mo. App. 355, 103 S. W. 147; *Re Smither*, 30 Hun, 632; *Second Nat. Bank v. Williams*, 13 Mich. 282,—holding that check not accepted or paid by bank is not valid gift *causa mortis*; *Curry v. Powers*, 70 N. Y. 212, 26 A. R. 577, holding check payable four days after drawer's death, invalid gift *causa mortis*; *Flint v. Pattee*, 33 N. H. 520, 66 A. D. 742, holding check delivered in expectation of death and to take effect thereafter, not valid gift *causa mortis*; *Pullen v. Placer County Bank*, 138 Cal. 169, 94 A. S. R. 19, 71 Pac. 83, holding check given with directions to present it after drawer's death, ineffective as gift *causa mortis*; *Kurtz v. Smither*, 1 Dem. 399, holding the drawing and delivering, in view of death, of a check for "the amount of deposit," valid gift *causa mortis*; *Re Small*, 27 App. Div. 438, 50 N. Y. Supp. 341, on validity as gift of order given by partner against firm, but not accepted by firm before his death.

Cited in notes in 56 A. R. 253, on delivery of check payable after maker's death as gift *inter vivos* or *causa mortis*; 18 L.R.A. 856, on gift of check or draft on person other than banker.

— Of certificates of deposit or bank books.

Cited in *Basket v. Hassell*, 107 U. S. 602, 27 L. ed. 500, 2 Sup. Ct. Rep. 415, holding indorsement on certificate of deposit directing payment to certain person on indorser's death, and expressing possibility of his living to attend to it, not valid as gift *causa mortis*; *Dunn v. German American Bank*, 109 Mo. 90, 18 S. W. 1139, holding delivery of certificate of deposit to another, with instructions to draw money and pay to donor's children if he should die, not valid gift *causa mortis*; *Dinley v. McCullagh*, 92 Hun, 454, 36 N. Y. Supp. 1007, holding delivery of savings-bank check and bank book to another, insufficient to constitute gift *inter vivos*; *Witherow v. Lord*, 41 App. Div. 413, 58 N. Y. Supp. 778, holding, where one gave savings-bank check and book to donee, that all elements of executed gift were present; *Tyrrell's Estate*, 19 W. N. C. 334, 3 Pa. Co. Ct. 228, 44 Phila. Leg. Int. 146, holding delivery of bank book in last illness, expressly made inoperative if death did not occur, valid gift *causa mortis*; *Pierce v.*

Boston Five Cents Sav. Bank, 129 Mass. 425, 37 A. R. 371, holding delivery to another of sealed package containing money, bank book, and instructions that money should be given to certain persons, valid gift *causa mortis* in trust.

Cited in reference notes in 96 A. D. 469, on sufficiency of delivery of pass book of bank to pass title as gift *causa mortis*; 92 A. D. 483, on when bank book given *causa mortis* passes by delivery.

—Of corporate stock.

Cited in Johnson v. Williams, 63 How. Pr. 233, denying validity as gift either *inter vivos* or *causa mortis*, of instrument directing gift of stock which was not, and could not have been, delivered; Allen-West Commission Co. v. Grumbles, 63 C. C. A. 401, 129 Fed. 287, denying validity of gift of corporate stock unaccompanied by certificate of shares; Noble v. Garden, 146 Cal. 225, 79 Pac. 883, 2 A. & E. Ann. Cas. 1001, holding delivery of loan association stock to agent by one who directed that it be given to another on her death, but who maintained dominion and drew dividends, not valid gift *causa mortis*; Egerton v. Egerton, 17 N. J. Eq. 419, holding directions to agent to subscribe stock for benefit of principal's wife, which is in fact done by his executor, not valid as gift *causa mortis*; Crawford v. Dox, 5 Hun, 507, upholding as gift another's assignment of bank stock to her sons, with reservation of right to dividends during her life.

Distinguished in Van Deusen v. Rowley, 8 N. Y. 358, holding instrument transferring bank stock to another, delivered, together with all evidences of title, to donee, valid *causa mortis*; Gilkinson v. Third Ave. R. Co. 47 App. Div. 472, 63 N. Y. Supp. 792, holding proof that one rented deposit box, placed stock therein, where it remained until his death, and gave key to one toward whom he had assumed parental relation, together with declarations, sufficient to sustain gift *inter vivos*.

Effect and enforcement of instruments for payment of money.

Cited in Famous Shoe & Clothing Co. v. Crosswhite, 51 Mo. App. 55, holding that contract of drawer of bill of exchange is that drawee will accept and pay, or that, if he does not, former will pay on notice of dishonor; Bowen v. Newell, 5 Sandf. 326, holding that order on bank payable on fixed day was check and not bill of exchange; Ross v. Smith, 19 Tex. 171, 70 A. D. 327, holding mere possession of unindorsed note payable to another, insufficient to support action thereon.

—As equitable assignment of funds generally.

Cited in Shuttleworth v. Bruce, 7 Robt. 160, holding order to factor to pay proceeds of specified consignment to another, an appropriation of the fund; Alger v. Scott, 54 N. Y. 14 (dissenting opinion), on order payable out of specified fund as assignment *pro tanto* of fund; Decker v. Mathews, 12 N. Y. 313, on right of maker of note to maintain trover for wrongful negotiation by his agent before it has been put into circulation.

Cited in note in 10 E. R. C. 424, on order payable out of particular fund as equitable assignment.

Distinguished in Hall v. Buffalo, 1 Keyes, 193, 2 Abb. App. Dec. 301, holding city contractor's order on comptroller, to pay certain amount on his contract, an assignment of funds; Re Smith, 16 Nat. Bankr. Reg. 399, Fed. Cas. No. 12,992, holding, where one drew orders against attorney collecting note for him, holders of orders entitled to preference over assignee in bankruptcy of drawer; Munger v. Shannon, 61 N. Y. 251, holding one's promissory note directing his copartner to pay it out of maker's share of profits, equitable assignment of profits; Brown v. Spohr, 180 N. Y. 201, 73 N. E. 14, holding that, where trust deed by

firm recited delivery of funds which trustees acknowledged, notes given by firm for such funds were enforceable; *Coates v. First Nat. Bank*, 91 N. Y. 20, holding letter of bank to its correspondent and debtor, directing transfer of sum from former's account to that of its depositor, assignment of such sum to depositor.

— **Effect of drafts.**

Cited in *Sands v. Matthews*, 27 Ala. 399; *Grammel v. Carmer*, 55 Mich. 201, 54 A. R. 363, 21 N. W. 418; *Lewis v. Trader's Bank*, 30 Minn. 134, 14 N. W. 597; *Jones v. Pacific Wood Lumber & Flume Co.* 13 Nev. 359, 39 A. R. 308; *Winter v. Drury*, 5 N. Y. 525; *Chapman v. White*, 6 N. Y. 412, 57 A. D. 464; *Lowery v. Steward*, 3 Bosw. 505; *Cashman v. Harrison*, 90 Cal. 297, 27 Pac. 283,—holding that bill of exchange not specifying fund for payment does not operate as assignment of funds until accepted; *Randolph v. Canby*, 11 Nat. Bankr. Reg. 296, Fed. Cas. No. 11,559, holding presentation of draft without acceptance, not assignment of funds giving payee lien; *Kahnweiler v. Anderson*, 78 N. C. 133, on draft on whole of specific fund as assignment of the fund.

Cited in reference notes in 64 A. D. 213; 73 A. D. 525,—on operation of bill of exchange or draft as equitable assignment before acceptance; 88 A. D. 178, as to when draft operates as assignment.

— **Effect of checks.**

Cited in *Atty. Gen. v. Continental L. Ins. Co.* 71 N. Y. 325, 27 A. R. 55; *First Nat. Bank v. Clark*, 134 N. Y. 368, 17 L.R.A. 580, 32 N. E. 38; *Lunt v. Bank of North America*, 49 Barb. 221; *Duncan v. Berlin*, 60 N. Y. 151,—holding that check not specifying fund does not, until accepted by bank, constitute assignment of funds; *Aetna Nat. Bank v. Fourth Nat. Bank*, 46 N. Y. 82, 7 A. R. 314, holding that check creates no lien on drawer's fund in payee's favor; *Cloyes v. Cloyes*, 36 Hun. 145, holding that payee of check drawn in usual form and unsupported by consideration has no right of action against bank; *Pickslay v. Starr*, 59 N. Y. S. R. 603, 27 N. Y. Supp. 616, on check as assignment of funds; *Pease v. Landauer*, 63 Wis. 20, 53 A. R. 247, 22 N. W. 847, holding that check is assignment of funds as between drawer and payee; *McGregor v. Loomis*, 1 Disney (Ohio) 247, holding that check is absolute appropriation of so much money; *McMurray v. Ennis*, 31 N. Y. S. R. 976, 10 N. Y. Supp. 698, holding creditor receiving check before debtor's death, and cashing it thereafter, not liable for amount to debtor's administratrix.

Cited in reference notes in 96 A. D. 157, 731, on bank check as assignment of deposit; 61 A. D. 436, on effect of unaccepted check or draft as assignment.

Cited in notes in 7 L.R.A. 596, on checks as equitable assignments; 57 A. D. 466, on unaccepted check as not an equitable assignment of deposit; 89 A. D. 442, on bank's liability on certified checks; 9 L.R.A. 109, on relation between depositor and bank.

51 AM. DEC. 364, STATE v. HILDRETH, 31 N. C. (9 IRED. L.) 429.

Cited without special discussion in *Ex parte Finlen*, 20 Nev. 141, 18 Pac. 827.
Province of court and jury in homicide case.

Cited in *State v. Vines*, 93 N. C. 493, 53 A. R. 466, upholding charge that, if jury believed evidence, defendant was guilty of manslaughter; *State v. Matthews*, 78 N. C. 523, holding that court may instruct that, if facts which evidence tends to establish have been proved, jury may acquit defendant of murder; *State v. Hill*, 72 N. C. 345, upholding charge that, if one prisoner fired gun, the others, if present and aiding and abetting, were equally guilty.

Cited in reference note in 3 A. S. R. 781, on what matters respecting degree of murder are for court and what for jury.

Effect of provocation, passion, and malice on homicide.

Cited in *State v. Boon*, 82 N. C. 637; *State v. Chavis*, 80 N. C. 353,—holding homicide by excessive violence out of proportion to provocation, murder; *Ferguson v. State*, 49 Ind. 33, denying propriety of charge that, to reduce homicide upon provocation, blow must have been given immediately after provocation.

Cited in reference notes in 71 A. D. 381, on murder as killing of human being with malice aforethought express or implied; 81 A. D. 791, defining "malice aforethought"; 52 A. D. 736, on presumption of malice from every intentional homicide; 52 A. D. 736, distinguishing between murder and manslaughter.

Cited in note in 5 L.R.A. (N.S.) 826, on determination as to existence and sufficiency of passion to mitigate or reduce degree of homicide.

— When committed in combat.

Cited in *State v. Gooch*, 94 N. C. 987, holding killing in sudden combat, but by violence, disproportionate to provocation, murder; *Hash v. Com.* 88 Va. 172, 13 S. E. 398, holding slayer not precluded from setting up self-defense by fact that he provoked combat, if he provoked it without felonious intent; *State v. Taylor*, 57 W. Va. 228, 50 S. E. 247, holding that fact that accused agreed to engage in combat does not preclude finding that shooting was done in hot blood, and that offense was only manslaughter; *State v. White*, 30 La. Ann. 364, holding that blow inflicted in combat need not be given in actual struggle while combatants are "clutched," in order to be given in heat of passion; *State v. Partlow*, 90 Mo. 608, 59 A. R. 31, 4 S. W. 14, holding that, where slayer makes common assault which is returned with disproportionate violence, the killing, without cooling time, is only manslaughter.

Cited in reference notes in 48 A. S. R. 29, on homicide by killing on sudden quarrel; 52 A. D. 737, as to when homicide in mutual combat is manslaughter and when murder.

Cited in note in 63 L.R.A. 378, on homicide by dueling.

Reviewability of rulings of trial court.

Cited in *State v. Joyce*, 121 N. C. 610, 28 S. E. 366, holding judgment of commissioners ordering laying out of road, conclusive until reversed and not subject to collateral attack.

—As to continuance or transfer of causes.

Cited in *McNealy v. State*, 17 Fla. 198, holding that trial court's refusal to grant continuance will not be disturbed, in absence of abuse of discretion placing rights of accused in jeopardy; *State v. Hill*, 72 N. C. 345, holding judge's decision as to sufficiency of grounds of belief, stated in affidavit for removal of murder trial not reviewable; *State v. Johnson*, 104 N. C. 780, 10 S. E. 257, holding trial court's action on motion for transfer of perjury trial because of his prejudice, discretionary and not ordinarily reviewable; *Albertson v. Terry*, 109 N. C. 8, 13 S. E. 713, holding trial court's findings of fact on motion for removal of civil cause, conclusive, and his ruling thereon, not reviewable.

Cited in reference notes in 55 A. D. 743, on how far granting of continuance is discretionary; 53 A. S. R. 73, on nature of order granting or refusing continuance; 95 A. D. 379, on interference with motion for continuance; 55 A. D. 743, as to when continuance will be granted for absence of witness or failure to obtain his testimony; 62 A. D. 312, on discretionary nature of continuance in criminal case.

51 AM. DEC. 369, STATE v. HILDRETH, 31 N. C. (9 IRED. L.) 440.**Necessity for basing instructions on evidence adduced.**

Cited in reference notes in 53 A. D. 496; 58 A. D. 309; 60 A. D. 330; 62 A. D. 688; 64 A. D. 165; 66 A. D. 96; 68 A. D. 543; 81 A. D. 530,—on propriety of instructions on matters not in evidence.

Cited in notes in 72 A. D. 540, on instructions being based upon evidence.

Complicity in wrongful act.

Annotation cited in *Wright v. Stewart*, 130 Fed. 905, on liability of one knowingly encouraging or promoting commission of trespass.

— Criminal act.

Cited in *State v. Douglass*, 44 Kan. 618, 26 Pac. 476, holding that mental consent to crime, unaccompanied with express consent, does not render one consenting guilty of offense; *Jordan v. State*, 81 Ala. 20, 1 So. 577, holding that, to warrant conviction of aiding and abetting offense, there must have been common purpose to perpetrate it, and citing annotation also on this point.

Cited in reference notes in 59 A. D. 359, on aiders and abettors; 60 A. D. 378; 78 A. D. 756; 80 A. D. 347; 83 A. D. 712; 98 A. D. 769; 73 A. S. R. 970,—on indictment of accomplice as principal; 87 A. S. R. 460, on accessory before the act; 65 A. D. 457, on who are accessories, and when punishable; 40 A. S. R. 671, on presence at commission of crime constituting one accessory; 79 A. D. 694, on rule that in misdemeanors there are no degrees and that all participants are principals.

Cited in note in 13 L.R.A. 196, on aiders and abettors of crime as principals.

Admissibility of declarations of accused.

Cited in *State v. Howard*, 82 N. C. 623, holding declarations of accused twelve months before homicide, inadmissible against him.

Cited in reference note in 62 A. D. 562, as to when confessions or declarations of accused are admissible in evidence.

— In his favor.

Cited in *United States v. Neversen*, 1 Mackey, 152; *State v. McNair*, 93 N. C. 628; *State v. Rhyne*, 109 N. C. 794, 13 S. E. 943; *State v. Edwards*, 112 N. C. 901, 17 S. E. 521,—holding declarations of accused after commission of crime, not admissible in his favor, where not part of *res gesta*.

Cited in reference note in 28 A. S. R. 922, on admissibility of declarations of accused in his favor.

51 AM. DEC. 376, DEN EX DEM. SMITH v. FORE, 32 N. C. (10 IRED. L.) 37.**Restrictions on execution on judgment.**

Cited in *Peebles v. Pate*, 86 N. C. 437 (later appeal 90 N. C. 348), holding that, where record shows previous levy and sale, subsequent execution on same judgment confers no authority to sell same premises.

Rights and defenses of execution debtor.

Cited in *Smith v. Fore*, 40 N. C. (1 Jones, L.) 488, as settling point that execution debtor may resist ejectment brought by execution purchaser, unless latter can show valid execution.

Cited in reference notes in 4 A. S. R. 724, on defenses available to execution defendant; 53 A. D. 416, on right of defendant in possession, and of execution defendant, to deny title of purchaser at execution sale.

51 AM. DEC. 377, McNEELEY v. HART, 32 N. C. (10 IRED. L.) 63.**Acquisition of title after conveyance.**

Cited in *Barwick v. Wood*, 48 N. C. (3 Jones, L.) 306, holding that, where remainderman conveyed during life estate, his title, upon fall of life estate, inured to grantee by relation back; *Wellborn v. Finley*, 52 N. C. (7 Jones, L.) 228, holding that where husband and wife join in deed of latter's land, which is ineffective as to her for want of privy examination, the husband's interest *jure mariti* under subsequent assignment of term to wife passed by estoppel.

Nature and effect of cropper's contract.

Cited in *Harrison v. Ricks*, 71 N. C. 7, holding that cropper is laborer receiving pay in share of crop; *Rouse v. Wooten*, 104 N. C. 229, 10 S. E. 190, holding that cropper, although laborer paid in share of crops was protected in such right by statute; *State v. Austin*, 123 N. C. 749, 31 S. E. 731, holding that cropper's possession of crop is that of servant, and, in law, is that of landlord; *Kelly v. Rummerfield*, 117 Wis. 620, 98 A. S. R. 951, 94 N. W. 649, holding that owner of land worked by cropper is legal owner of crop.

Cited in reference notes in 69 A. D. 508, on rights and relations of parties when land is let on shares; 56 A. D. 196, on nature of contract leasing land on shares; 59 A. D. 55, on right of lessee of land on shares to sell share of crop to third party before division.

Cited in notes in 98 A. S. R. 956, on cropper's title to or interest in crops; 37 A. D. 320, on agreement to work land on shares as making occupier, "cropper."

51 AM. DEC. 379, BROWN v. RAY, 32 N. C. (10 IRED. L.) 72.**Sufficiency of consideration to support promise.**

Cited in *Johnston v. Smith*, 86 N. C. 498, holding that there must be an entire failure of consideration to defeat sale or contract.

—Detriment to promisee.

Cited in *Sherrill v. Hagan*, 92 N. C. 345; *Watkins v. James*, 50 N. C. (5 Jones, L.) 105,—holding loss or inconvenience to promisee, sufficient consideration to support promise.

Cited in reference notes in 71 A. D. 578, on advantage to one party or detriment to another as consideration for promise; 57 A. D. 527, on sufficiency, as consideration, of loss to promisee or benefit to promisor.

—Reposing trust in promisor.

Cited in *Byerly v. Kepley*, 46 N. C. (1 Jones, L.) 35, holding one voluntarily undertaking piece of engineering, bound to use skill necessary for accomplishment of work.

51 AM. DEC. 380, DOE EX DEM. WALLACE v. MAXWELL, 32 N. C. (10 IRED. L.) 110.**Acquisition of rights as against state.**

Cited in *Crescent City Gaslight Co. v. New Orleans Gaslight Co.* 27 La. Ann. 138, holding that, where statute prolonging corporate charter was void, no act of its own could cure the infirmity.

—By estoppel.

Cited in *State v. Williams*, 94 N. C. 891, holding that doctrine of estoppel does not apply against state; *Chicago, St. P. M. & O. R. Co. v. Douglas County*,

134 Wis. 197, 14 L.R.A.(N.S.) 1074, 114 N. W. 511, holding that estoppel *in pais* cannot be asserted against state's exercise of taxing power; *Terre Haute, & I. R. Co. v. State*, 159 Ind. 438, 65 N. E. 401, holding right of action by state not barred by laches of its officers.

Cited in reference note in 85 A. S. R. 870, on estoppel of state.

Cited in notes in 16 A. D. 754, on estoppel of state by recitals in grant; 15 A. D. 519, on estoppel of sovereignty by acts or declarations of its agents.

Presumptive grants.

Cited in *Davis v. McArthur*, 78 N. C. 357; *Bryan v. Spivey*, 109 N. C. 57, 13 S. E. 766; *Baker v. McDonald*, 47 N. C. (2 Jones, L.) 244,—holding that thirty years' continuous possession of land raised presumption of grant; *Mason v. McLean*, 35 N. C. (13 Ired. L.) 262, holding that possession of land for less than thirty years did not authorize presumption of grant.

Cited in reference notes in 80 A. D. 118, as to when grant will be presumed; 54 A. D. 357; 60 A. D. 716,—on what constitutes adverse possession; 61 A. D. 305, on essentials of adverse possession to defeat statute of limitations.

51 AM. DEC. 383, HISE v. FINCHER, 32 N. C. (10 IRED. L.) 139.

What is a revocation of will.

Cited in *Runkle v. Gates*, 11 Ind. 95, holding testator's reliance upon false statement that will had been burned, not a revocation; *Graham v. Burch*, 47 Minn. 171, 28 A. S. R. 339, 49 N. W. 697, holding will not revoked by subsequent conveyance of devised property by instrument void for fraud and undue influence; *Fellows v. Allen*, 60 N. H. 439, 49 A. R. 328, holding will not deemed destroyed because found among worthless papers in insecure place; *Ladd's Will*, 60 Wis. 187, 50 A. R. 355, 18 N. W. 734, holding unattested inscription, "I revoke this will," with signature, in pencil, not a revocation.

Cited in reference notes in 84 A. D. 631, on testator's directions to destroy will as revocation; 59 A. D. 589, on revocation of will by burning; 64 A. D. 600, on revocation of will by subsequent will duly executed; 48 A. S. R. 198, on revocation of will by mistake; 73 A. S. R. 601, on establishing revocation of will by parol evidence.

Cited in notes in 28 A. S. R. 345, on modes of revoking wills; 28 A. S. R. 347, on destruction of will as revocation; 12 A. D. 379, on effect of destruction of substituted paper testator supposing it to have been will.

Distinguished in *White v. Casten*, 46 N. C. (1 Jones, L.) 197, 59 A. D. 585, holding casting of will by testator into fire, so that it was slightly burned, a revocation, although it was rescued by another.

51 AM. DEC. 386, CABE v. JAMESON, 32 N. C. (10 IRED. L.) 193.

What constitutes an accord and satisfaction.

Cited in note in 1 E. R. C. 402, on payment of less sum as satisfaction of claim for unliquidated damages.

Parol evidence to show waiver.

Cited in *Franklin F. Ins. Co. v. Hamill*, 5 Md. 170, holding that one sued in covenant on bond may show by parol evidence that condition was waived.

Cited in note in 13 L.R.A. 633, on admissibility of parol evidence to show waiver.

51 AM. DEC. 387, PERRY v. PHIPPS, 32 N. C. (10 IRED. L.) 259.**Dogs as property.**

Cited in *Patton v. State*, 93 Ga. 111, 24 L.R.A. 732, 19 S. E. 734, as to whether dogs are "private property"; *Harrington v. Miles*, 11 Kan. 480, 15 A. R. 355, holding that stealing of dog constitutes larceny.

Cited in notes in 15 A. R. 356, on right of property in dogs; 40 L.R.A. 518, on value of dogs; 9 L.R.A. 352, on license on privilege to keep dogs.

— Right to kill or injure animals.

Cited in *Aldrich v. Wright*, 53 N. H. 398, 16 A. R. 339, holding statute creating close season for fur bearing animals, not applicable to cases of destruction of such in exercise of constitutional right of protecting property therefrom.

— Dogs.

Cited in *St. Louis, A. & T. R. Co. v. Holden*, 3 Tex. App. Civ. Cas. (Willson) 391, sustaining action at common law for wrongful killing of dog; *Parker v. Mise*, 27 Ala. 480, 62 A. D. 776, holding action for shooting of dog maintainable without proof of pecuniary value; *Heiligmann v. Rose*, 81 Tex. 222, 26 A. S. R. 804, 13 L.R.A. 272, 16 S. W. 931, holding that judgment for damages from poisoning of useful dogs may be sustained without proof of market or pecuniary value; *Mowery v. Salisbury*, 82 N. C. 175, sustaining validity of ordinance providing for summary destruction of unregistered dogs found at large.

Cited in reference note in 81 A. D. 183, as to when action for injuries to dog lies.

Cited in notes in 15 L.R.A. 250; 40 L.R.A. 510; 74 A. S. R. 360,—on right to kill dogs; 67 A. S. R. 294, on justification and defenses for killing or injuring another's dog; 67 A. S. R. 292, on remedies of owner to protect property right in dogs, and measure of recovery for injury thereto.

Tax on dogs.

Cited in *Sentell v. New Orleans & C. R. Co.* 166 U. S. 698, 41 L. ed. 1169, 17 Sup. Ct. Rep. 693, sustaining statute requiring dogs to be placed upon assessment rolls, and limiting any recovery by owner to value fixed by himself for taxation.

51 AM. DEC. 389, SIKES v. PAINE, 32 N. C. (10 IRED. L.) 280.**Admissibility of opinions of witnesses.**

Cited in reference notes in 53 A. D. 430; 59 A. D. 706; 64 A. D. 328,—on opinion of witness as evidence.

— Experts.

Cited in *Barnes v. Ingalls*, 39 Ala. 193, holding ambrotypist and daguerreotypist competent to testify as to whether photographic painting was well executed.

Cited in reference note in 9 A. S. R. 875, on competency of opinion of tradesman.

Cited in note in 66 A. D. 229, on competency of expert testimony on question of art, science, or skill only.

51 AM. DEC. 391, DEN EX DEM. HOUSER v. BELTON, 32 N. C. (10 IRED. L.) 358.**Construction of deeds containing inconsistent descriptions.**

Cited in *Mizell v. Simmons*, 79 N. C. 182, construing "east" to mean "west" when fully corrected by other calls; *Credle v. Hays*, 88 N. C. 321, holding that

error in course and distance will be corrected where means of correcting are afforded by more certain descriptions in deed; *Higdon v. Rice*, 119 N. C. 623, 26 S. E. 256, holding that deed or patent should be so run as to include land actually shown to have been surveyed with view to its execution; *Doe ex dem. Marshall v. Fisher*, 46 N. C. (1 Jones, L.) 111, holding that call for corner of lot of certain number will control where there is error in recital of given name of owner thereof; *Bowen v. Gaylord*, 122 N. C. 816, 29 S. E. 340, holding that course and distance must give way to call for natural object or well known line of another tract; *McKenzie v. Houston*, 130 N. C. 566, 41 S. E. 780 (dissenting opinion), on rule that course and distance must give way to call for well known line of another lot.

Cited in reference note in 55 A. D. 147, on parol evidence to explain description in deed.

51 AM. DEC. 393, *KEATON v. BANKS*, 32 N. C. (10 IRED. L.) 381.

What constitutes an irregular judgment.

Cited in *Stradley v. King*, 84 N. C. 635, holding that irregular judgment is one which is signed on record without intervention of court, and which, to knowledge of plaintiff, ought not to have been given; *Stafford v. Gallops*, 123 N. C. 19, 68 A. S. R. 815, 31 S. E. 265, holding judgment irregular and not void when based on notice not issued required number of days before return day; *Emeric v. Alvarado*, 64 Cal. 529, 2 Pac. 418, holding that appearance for infant by guardian *ad litem* without appointment by court order is irregularity that may be corrected by motion.

Cited in reference note in 73 A. D. 666, on invalidity of judgment against party without notice or appearance.

Cited in note in 11 A. S. R. 821, on validity of judgments rendered without jurisdiction.

Method of attacking judgment.

Cited in *Syme v. Trice*, 96 N. C. 243, 1 S. E. 480, holding that attack on judgment for fraud must be made by new action, where action in which it was rendered is ended; *Burgess v. Kirby*, 94 N. C. 575, holding that irregular judgment cannot be attacked in collateral proceedings.

Distinguished in *England v. Garner*, 84 N. C. 212, holding that, where suit is ended by final decree which is carried into effect, vacation thereof must be sought by new action; *Sumner v. Sessoms*, 94 N. C. 371, holding that judgment cannot be attacked in collateral proceeding for want of authority of next friend or guardian *ad litem* to appear.

Vacation of judgments.

Cited in *Dick v. McLaurin*, 63 N. C. 185; *Harrell v. Peebles*, 79 N. C. 26; *Vass v. Peoples' Bldg. & L. Asso.* 91 N. C. 55; *Stark Bros. v. Royce*, 44 Wash. 287, 87 Pac. 340; *Williams v. Beasley*, 35 N. C. (13 Ired. L.) 112,—holding that court in which judgment is rendered may set it aside for irregularity; *Mason v. Miles*, 63 N. C. 564, holding parol proof of want of service of process admissible on motion to vacate default judgment; *Whitehurst v. Merchants' & F. Transp. Co.* 109 N. C. 342, 13 S. E. 937, holding that on motion to vacate judgment court may inquire into truthfulness of sheriff's return of summons as served.

Cited in reference note in 48 A. S. R. 799, on vacating on motion judgment irregularly entered.

Cited in notes in 60 A. S. R. 654, on vacation of judgments and decrees for

irregularities; 60 A. S. R. 656, on vacation, on motion, of judgments and decrees against infants, lunatics, and married women.

—Time for motion to vacate.

Cited in *Monroe v. Whitted*, 79 N. C. 508, holding that irregular judgment may be set aside at any time; *Re College Street*, 11 R. I. 472, holding that irregular or void judgment may be set aside on motion after term has ended; *Cowles v. Hayes*, 69 N. C. 406, holding one's right to have judgment set aside for irregularity, not confined to year after he has notice of it; *Doe ex dem. Taylor v. Gooch*, 110 N. C. 387, 15 S. E. 2, holding that irregular judgment may be set aside on motion within any reasonable time; *Larkins v. Bullard*, 88 N. C. 35, upholding vacation of judgment for irregularity where notice of motion was served after lapse of seven years.

Cited in reference notes in 96 A. D. 624, on diligence required of party in moving to set aside judgment; 99 A. D. 533, on vacating void judgments after lapse of considerable time.

Distinguished in *Vick v. Pope*, 81 N. C. 22, holding that judgment should not be set aside for irregularity after its transfer to innocent holder for full value.

51 AM. DEC. 395, HERRING v. WILMINGTON & R. R. CO. 32 N. C. (10 IRED. L.) 402.

Negligence as question of law or fact.

Cited in *Ex parte Stell*, 4 Hughes, 157, Fed. Cas. No. 13,358; *Emry v. Raleigh & G. R. Co.* 109 N. C. 589, 15 L.R.A. 332, 14 S. E. 352; *Brock v. King*, 48 N. C. (3 Jones, L.) 45,—holding that what amounts to negligence is question of law; *Pleasants v. Raleigh & A. Air Line R. Co.* 95 N. C. 195; *Dunn v. Seaboard & R. R. Co.* 78 Va. 645, 49 A. R. 388; *Manly v. Wilmington & W. R. Co.* 74 N. C. 655,—holding negligence question of law where facts are found or admitted; *Biles v. Holmes*, 33 N. C. (11 Ired. L.) 16, holding ordinary care question of law where facts are admitted or proved; *Miller v. Wilmington & P. R. Co.* 128 N. C. 26, 38 S. E. 29, holding contributory negligence question of law where facts are undisputed.

Cited in reference notes in 70 A. D. 655, on what amounts to negligence being question of law; 80 A. D. 588, on whether negligence exists, question of fact at common law; 57 A. D. 129; 69 A. D. 551; 78 A. D. 186; 80 A. D. 53,—on whether negligence is question of law or fact; 62 A. D. 327, as to whether negligence of carrier of passengers is a question of law or fact.

Cited in note in 58 A. D. 199, as to whether negligence is question of law or fact.

Distinguished in *Zemp v. Wilmington & M. R. Co.* 9 Rich. L. 84, 64 A. D. 763, holding that, when facts are not ascertained, negligence is mixed question of law and fact.

Liability for injury to trespasser.

Cited in reference note in 68 A. D. 421, on liability for negligent injury to trespasser.

Cited in notes in 55 A. D. 674, on fact that plaintiff was a trespasser at time of injury as a defense; 69 L.R.A. 547, as to whether duty exists to discover peril or disability of trespassers.

—Persons trespassing on railroad track.

Cited in *Windsor v. Hannibal & St. J. R. Co.* 45 Mo. App. 123, on railroad's duty to trespasser on track; *Columbus & W. R. Co. v. Wood*, 86 Ala. 164, 5 So.

463, holding railroad's duty to trespasser not increased by fact that he was drunk, of which train operatives were unaware; *Moore v. Philadelphia, W. & B. R. Co.* 108 Pa. 349, 16 W. N. C. 53, holding that engineer has right to suppose that person on track will step off in event of danger.

Cited in note in 25 L.R.A. 288, on duty to maintain lookout for persons on track.

Cited as overruled in *Deans v. Wilmington & W. R. Co.* 107 N. C. 686, 22 A. S. R. 902, 12 S. E. 77, holding that, where engineer sees, or by reasonable watchfulness may see, person lying on track, he must use all means short of imperiling passengers to stop train; *Clark v. Wilmington & W. R. Co.* 109 N. C. 430, 14 L.R.A. 749, 14 S. E. 43, holding that engineer who observes, or by reasonable watchfulness may observe, person on railroad bridge, must use every safe means to slacken speed.

—Animals trespassing on track.

Cited in *Jones v. North Carolina R. Co.* 67 N. C. 122, holding that duty of engineer observing animal on track is not to slacken speed but to blow whistle; *Doggett v. Richmond & D. R. Co.* 81 N. C. 459, holding railroad not negligent in killing cattle if train could not have been stopped after they were first seen.

What constitutes contributory negligence.

Cited in *Virginia Midland R. Co. v. Boswell*, 82 Va. 932, 7 S. E. 383; *Houston & T. C. R. Co. v. Sympkins*, 54 Tex. 615, 38 A. R. 632,—holding drunkenness of one injured by train, contributory negligence barring recovery except for wanton or wilful neglect.

Cited in reference notes in 62 A. D. 327, on contributory negligence; 90 A. D. 783, on duty of traveler to look and listen at railroad crossing.

Effect of contributory negligence to bar recovery.

Cited in *Richardson v. Wilmington & M. R. Co.* 8 Rich. L. 120, holding that where death of slave was proximate result of his going to sleep on track, there could be no recovery from railroad.

Cited in reference note in 55 A. D. 65, 519, as to when contributory negligence bars action.

— Doctrine of last clear chance.

Cited in *Dun v. Seaboard & R. R. Co.* 78 Va. 645, 49 A. R. 388; *Richmond & D. R. Co. v. Anderson*, 31 Gratt. 812, 31 A. R. 750,—holding that plaintiff's negligence will not bar recovery, if defendant could have avoided injury by exercise of ordinary care.

Cited in notes in 55 L.R.A. 456, on doctrine of last clear chance; 40 L.R.A. 140, 141, on intoxication as affecting negligence when there is negligence on both sides; 25 A. S. R. 42, on liability for reckless negligence to intoxicated persons.

Cited as overruled in *Pickett v. Wilmington & W. R. Co.* 117 N. C. 616, 53 A. S. R. 611, 30 L.R.A. 257, 23 S. E. 264, holding railroad responsible for injury, through engineer's failure to keep lookout, to person negligently on track.

Presumptions as to negligence.

Cited in *Chaffin v. Lawrence*, 50 N. C. (5 Jones, L.) 179, holding that mere fact that horse was injured on sidling and slippery ground does not make out prima facie case of negligence.

Cited in note in 69 L.R.A. 554, on "last moment" to which presumption that person in peril will help himself may be indulged.

— In cases of injury to persons or animals on railroad track.

Cited in *Whitesides v. Southern R. Co.* 128 N. C. 229, 38 S. E. 878 (dissenting opinion), on presumption of negligence from fact that person was found under railroad trestle badly injured; *Scott v. Wilmington & R. R. Co.* 49 N. C. (4 Jones, L.) 432, holding that proof that cow was killed by railroad train does not establish negligence.

— In cases of communication of fire.

Cited in *Butcher v. Vaca Valley & C. L. R. Co.* 67 Cal. 518, 8 Pac. 174, holding prima facie case of negligence in communicating fire from locomotive, made out by proof that engine properly equipped and operated will not ordinarily throw out sparks; *Smith v. Hannibal & St. J. R. Co.* 37 Mo. 287, holding that negligence is not to be presumed from mere setting of fire by sparks from locomotive; *H. & T. C. R. Co. v. McDonough*, 1 Tex. App. Civ. Cas. (White & W.) 354, holding that jury may infer negligence from communication of fire by sparks from locomotive; *Kelsey v. Chicago & N. W. R. Co.* 1 S. D. 80, 45 N. W. 204, holding that propagation of damaging fire by sparks from locomotive raises presumption of negligence on part of company; *Jacksonville, T. & K. W. R. Co. v. Peninsular Land, Transp. & Mfg. Co.* 27 Fla. 1, 17 L.R.A. 33, 9 So. 661, holding that extraordinary escape of sparks from locomotive raised presumption of negligence; *Aycock v. Raleigh & A. Air Line R. Co.* 89 N. C. 321, holding that communication of fire from smokestack without spark arrester, to accumulation of combustible matter along track, was negligence.

Distinguished in *Bryan v. Fowler*, 70 N. C. 596, holding destruction of cotton gin by fire, not prima facie evidence of negligence of owner; *Anderson v. Cape Fear S. B. Co.* 64 N. C. 399, holding that proof that fire was communicated by failure to use spark arrester with which steamboat was equipped established negligence.

Measure of intelligence to be ascribed to negro.

Cited in *Woodhouse v. McRae*, 50 N. C. (5 Jones, L.) 1; *Poole v. North Carolina R. Co.* 53 N. C. (8 Jones, L.) 340; *Couch v. Jones*, 49 N. C. (4 Jones, L.) 402,—holding that negro is to be regarded as intelligent being, with instinct of self-preservation, and capable of avoiding danger.

51 AM. DEC. 398, DOE EX DEM. BRANNOCK v. BRANNOCK, 32 N. C. (10 IRED. L.) 428.

Effect of partial illegality of instrument.

Cited as leading case in *North Carolina Endowment Fund v. Satchwell*, 71 N. C. 111 (dissenting opinion), on validity of incorporation of endowment trustees, as to lawful purposes, as affected by fact that in some respects it was calculated to aid Rebellion.

Cited in *Hicks v. Skinner*, 71 N. C. 539, 17 A. R. 16 (dissenting opinion), on effect of fact that part of consideration is unlawful and comes from one claiming entire benefit of deed.

— Assignment for creditors.

Cited in *Hardcastle v. Fisher*, 24 Mo. 70, holding assignment for creditors, ineffectual as to fraudulent claims, and good as to honest ones; *Harris v. De Graffenreid*, 33 N. C. (11 Ired. L.) 89, holding that insertion of fraudulent debt in deed of trust to secure creditor did not prevent passing of title to trustee; *Falmer v. Giles*, 58 N. C. (5 Jones, Eq.) 75, on fact that deed of trust secures fraudulent debts as affecting its security for other debts; *McCorkle v. Earnhardt*,

61 N. C. (Phill. L.) 300, upholding, as against creditors of grantor, title claimed under deed of trust to secure debts some of which are fictitious; *Carter v. Cocke*, 64 N. C. 239, holding deed of trust to pay debts not avoided by invalid reservation of dower to grantor's wife; *McNeill v. Riddle*, 66 N. C. 290, upholding title acquired at sale under deed of trust to secure debts one of which was usurious; *Morris v. Pearson*, 79 N. C. 253, 28 A. R. 315, holding deed of trust to secure debts of which some were fraudulent, operative to secure good debts; *Brown v. Nimocks*, 124 N. C. 417, 32 S. E. 743, holding that preferences insufficiently stated in schedule of debts do not affect it as to others; *Sutton v. Bessent*, 133 N. C. 559, 45 S. E. 844, on preference of void claim in assignment for creditors as affecting its enforcement for valid claims.

Distinguished in *Stone v. Marshall*, 52 N. C. (7 Jones, L.) 300, holding debtor's deed of trust covering several feigned notes, totally void as against creditor's *fi. fa.*; *Savage v. Knight*, 92 N. C. 493, 53 A. R. 423, holding deed of assignment which was void as to one creditor because made with intent to hinder and defraud him, void as to all.

Validity of conveyance by insolvent generally.

Cited in *Woodruff v. Bowles*, 104 N. C. 197, 10 S. E. 482, holding deed of insolvent to wife, reciting consideration of \$1,100 and natural love and affection, not fraudulent on its face.

51 AM. DEC. 400, BROTHERS v. HURDLE, 32 N. C. (10 IRED. L.) 490.

Rights as to crops and severed portions of freehold.

Cited in *Altes v. Hinckler*, 36 Ill. 275, 85 A. D. 407; *Huerstal v. Muir*, 64 Cal. 450, 2 Pac. 33,—holding that as between successful plaintiff in ejectment and evicted defendant growing crops are part of realty; *Lindsay v. Winona & St. P. R. Co.* 29 Minn. 411, 43 A. R. 228, 13 N. W. 191, that trespasser is owner of crops gathered by him while in possession; *Falcon v. Johnston*, 102 N. C. 264, 11 A. S. R. 737, 9 S. E. 394, holding that crops resulting from efforts of trespassing possessor belong to him and not to owner of soil; *Churchill v. Ackerman*, 22 Wash. 227, 60 Pac. 406, holding possessor of land, growing and severing crops, entitled thereto as against one claiming under executory sale from owner; *United States v. Loughrey*, 172 U. S. 206, 43 L. ed. 420, 19 Sup. Ct. Rep. 153, holding that reversion on condition subsequent of land granted to state by United States did not carry with it timber cut before reversion.

— Right of action, generally.

Cited in note in 69 L.R.A. 732, on right to maintain replevin by or against one in adverse possession of land for things severed.

Distinguished in *Russell v. Hill*, 125 N. C. 470, 34 S. E. 640, holding that one cutting timber as vendee of one not in possession but claiming under grant cannot maintain trover for conversion of logs.

— Right of action against true owner of land for conversion.

Cited in *Branch v. Morrison*, 51 N. C. (6 Jones, L.) 16 [affirming decision on former appeal in 50 N. C. (5 Jones, L.) 16], holding one in possession and cultivating turpentine trees under lease from stranger, entitled to maintain trover against owner of land, who converted turpentine; *Ray v. Gardner*, 82 N. C. 454, holding possessor of land, harvesting crop, entitled to sue true owner for conversion thereof; *Johnston v. Fish*, 105 Cal. 420, 45 A. S. R. 53, 38 Pac. 979,—

holding purchaser of crops from one in adverse possession of land, entitled to sue real owner for conversion of crop.

—Right of action by true owner of land out of possession.

Cited in *Johnson v. C. & N. W. Sand & Gravel Co.* 30 C. C. A. 35, 58 U. S. App. 552, 86 Fed. 269, holding that true owner out of possession cannot sue for injury to freehold or for severance or conversion of portion thereof, as against one in open and exclusive possession under color of title; *Lehigh Zinc & I. Co. v. New Jersey Zinc & I. Co.* 55 N. J. L. 350, 26 Atl. 920, holding that owner of land can not bring trover or replevin for severance of part of freehold by another while in adverse possession under bona fide claim of right; *Cooper v. Watson*, 73 Ala. 252, holding that owner not having actual or constructive possession cannot bring detinue for severance and conversion of part of freehold; *Beatty v. Brown*, 76 Ala. 267, denying right of owner out of possession to bring trespass for severance and conversion of part of freehold; *Rogers v. Brooks*, 99 Ala. 31, 11 So. 753, holding that landlord cannot bring action against tenant in possession for statutory penalty for cutting trees; *Richbourg v. Rose*, 53 Fla. 173, 44 So. 69, 12 A. & E. Ann. Cas. 274, denying right of owner not in possession to replevy turpentine taken from trees; *Harrison v. Hoff*, 102 N. C. 126, 9 S. E. 638, holding that action of claim and delivery cannot be maintained against one severing logs from freehold while in possession; *White v. Fox*, 125 N. C. 544, 74 A. S. R. 654, 34 S. E. 645, holding action for timber or on note given therefor to adverse possessor as vendor of timber, cannot be maintained by owner of land after eviction of adverse possessor; *Clarke v. Clyde*, 25 Wash. 661, 66 Pac. 46, holding owner of land not in possession not entitled to replevy logs severed by adverse possessor.

Cited in reference note in 74 A. S. R. 658, on remedy of owner for removal of timber by one in adverse possession.

Disapproved in *McGinnis v. Fernandes*, 32 Ill. App. 424, holding successful plaintiff in ejectment entitled to replevy severed crop as against one to whom ejectment defendant leased pending appeal resulting in affirmance; *Alliance Trust Co. v. Nettleton Hardware Co.* 74 Miss. 584, 60 A. S. R. 531, 36 L.R.A. 155, 21 So. 396, holding that owner may, upon re-entry, bring trover or trespass for trees cut while he was out of possession.

—Rights of lienor or vendee of tenant.

Cited in *Dail v. Freeman*, 92 N. C. 351, holding that lienor of tenant has right to crop superior to execution purchaser against landlord; *Howland v. Forlaw*, 108 N. C. 567, 13 S. E. 173, holding that sale of crops by tenant before rent is ascertained conveys good title.

Right to maintain ejectment.

Cited in *Brock v. Leighton*, 11 Ill. App. 361, holding that rights acquired under quitclaim deed from tax sale purchaser was to bring ejectment for possession and for damages for rents and profits.

Conclusiveness of judgment in ejectment.

Cited in reference notes in 65 A. D. 614, on conclusiveness of judgment in ejectment as to title in action for mesne profits; 65 A. D. 614, on action for mesne profits as proper remedy to recover for produce of land severed therefrom after recovery in ejectment.

Distinguished in *Boyle v. Wallace*, 81 Ala. 352, 8 So. 194, holding that under statute judgment in ejectment for mortgaged lands is not bar to action for personality covered by same mortgage.

51 AM. DEC. 404, BARBEE v. ARMSTEAD, 32 N. C. (10 IRED. L.) 530.**Liability for interference with contractual relations.**

Cited in *Haskins v. Royster*, 70 N. C. 601, 16 A. R. 780, holding person maliciously inducing another to violate his contract to render personal services, liable to injured party.

— Marital relations.

Cited in *Pool v. Everton*, 50 N. C. (5 Jones, L.) 241, remarking that, so far from being liable on contract of wife leaving bed and board without cause, husband may maintain action against one furnishing her necessaries.

Cited in reference note in 82 A. D. 434, on husband's right of action for enticing away his wife.

Cited in note in 44 A. S. R. 845, 846, on action for alienation of wife's affections.

Requisites and validity of separation agreement.

Cited in notes in 83 A. S. R. 867, on validity of separation agreement; 83 A. S. R. 861, on necessity of trustee in agreement between husband and wife for living separate.

Revocation of license.

Cited in note in 54 A. D. 167, on how license may be revoked.

51 AM. DEC. 408, BRAZIER v. ANSLEY, 33 N. C. (11 IRED. L.) 12.**Who are croppers.**

Cited in *Rouse v. Wooten*, 104 N. C. 229, 10 S. E. 190, holding cultivator of crop agreeing to take share thereof as compensation, cropper at most.

Cited in note in 37 A. D. 320, on agreement to work land on shares as making occupier, "cropper."

Distinguished in *Harrison v. Ricks*, 71 N. C. 7, holding that, where occupier agrees to pay share of crop as rent, he is tenant and not cropper.

Nature of interest of cropper.

Cited in *Kelly v. Rummerfield*, 117 Wis. 620, 98 A. S. R. 951, 94 N. W. 649; *State v. Austin*, 123 N. C. 749, 31 S. E. 731,—holding that possession of cropper is that of landlord who is to divide to former his share.

Cited in reference notes in 59 A. D. 55, on right of lessee of land on shares to sell share of crop to third party before division; 67 A. D. 733, on property in crop raised on shares as between lessor and lessee.

Cited in note in 98 A. S. R. 957, on cropper's title to or interest in crops.

Right to subject cropper's interest to payment of debts.

Cited in *Gray v. Robinson*, 4 Ariz. 24, 33 Pac. 712, holding cropper's interest not subject to execution for his debts, while *en masse*; *Warbritton v. Savage*, 49 N. C. (4 Jones, L.) 382, holding that, where one joint owner of crop sold his share to other to pay debts and division was made in presence of both, latter was not liable for removal thereof.

Cited in reference note in 75 A. S. R. 841, on levy under execution of growing crops.

Cited in notes in 23 L.R.A. 260, on levy and sale of cropper's share of crops; 51 A. D. 410, on inchoate interest of croppers not being subject to execution.

Prerequisites to maintenance of trover.

Cited in reference notes in 66 A. D. 274, on what is necessary to maintain trover; 52 A. D. 680; 54 A. D. 190,—on what title must be shown to sustain trover; 38 A. S. R. 625, on necessity of plaintiff in trover proving right of possession; 57 A. D. 319, on trover when right of property and possession are united in plaintiff at time of conversion.

Requisites and sufficiency of sale of chattels.

Cited in reference notes in 53 A. D. 620, as to when sale of personal property is complete; 59 A. D. 57, on effect of something remaining undone between buyer and seller on passing of title; 62 A. D. 359, on effect of selection of articles sold as delivery; 70 A. D. 797, on measuring and setting apart goods as essential to perfect sale; 82 A. D. 667, as to whether chattel must be set aside and identified before title passes by sale.

Cited in note in 35 L. ed. U. S. 709, on delivery of goods sold.

51 AM. DEC. 412, TAYLOR v. TAYLOR, 41 N. C. (6 IRED. EQ.) 26.**What constitutes undue influence in execution of instrument.**

Cited in *Deaton v. Munroe*, 57 N. C. (4 Jones, Eq.) 39, holding acts of kindness and constant attention to aged and illiterate mother-in-law, not undue influence avoiding her deed of gift.

Cited in reference note in 56 A. D. 430, on undue influence affecting validity of wills.

Distinguished in *Futrill v. Futrill*, 59 N. C. (6 Jones, Eq.) 337, holding one inducing feeble person over whom he had considerable influence to execute deed reciting fictitious debt, not entitled to enforce it except to extent of sum actually due.

51 AM. DEC. 413, BROWN v. CLEGG, 41 N. C. (6 IRED. EQ.) 90.**Equitable discovery of fraud or secret trust.**

Cited in reference notes in 60 A. D. 635, on right to discovery to detect fraud and imposition; 57 A. D. 381, on compelling discovery of secret trust.

51 AM. DEC. 415, JONES v. BLANTON, 41 N. C. (6 IRED. EQ.) 115.**Effect of execution of additional bond on liability of sureties.**

Cited in *Walton v. Williams*, 1 Va. Dec. 579, holding successive, annual bonds executed by receiver acting during court's pleasure, cumulative.

Cited in reference note in 56 A. D. 107, 286, on surety's right of contribution.

Cited in notes in 1 L.R.A. 313, on contribution among sureties; 70 A. S. R. 445, 451, on liability as between different sets of sureties.

— By guardian.

Cited in *Rush v. State*, 19 Ind. App. 523, 49 N. E. 839; *Stevens v. Tucker*, 87 Ind. 109,—holding surety on guardian's bond not discharged by the giving of new bond as cumulative security; *Douglass v. Kessler*, 57 Iowa, 63, 10 N. W. 313, holding that surety on additional bond of guardian may be held for default occurring before bond is filed; *Hughes v. Boone*, 81 N. C. 204, holding sureties on guardian's bonds liable to contribute in proportion to respective penalties in different bonds; *State ex rel. Dudley v. Bland*, 83 N. C. 220, holding that liability resting upon each of several guardian bonds is ratio of its penalty to sum of penalties of all.

Cited in note in 44 A. D. 83, on liability of sureties on different bonds given by guardian at different times.

Failure to invoke statute of limitations as affecting right to contribution or credit.

Cited in *Bright v. Lennon*, 83 N. C. 183, holding that waiver of statute of limitations by surety on guardian's bond does not affect his right to contribution; *Halliburton v. Carson*, 100 N. C. 99, 6 A. S. R. 565, 5 S. E. 912, holding executor entitled to credit for payment of debts barred by statute of limitations.

Cited in note in 10 A. S. R. 642, on effect on right to subrogation of payment by surety of debt barred by statute of limitations.

Joinder of cosureties in action for contribution.

Cited in *Faurot v. Gates*, 86 Wis. 569, 57 N. W. 294, holding that in action against cosureties for contribution nonresidents are to be regarded as insolvent and unnecessary parties.

Cited in reference notes in 56 A. D. 108, on joinder of cosureties in suit for contribution; 59 A. D. 596, on necessary parties.

Cited in note in 10 A. S. R. 646, on parties to suit or action by surety for contribution.

51 AM. DEC. 418, VANNOY v. MARTIN, 41 N. C. (6 IRED. EQ.) 169.

Rights acquired by purchaser at judicial sale.

Cited in *Hicks v. Skinner*, 71 N. C. 539, 17 A. R. 16, holding that execution purchaser takes subject to equities against defendant, whether he knows them or not; *Re Reynolds*, 16 Nat. Bankr. Reg. 158, Fed. Cas. No. 11,724, holding that interest of purchaser at sale by administrator who has not made title is liable to liens of judgment creditors, of such purchaser, subject to his unregistered assignment thereof to indemnify his surety.

Cited in note in 34 A. D. 413, on interest of execution purchaser as subject to prior equities.

—Effect of promise to hold for defendant's benefit.

Cited in *Mulholland v. York*, 82 N. C. 510, holding that, where purchaser at execution sale promises to allow defendant to redeem, his subsequent purchase at sale of defendant's assignee in bankruptcy is subject to such promise; *Cobb v. Edwards*, 117 N. C. 244, 23 S. E. 241, holding that proof of parol promise of purchaser of land at judicial sale to hold subject to redemption must be strong, clear, and convincing; *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329, on equity jurisdiction, on ground of preventing fraud, to compel compliance with promise of purchaser at judicial sale to hold for benefit of defendant; *Avery v. Stewart*, 130 N. C. 426, 68 L.R.A. 776, 48 S. E. 775, holding that enforceable trust results where one person, at another's request, takes with promise to hold and convey to latter on repayment of price.

Cited in reference notes in 40 A. D. 211, on effect of agreement to hold for defendant land purchased on execution; 38 A. D. 681, on right of execution defendant to redeem according to agreement made by purchaser at sale; 87 A. D. 740, on relief in equity in case of breach of agreement to permit redemption.

Distinguished in *Barnes v. Brown*, 71 N. C. 507, holding that one conveying land to creditor who makes parol promise to reconvey on payment of debt cannot compel reconveyance after payment.

51 AM. DEC. 419, LOVE v. CAMP, 41 N. C. (6 IRED. EQ.) 209.**Want of title of vendor of land as affecting specific performance.**

Cited in *Welborn v. Sechrist*, 88 N. C. 287, holding fact that one has put it out of his power to comply with contract to convey land, no defense to bill for specific performance; *Jones v. Carland*, 55 N. C. (2 Jones, Eq.) 502 (former appeal 45 N. C. (Busbee Eq.) 235), remarking that on bill to compel conveyance of land according to contract defendant should not be heard to say that he is unable to procure title, after parties have acted on contract; *Swepson v. Johnston*, 84 N. C. 449, holding inability to acquire title to land after reasonable efforts, good defense to bill to compel performance of agreement to convey it.

Cited in reference note in 84 A. D. 155, as to when specific performance will be refused for want of title in vendor.

— Right of vendor to perfect title.

Cited in *Hughes v. McNider*, 90 N. C. 248, holding that vendor of land, suing for purchase price, may complete his title pending suit and before hearing; *Battery Park Bank v. Loughran*, 122 N. C. 668, 30 S. E. 17, remarking that vendor may perfect his title even at time of trial of action for purchase money.

51 AM. DEC. 422, CRUMP v. BLACK, 41 N. C. (6 IRED. EQ.) 321.**Equitable protection of rights.**

Cited in reference note in 62 A. D. 647, on maxim, When equities are equal the law prevails.

Distinguished in *Tyson v. Harrington*, 41 N. C. (6 Ired. Eq.) 329, holding that grantee, without consideration and with notice, of one abstracting deed of gift to another and procuring deed to himself, should convey to heir of donee.

— Of bona fide purchaser.

Cited in *Wilson v. Western North Carolina Land Co.* 77 N. C. 445, holding that equity will not interfere to deprive bona fide purchaser for consideration, without notice, of his legal advantage; *Brendle v. Herron*, 88 N. C. 383, holding that, to entitle purchaser of land to priority over other equities, he must be purchaser for value without notice.

Cited in reference notes in 69 A. D. 399; 72 A. D. 152; 80 A. D. 589,—on equitable protection of bona fide purchaser for value without notice.

51 AM. DEC. 425, HART v. ROPER, 41 N. C. (6 IRED. EQ.) 349.**Ignorance or mistake of law as ground for relief.**

Cited in *State v. McIntire*, 46 N. C. (1 Jones, L.) 1, 59 A. D. 566, holding that, where pardon was void for annulment of conviction on appeal, ignorance of effect of appeal was of no avail; *Kornegay v. Everett*, 99 N. C. 30, 5 S. E. 418, holding that, where instrument fails to express intention of parties, equity will reform it, whether mistake be of fact or law.

Cited in reference notes in 59 A. D. 572, on ignorance of law as excuse; 60 A. D. 543, as to whether mistake of law will be relieved against in equity; 56 A. D. 310, on distinction between ignorance and mistake of law, and equitable relief against; 55 A. S. R. 496, on presumption of understanding of one's legal rights; 55 A. D. 442, on power of courts of equity to construe devises and correct mistakes in written instruments.

Cited in note in 55 A. S. R. 519, on pleading in action for relief on ground of ignorance of one's rights.

Distinguished in *Foulkes v. Foulkes*, 55 N. C. (2 Jones, Eq.) 260, holding that equity will not restore to executrix of husband property given over to legatee, on ground that she was ignorant that she was entitled to life estate.

Remanding removed cause after demurrer is sustained.

Cited in *Smith v. Kornegay*, 54 N. C. (1 Jones, Eq.) 40, holding that, where demurrer is sustained on removal to higher court, cause must be remanded for amendment.

51 AM. DEC. 428, INGRAM v. KIRKPATRICK, 41 N. C. (6 IRED. EQ.) 463, Later appeal in 43 N. C. (8 Ired. Eq.) 62.

Trust deeds and assignments or other security for creditors.

Cited in *Potts v. Blackwell*, 57 N. C. (4 Jones, Eq.) 58, holding trust mortgage for payment of debts, a conveyance for value.

—Presumption of assent to.

Cited in reference notes in 65 A. D. 394, 473; 75 A. D. 819,—on presumption of creditors' assent to trust deed for their benefit.

Cited in note in 24 L.R.A. 370, on presumption of assent to assignment or deed of trust for creditors.

—Effect of assent to.

Cited in note in 24 L.R.A. 380, on effect of assent to assignment or deed of trust to creditors after attack.

—Revocability of.

Cited in *Anderson v. Kemper*, 116 Ky. 339, 76 S. W. 122, holding that spendthrift conveying property on trust for his own benefit cannot terminate trust upon becoming capable and desirous of handling property; *Low v. Blackford*, 31 C. C. A. 15, 58 U. S. App. 737, 87 Fed. 392 (dissenting opinion), on rule that grantor in mortgage or deed of trust cannot, after execution, vary trust; *Brown v. Chamberlain*, 9 Fla. 464, holding parol assignment to certain creditors to pay debts due to them and others, valid and, upon acceptance, irrevocable.

Cited in reference notes in 94 A. D. 214, on revocability of deed of trust for benefit of creditors; 90 A. D. 508, on necessity of consent of creditors to revocation of assignment for their benefit.

Cited in note in 44 A. D. 427, on revocation of assignments made for benefit of creditors.

—Effect as to creditor's rights, and validity of, generally.

Cited in *Schoolfield v. Hirsh*, 71 Miss. 55, 42 A. S. R. 450, 14 So. 528, holding that accepted assignment of judgment to trustee to pay debt's precludes subsequent garnishment of judgment debtor by creditor of assignor; *Voorhees v. Carpenter*, 127 Ind. 300, 26 N. E. 838, holding that after assignment one creditor cannot sue for his own benefit, to set aside prior conveyance as fraudulent; *Blanton v. Bostic*, 126 N. C. 418, 35 S. E. 1035, saying that, if payees in note acquired right of subrogation to security given sureties thereon, it could not be released by sureties; *Baggarly v. Gaither*, 55 N. C. (2 Jones, Eq.) 80, on rights of creditor obtaining transfer of note, without notice of prior equities, and taking indorsement thereof after notice.

Cited in reference note in 91 A. D. 162, on effect of creation of trust for payment of debts.

Distinguished in *Blount v. Windley*, 68 N. C. 1, 12 A. R. 616, holding that bank's assignment of effects and choses in action did not deprive maker of note

due bank of right to pay in bills of bank; *Dixon v. Pace*, 63 N. C. 603, holding creditor to whom debtor instructed his agent to pay certain sum, not entitled to hold agent responsible for other disposition of the sum.

— **Where preferences are given.**

Cited in *Wiswall v. Potts*, 58 N. C. (5 Jones, Eq.) 184, holding that deed of trust to pay debts preferring sureties still contingently liable, protected other debts primarily, as such debts constituted consideration for deed; *McRary v. Fries*, 57 N. C. (4 Jones, Eq.) 233; *Stimpson v. Fries*, 55 N. C. (2 Jones, Eq.) 156,—holding that deed directing trustee to pay specified debt and such others as he should deem best gave specified creditor absolute right to payment but authorized trustor to control fund as to other debts; *Smith v. Turrentine*, 43 N. C. (8 Ired. Eq.) 185, holding that, where deed of trust preferred certain creditors and provided that payments by trustor should be credited in extinguishment of debt, creditors of second class were necessary parties in action by first class for account and payment; *Hogan v. Strayhorn*, 65 N. C. 279, holding deed of trust directing trustee to pay specified debts, but not providing for payment of residue on other debts or reciting consideration, void as to creditors.

51 AM. DEC. 438, GRIFFIS v. YOUNGER, 41 N. C. (6 IRED. EQ.) 520.

Infant's duty on disaffirming contract.

Cited in notes in 26 L.R.A. 183, on necessity of accounting by infant on disaffirming contract where property has been lost or squandered; 18 A. S. R. 689, on infant's obligation to restore consideration on disaffirmance.

51 AM. DEC. 442, CUMPSTON v. LAMBERT, 18 OHIO, 81.

Contribution and indemnity for wrongful act—Right to.

Cited in *Rogers v. Bonnett*, 2 Okla. 553, 37 Pac. 1078, denying right to contribution between stockholders of board of trade making illegal contract.

Cited in notes in 57 A. D. 108; 73 A. D. 147, 148,—on contribution between co-trespassers; 4 L.R.A. 859, on right of indemnity as between wrongdoers.

— **Validity of contracts for.**

Cited in *Porter v. Stapp*, 6 Colo. 32, holding void, a bond of indemnity given to sheriff executing process directed to constable.

Cited in reference note in 62 A. D. 768, on validity of bond of indemnity given sheriff to induce him to perform act in violation of his duty.

Cited in notes in 89 A. S. R. 418, on acts for which an officer may require indemnity; 66 A. D. 511, on invalidity of agreements to influence action of officers; 40 A. D. 425, 427; 55 A. D. 87,—as to when agreements for indemnity are void because act indemnified against is illegal.

Distinguished in *Farwell v. Becker*, 129 Ill. 261, 16 A. S. R. 267, 6 L.R.A. 400, 21 N. E. 792, allowing contribution between attaching creditors committing trespass in belief that debtor's assignment was fraudulent.

51 AM. DEC. 444, LAUGHLIN v. STATE, 18 OHIO, 99.

Admissibility of declarations of victim of sexual offense.

Distinguished in *Foster v. State*, 1 Ohio C. C. 467, 1 Ohio C. D. 261, holding man's declarations that sodomy was committed upon him, inadmissible on trial

of accused; *Richmond v. State*, 19 Wis. 308, holding mother's declarations during confinement, as to paternity of child, inadmissible in bastardy proceedings.

— **Of prosecutrix on trial for rape generally.**

Cited in *Dunn v. State*, 45 Ohio St. 249, 12 N. E. 826, holding declarations of raped female, made several days after offense, inadmissible unless delay is explained.

Cited in notes in 80 A. D. 371, 372, on admissibility of statements of prosecutrix in rape; 11 A. D. 759, on declarations of raped woman as exception to rule that corroborative statements out of court are inadmissible.

Distinguished in *Hornbeck v. State*, 35 Ohio St. 277, 35 A. R. 608, holding declarations of raped female inadmissible to prove offense, where, because of imbecility she was incompetent to testify.

— **Purpose for which declarations of prosecutrix admitted.**

Cited in *Trimble v. Territory*, 8 Ariz. 273, 71 Pac. 932; *Thompson v. State*, 38 Ind. 39,—holding fact of female's complaint of commission of rape admissible on trial of accused only for purposes of corroboration; *State v. Imlay*, 22 Utah, 156, 61 Pac. 557, holding declarations of raped female admissible only for purposes of corroboration.

— **Extent to which declarations of prosecutrix are admissible.**

Cited in *McCombs v. State*, 8 Ohio St. 643, holding substance of woman's declarations as to commission of rape, admissible on trial for purposes of corroboration; *State v. Kinney*, 44 Conn. 153, 26 A. R. 436, holding details of raped woman's declarations admissible to confirm her testimony on trial; *Reddick v. State*, 35 Tex. Crim. Rep. 463, 60 A. S. R. 56, 34 S. W. 274, holding substance of raped female's declarations inadmissible to prove offense.

Cited in reference note in 1 A. S. R. 389, on inadmissibility in chief of details of complaint by prosecutrix in trial for rape.

Limited in *People v. Clemons*, 37 Hun, 580, 3 N. Y. Crim. Rep. 565, holding name of person accused of rape by female in declarations, inadmissible on trial for offense.

Effect of disobeying order for separation of witnesses.

Cited in *Holder v. United States*, 150 U. S. 91, 37 L. ed. 1010, 14 Sup. Ct. Rep. 10, holding testimony of witness disobeying order that witnesses withdraw from court room, admissible at discretion of trial judge; *State v. Ross*, 9 Ohio Dec. Reprint, 590, 15 Ohio L. J. 238, holding admission of testimony of witnesses who listened at door of court room, in violation of order that they remain out of hearing, reversible error.

Criticized in *McHugh v. State*, 42 Ohio St. 154; *Dickson v. State*, 39 Ohio St. 73,—holding court not vested with discretion to prevent examination of witness disobeying order for exclusion of witnesses, without procurement.

51 AM. DEC. 448, HARRIS v. COLUMBIANA COUNTY MUT. INS. CO. 18 OHIO, 116.

Concealment or untrue answers avoiding insurance policy.

Cited in reference note in 55 A. D. 550, on invalidity of policy because of concealment of material facts from insurer.

Distinguished in *Connecticut Mut. L. Ins. Co. v. Pyle*, 44 Ohio St. 19, 58 A. R. 781, 4 N. E. 465, holding that untrue answers in application for life insurance, although not made with fraudulent intent, rendered policy void.

Effect of failure to comply with conditions in policy.

Cited in *Robert v. New England Mut. Ins. Co.* 2 Disney (Ohio) 106, holding that failure to pay premium note at maturity terminated risk, although agent holding note failed to give notice of maturity to insured.

Reformation and correction of insurance policies.

Cited in *Home Ins. & Bkg. Co. v. Lewis*, 48 Tex. 622, holding that mistake in policy as to number of block in which insured building was located should be corrected; *Palmer v. Hartford F. Ins. Co.* 54 Conn. 488, 9 Atl. 248, holding insured applying for new policy on same terms as old, not precluded from right to reformation by failure to ascertain before loss that it was not on same terms as old policy; *Continental Ins. Co. v. Goodall*, 5 Ohio Dec. Reprint, 160, upholding action to correct policy and recover on it as corrected, on ground that insured's age was, through mutual mistake, stated too low in application.

Cited in reference notes in 59 A. D. 604, on reformation of contracts; 59 A. D. 707, on reformation of insurance application.

Cited in notes in 65 A. S. R. 515; 2 L.R.A. 64,—on reformation of insurance policy; 11 L.R.A. 377, on equitable relief from mistake in contract.

Distinguished in *Hearne v. New England Mut. M. Ins. Co.* 20 Wall. 488, 22 L. ed. 395, refusing to reform marine policy covering voyage to port in Cuba and thence to port in England, on ground of custom of touching second port in Cuba.

Parol variation of policy, and action on original parol agreement.

Cited in *Elstner v. Cincinnati Equitable Ins. Co.* 1 Disney (Ohio) 412, holding parol evidence inadmissible in action on policy on warehouse, to show that insurer was notified, when application was made of intention to use it for other purposes.

Distinguished in *Cooper v. Farmers' Mut. F. Ins. Co.* 50 Pa. 299, 88 A. D. 544, holding that assured cannot show by parol evidence that warranty as to encumbrances was made by mistake; *Kleis v. Niagara F. Ins. Co.* 117 Mich. 469, 76 N. W. 155, denying right of insured to ignore policy and sue on preliminary parol agreement to issue policy, permitting other insurance.

51 AM. DEC. 450, SUTCLIFFE v. DOHRMAN, 18 OHIO, 181.**Extent of partner's interest in partnership property.**

Cited in *Jones v. Fletcher*, 42 Ark. 422 (dissenting opinion), on rule that partner's interest in firm property is his proportionate share after firm debts are paid.

Cited in reference notes in 80 A. D. 455; 33 A. S. R. 105,—on partner's interest in firm property; 59 A. D. 364, on respective rights of creditors of partnership and creditors of individual partners.

Levy on firm property.

Cited in *Daniel v. Owens*, 70 Ala. 297, holding that purchaser of firm property under execution against partner individually acquires no greater interest than latter had; *Day v. McQuillan*, 13 Minn. 205, Gil. 192, holding attachment of one partner's interest in debt due firm, no defense to action by other partner in firm name to recover debt; *Scruggs v. Burruss*, 25 W. Va. 670, holding attachment by firm creditors of one partner's interest, not superior to former deed of trust of firm property, executed by one partner for all creditors generally.

Cited in reference notes in 57 A. D. 707; 74 A. D. 291; 77 A. D. 519,—on

levy on partnership property for partner's individual debt; 83 A. D. 502, on attachment of partner's share in firm goods for individual debt.

Cited in notes in 46 L.R.A. 485, on purchaser taking possession of partnership property levied on for debt of partner; 46 L.R.A. 486, on what may be sold under levy on partnership property for debt of partner.

Injunction against sale of firm property under claim against partner.

Cited in *Nixon v. Nash*, 12 Ohio St. 647, 80 A. D. 390, holding that partner may enjoin sale of firm property under execution by separate creditor of his copartner, until account can be taken of partnership.

Cited in reference notes in 74 A. D. 291, on injunction against sale of partnership property for individual debt; 83 A. D. 513, on restraining sale of entire partnership property to satisfy individual debt of one partner.

Cited in notes in 46 L.R.A. 493, on injunction against interfering with partnership property for debt of partner; 30 L.R.A. 105; 111 A. S. R. 101,—on injunction against execution sale of partnership property.

Measure of damages in replevin.

Cited in *Cruts v. Wray*, 19 Neb. 581, 27 N. W. 634, holding that, where judgment in replevin is for defendant having special ownership in property by way of lien, measure of damages for nonreturn is the amount of his lien, if within value of property.

Cited in reference notes in 49 A. D. 453; 93 A. D. 744,—on measure of damages in replevin.

51 AM. DEC. 453, AKRON v. McCOMB, 18 OHIO, 229.

Liability of public officers.

Cited in reference note in 57 A. D. 433, as to when public officers are personally liable for acts done by them.

Municipal liability for damages.

Cited in reference note in 54 A. D. 483, on municipal liability for injury to private property by improvements.

Cited in notes in 36 A. D. 84, on liability of municipal corporation for injuries by it; 53 A. D. 320, 366, on liability of municipal corporation for negligence or unskilfulness of agents in performance of work authorized by law; 66 A. D. 438, on municipal liability for consequential damages resulting from act done under authority of valid statute or charter.

Distinguished in *Eastman v. Meredith*, 36 N. H. 284, 72 A. D. 302, denying right of action against town for injury to voter by collapse of floor of townhouse at town meeting; *Western College v. Cleveland*, 12 Ohio St. 375, holding that charter imposing on city duty of regulating police and preventing disturbances did not render it liable for destruction of property during riot.

Disapproved in *Alexander v. Milwaukee*, 16 Wis. 247, denying liability of city for injury to property resulting from change of channel by authorized harbor improvement, where work was carefully done.

— For injury to abutting property by street improvements generally.

Cited in *Gilman v. Laconia*, 55 N. H. 130, 20 A. R. 175, on liability of town for injury to land by negligent construction and maintenance of highway; *Cohen v. Cleveland*, 43 Ohio St. 190, 1 N. E. 589, holding city liable for damages to property abutting on street above which viaduct is constructed.

Cited in reference note in 61 A. D. 705, on municipal liability for defective streets.

Distinguished in *Cincinnati v. Penny*, 21 Ohio St. 499, 8 A. R. 73, holding owner of improved lot not entitled to recover damages caused by excavation for sewer.

—Injuries caused by grading and regrading streets.

Cited in *Keating v. Cincinnati*, 38 Ohio St. 141, 43 A. R. 421, holding city excavating for street liable for injury to property caused by caving; *Crawford v. Delaware*, 7 Ohio St. 459, holding owner of lot improved in accordance with grade, entitled to recover from city damages caused by grading street; *Goodall v. Milwaukee*, 5 Wis. 32, holding city liable for injury to building, caused by change of grade of street; *Cincinnati v. Whelstone*, 9 Ohio Dec. Reprint, 368, 12 Ohio L. J. 247, upholding abutter's right to recover from city damages caused by change of grade of street; *Youngstown v. Moore*, 30 Ohio St. 133, holding one improving lot in conformity to grade of street, entitled to recover damages caused by change of grade; *Freeman v. Hunter*, 7 Ohio C. C. 117, 3 Ohio C. D. 689, holding city changing grade of street, without power to levy assessment on abutting property to meet damages which it awarded to part of abutters; *Grant v. Hyde Park*, 67 Ohio St. 166, 65 N. E. 891, holding that in proceeding to condemn land for street probable grade is proper subject of inquiry on question of damages to land not taken.

Cited in reference notes in 55 A. D. 90, on power of municipality to grade or regrade street; 4 A. S. R. 401, on compensation for consequential damages resulting from change of street grade; 12 A. S. R. 363, on municipal liability for damages arising from changes to, improvements in, or grading of streets.

Cited in notes in 12 L.R.A. (N.S.) 699, on municipal liability for injury to lateral support in making street improvements; 14 L.R.A. 372, on injury to abutter's easements by changing grade of street; 23 L.R.A. 658, on damage to abutting owner by first grading and improvement of street; 7 A. R. 260, on liability of municipality for damage resulting from change of street grade.

Distinguished in *Fellowes v. New Haven*, 44 Conn. 240, 26 A. R. 447, holding city taking land for street and making compensation, not liable for incidental injury to land not taken, by grading street.

Criticized in *Pontiac v. Carter*, 32 Mich. 164, holding that action will not lie against city for damages to property caused by lawful change of grade of street.

—For injury by collapse of bridge.

Distinguished in *Dayton v. Pease*, 4 Ohio St. 80, holding city liable for personal injury by collapse of bridge resulting from negligence and unskillfulness of city engineer.

Exclusiveness of statutory remedy for recovery of damages for condemnation of land.

Cited in *Little Miami R. Co. v. Whitacre*, 8 Ohio St. 590, holding that, where statute provides remedy for recovery of damages caused by taking of land for railroad right of way, landowner cannot sue in trespass on case for continuance of possession; *Hathaway v. Springfield Mt. V. & P. R. Co.* 2 Ohio Dec. Reprint, 349, on effect of statute giving right to institute proceedings to assess damages for taking of land for railroad right of way, to preclude action at common law.

Parol proof of city's authorization of acts of officer.

Cited in *Willoughby v. Allen*, 25 R. I. 531, 56 Atl. 1109, holding that authorization by municipality of surveyor of highways to do work on highways may be proved by parol evidence.

51 AM. DEC. 458, GREEN v. RAMAGE, 18 OHIO, 428.

Operation and effect of liens—As between several grantees of lieenee.

Cited in *Neely v. Williams*, 79 C. C. A. 82, 149 Fed. 60, holding that, where land is devised subject to annuities, last grantee of parcel from devisee cannot have contribution from prior grantees of parcels for money paid on annuities; *Bates v. Ruddick*, 2 Iowa, 423, 65 A. D. 774, holding that as between grantees of parcels of mortgaged land they are liable in proportion to value of respective parcels; *Iglehart v. Crane*, 42 Ill. 261; *Fassett v. Mulock*, 5 Colo. 466,—holding that mortgage on land subsequently sold in different parcels must be enforced against aliened parcels in inverse order of alienation.

—Where senior lienor has recourse to property not covered by junior lien, generally.

Cited in *Fassett v. Traber*, 20 Ohio, 540, holding that, where one holds junior lien on property, he may compel one holding first lien on that and other property to exhaust such other property; *Richards v. Cowles*, 105 Iowa, 734, 75 N. W. 648, holding that intervention by creditor in action of another creditor who, by prior garnishment, has superior right to fund, presents no case for marshaling assets.

—In cases of mortgages.

Cited in *Gilliam v. McCormack*, 85 Tenn. 597, 4 S. W. 521, holding that, where senior mortgage covers land not included in junior mortgage, junior mortgagee may compel senior to seek satisfaction therefrom; *Webb v. Hunt*, 2 Ind. Terr. 612, 53 S. W. 437, denying right of junior mortgagee to compel application of property not covered by his mortgage to discharge of first mortgage, as against bona fide purchaser of property who took up first mortgage; *Jennings v. Ohio Nat. Bank*, 17 Ohio C. C. 664, 8 Ohio C. Dec. 657, holding that senior mortgagee of land obtaining decree of foreclosure and judgment which was levied on personally, cannot be compelled by one subsequently acquiring judgment lien on personally, to resort to realty on which third person holds second mortgage; *Wilson v. Otis*, 5 Ohio C. C. 228, 3 Ohio C. Dec. 114, holding that, where one has mortgage on two lots of which one is subject to second mortgage and other was sold after issuance of second mortgage, first mortgagee must resort to both lots proportionately to value.

Cited in note in 18 E. R. C. 215, as to right of mortgagee with other security for his demand to use his legal advantage in way to exclude demand of fellow creditor whose legal recourse is to but one of them.

51 AM. DEC. 459, SUTCLIFFE v. STATE, 18 OHIO, 469.

Elements and degrees of homicide.

Cited in reference notes in 52 A. D. 736; 54 A. D. 614; 54 A. D. 582,—on distinction between murder and manslaughter; 81 A. D. 791; 10 A. S. R. 113; 95 A. S. R. 800,—on what constitutes manslaughter.

Cited in note in 90 A. S. R. 571, on what constitutes involuntary manslaughter.

—Intent in murder.

Cited in *Bailus v. State*, 8 Ohio C. Dec. 526, 16 Ohio C. C. 226, holding murder not established by proof of intention to inflict wound short of mortal wound.

Cited in reference notes in 35 A. S. R. 250, on heat of passion reducing homicide; 71 A. D. 381, on murder as killing of human being with malice aforethought express or implied.

— **Homicide committed in doing of unlawful act.**

Cited in *Veller v. State*, 19 Ohio C. C. 186, 10 Ohio C. Dec. 381; *Johnson v. State*, 66 Ohio St. 59, 90 A. S. R. 564, 61 L.R.A. 277, 63 N. E. 607,—holding that, to sustain conviction of homicide committed in performance of unlawful act, such act must be prohibited by statute.

Cited in note in 63 L.R.A. 396, on indictment for homicide while committing an unlawful act not a felony.

Sufficiency of information or indictment.

Cited in *Davis v. State*, 32 Ohio St. 24, upholding information charging offense in words of statute; *State v. Fromer*, 6 Ohio Dec. 374, 7 Ohio N. P. 172, holding indictment for selling liquor within two miles of fair need not allege knowledge of proximity of fair, where statute is silent on question.

— **For homicide.**

Cited in *Poage v. State*, 3 Ohio St. 229, holding that precise words of statute are not always indispensable to validity of indictment; *Williams v. State*, 35 Ohio St. 175, upholding conviction of manslaughter under indictment alleging that accused unlawfully killed deceased.

Cited in reference notes in 65 A. D. 505, on sufficiency of indictment for murder; 32 A. S. R. 155, on sufficiency of indictment for homicide of averment as to manner of killing.

Distinguished in *Jennings v. State*, 7 Tex. App. 350, holding common-law indictment for manslaughter insufficient under Texas statute.

What constitutes jeopardy.

Cited in *State v. Reddington*, 8 S. D. 315, 66 N. W. 464, holding that prisoner securing reversal of judgment of conviction on ground of erroneous rulings by court cannot set up that he has been once in jeopardy; *State v. Knouse*, 33 Iowa, 365, holding that where accused secured reversal of conviction jeopardy did not attach; *Ex parte Bradley*, 48 Ind. 548, holding that, where accused secured reversal of conviction for lesser crime under indictment for murder, he could be again tried for higher crime; *Joy v. State*, 14 Ind. 139, holding that, where court on motion quashes indictment after commencement of trial, for defect that would render conviction void, accused cannot contend that he has been in jeopardy; *Hines v. State*, 24 Ohio St. 134, holding that discharge of jury before verdict without consent of accused and without necessity which law declares imperative exonerates accused from charge.

Cited in reference notes in 11 A. S. R. 159, on what constitutes jeopardy; 62 A. D. 312, as to what is "jeopardy" and when it begins; 24 A. S. R. 742, on new trial of accused as placing him again in jeopardy; 55 A. D. 545, on what constitutes valid plea of former jeopardy; 58 A. D. 681, as to when plea of former conviction available.

Necessity for presence of accused's counsel at rendition of verdict.

Cited in note in 68 A. D. 225, on necessity for presence of accused's counsel at rendition of verdict.

What constitutes record.

Cited in *McInerney v. United States*, 74 C. C. A. 655, 143 Fed. 729, holding that application for naturalization, together with affidavits and certificates, filed in court, is "record" within statute forbidding destruction thereof.

Influence of English law in United States.

Cited in reference note in 59 A. D. 359, on how far English common and statute law is part of law of United States.

51 AM. DEC. 465, COLLINS v. HATCH, 18 OHIO, 523.**Powers of corporations.**

Cited in *Fisher v. Baltimore & O. R. Co.* 3 Ohio N. P. 283, 6 Ohio Dec. 67, holding that, where statute authorizes corporation to lease its railroad does not exempt it from operation of general laws, the leasing does not have that effect.

Cited in note in 7 E. R. C. 283, on reasonableness or validity of by-law made by private corporation.

— Municipal corporations, generally.

Cited in *Merriman v. Moody*, 25 Iowa, 163, holding that municipality may exercise powers expressly granted, and those incidental to ones granted, and those indispensable to its declared objects; *Davenport v. Kelly*, 7 Iowa, 102 (dissenting opinion), on rule that municipal powers are those directly conferred, those necessary to carry granted powers into effect, those necessary to performance of legal duty, and those incidental to its existence; *Meinzer v. Racine*, 68 Wis. 241, 32 N. W. 139; *Gilman v. Milwaukee*, 61 Wis. 588, 21 N. W. 640,—holding that city authorities have powers expressly granted and such others as are necessary to effectuate them.

Cited in reference notes in 55 A. D. 386; 56 A. D. 504; 57 A. D. 415; 69 A. D. 589; 80 A. D. 730; 89 A. D. 386; 29 A. S. R. 757,—on powers of municipal corporations; 72 A. D. 97, on limited powers of municipal corporations; 72 A. D. 97; 83 A. D. 257,—on power of municipal corporations to enact ordinances and by-laws; 68 A. D. 144, on municipal power to regulate business; 90 A. D. 283, on necessity of municipal corporation acting within limits of its delegated authority; 61 A. D. 599, on right of municipality to exercise only those powers expressly granted and those necessary to carry them into execution.

Cited in notes in 2 L.R.A. 722, as to whether special grant of power to municipal corporation excludes implied powers; 1 L.R.A. 169, on power and authority of municipal corporations; 35 A. R. 702, on validity of ordinances regulating business; 41 L. ed. U. S. 519, on authority to pass municipal ordinances; 36 L.R.A. 601, on extent of municipal power to prevent or abate nuisances; 34 A. D. 630, on limitations on power of municipality to pass by-laws.

— To prevent stock from running at large.

Cited in *Wilson v. Beyers*, 5 Wash. 303, 34 A. S. R. 851, 32 Pac. 90, holding that, where statute expressly confers upon cities of second and third class power to prevent cattle running at large, it did not impliedly confer it upon cities of fourth class.

Cited in notes in 4 L.R.A. 254; 39 L.R.A. 677,—on municipal power over animals running at large.

Distinguished in *Cochrane v. Frostburg*, 81 Md. 54, 48 A. S. R. 479, 27 L.R.A. 728, 31 Atl. 703, holding ordinances to prevent stock from running at large within grant of power to pass ordinances that may be deemed beneficial and to remove nuisances and obstructions on streets.

51 AM. DEC. 467, VANCE v. BLAIR, 18 OHIO, 532.**Characteristics of partnership.**

Cited in note in 19 E. R. C. 322, on what constitutes a partnership.

— Right to sue partner generally.

Cited in *Tevis v. Carter*, 111 Ky. 938, holding that one partner may sue another on contract, where breach consisted of failure to do things required of latter to form partnership; *Hill v. Palmer*, 56 Wis. 123, 43 A. R. 703, 14 N. W. 23, holding

wrongful refusal by one partner to permit firm to launch business, ground of action by other partner; *Hyer v. Richmond Traction Co.* 168 U. S. 471, 42 L. ed. 547, 18 Sup. Ct. Rep. 114, on same point.

— **Necessity that all partners be joined.**

Cited in *Goldsmith v. Sachs*, 8 Sawy. 110, 17 Fed. 726, holding that, where seven persons agreed to form partnership and four refused to perform, one of the remaining three could sue the four without joining the two others.

Cited in reference notes in 69 A. S. R. 968, on action by one partner against another without joining the other partners; 59 A. D. 596, on necessary parties.

— **Time for making tender.**

Cited in *Powe v. Powe*, 42 Ala. 113, holding that, where promise is to pay in chattels or money of fluctuating value, tender must be made on day appointed for payment.

51 AM. DEC. 469, TAYLOR v. FOWLER, 18 OHIO, 567.

— **Dower as against lienor or alienee of husband.**

Cited in *Lynde v. Wakefield*, 19 Mont. 23, 47 Pac. 5, holding inchoate right of dower not affected by sheriff's deed after sale under judgment against husband; *Dingman v. Dingman*, 39 Ohio St. 172, holding that, where husband was given property subject to legacy and it was ordered sold in action by his judgment creditor, proceeds first to apply to legacy, wife's dower was not barred, where she was not party.

Cited in reference note in 62 A. D. 747, on effect of execution sales of husband's land upon widow's right of dower.

Cited in note in 5 L.R.A. 521, on costs of suit as element in estimating dower.

Distinguished in *Jaquess v. Hamilton County*, 1 Disney (Ohio) 121, holding that woman who married one having equity of redemption in land in which he never acquired legal estate could not claim dower therein.

Cited as overruled in *Sprague v. Law*, 5 Ohio S. & C. P. Dec. 384, holding that as against judgment creditors of husband wife has right of dower in entire mortgaged premises.

— **Effect of wife's joinder in instrument of alienation, generally.**

Cited in *Nickell v. Tomlinson*, 27 W. Va. 697, holding that, where wife joins in husband's deed, her release of dower operates only as to grantee or those claiming under him; *Ridgway v. Masting*, 23 Ohio St. 294, 13 A. R. 251, holding wife releasing dower in husband's fraudulent deed, entitled to dower as against one setting it aside and procuring decree of title to himself.

Distinguished in *Woodworth v. Paige*, 5 Ohio St. 70, denying right of wife to claim dower as against bona fide transferee, for consideration, without notice, of husband's fraudulent grantee, to whom she released dower.

— **Mortgage.**

Cited in *State Bank v. Hinton*, 21 Ohio St. 509, holding wife joining in mortgage, dowerable in surplus of proceeds of foreclosure sale remaining after paying mortgage debt; *Baldwin v. Jacks*, 3 Ohio Dec. Reprint, 545, holding right of dower of wife joining in husband's mortgage, not barred by sale by his assignee for creditors under proceedings in probate court to which she was not party; *Duval v. Febiger*, 1 Cin. Sup. Ct. Rep. 268, holding that, where wife joined in husband's mortgage, his sale of equity of redemption without her joinder did not revive her right to dower; *Jewett v. Feldheiser*, 68 Ohio St. 523, 67 N. E. 1072, holding that sale under creditors' judgment against husband did not bar dower,

although there was also judgment in favor of mortgagees to whom she had released dower; *Carter v. Goodwin*, 3 Ohio St. 75, holding that satisfaction by vendee of land of purchase-money mortgage previously executed by vendor and wife did not bar her right of dower.

Cited in reference notes in 34 A. D. 418; 56 A. D. 282,—on when right of dower barred by joining in mortgage; 84 A. D. 50, on bar of dower by sale of land under judgment to satisfy mortgage against husband, in which wife joined and released dower.

Cited in note in 5 A. D. 234, on wife's right of dower where mortgage is paid in lifetime of mortgagor.

51 AM. DEC. 472, KNABB'S APPEAL, 10 PA. 186.

requisites and sufficiency of mechanics' lien.

Cited in *American Car & Foundry Co. v. Alexandria Water Co.* 215 Pa. 520, 64 Atl. 683, overruling objection that mechanics' lien did not allege that materials were furnished in accordance with specifications, where it alleged that they were furnished under contract; *Waters v. Goldberg*, 124 App. Div. 511, 108 N. Y. Supp. 992, upholding notice of lien for work done by partners which failed to allege copartnership; *Keel v. Rhoads*, 34 Pa. Co. Ct. 159, denying sufficiency of sub-contractor's parol notice of intention to file lien, given to owner, who answered: "Go ahead."

Cited in reference notes in 1 A. S. R. 483, on what certificate of mechanics' lien must state; 64 A. D. 679, as to when mechanics' lien certificate is sufficiently definite.

—As to kind, amount and price of work or materials, generally.

Cited in *Grant v. Cumberland Valley Cement Co.* 58 W. Va. 162, 52 S. E. 36, upholding account of work done for which mechanics' lien was claimed, which showed kind, amount, and price of work; *Great Southern Fireproof Hotel Co. v. Jones*, 116 Fed. 793, upholding affidavit of amount of materials furnished, which incorporated copy of contract showing price; *Ford v. Springer Land Asso.* 8 N. M. 37, 41 Pac. 541, upholding notice of lien showing time, terms, and conditions of contract by incorporation therein of copy of contract; *Rush v. Able*, 36 Phila. Leg. Int. 337, denying sufficiency of portion of mechanics' lien relating to extra work and materials, where it failed to specify kind, quality, amount, and time of work and materials.

—Showing kind, etc., in bill of particulars.

Cited in *Wethered v. Garrett*, 7 Pa. Co. Ct. 529, overruling objection that claim did not show kind of work and materials, where such fact was shown in bill of particulars attached to claim; *Brown v. Myers*, 29 W. N. C. 393, on sufficiency of claim to which is annexed bill of particulars showing essential facts; *Schultz v. Asay*, 2 Pennyp. 411 (affirming 15 Phila. 268, 28 Phila. Leg. Int. 149, 10 W. N. C. 33, 4 Walker (Pa.) 419), holding that bill of particulars is integral part of claim and must be read with it.

—As to time of furnishing work or materials.

Cited in *Brown v. Erisman*, 5 Luzerne Leg. Reg. 189, holding mechanics' lien specifying labor and materials furnished during preceding six months, sufficient as to time; *Calhoun v. Mahon*, 14 Pa. 56, upholding claim filed Nov. 6, 1847, for bricks furnished within previous six months, of which last were furnished June 3, 1847; *Este v. Pennsylvania R. Co.* 13 Pa. Dist. R. 451, 30 Pa. Co. Ct. 209,

upholding notice of lien for materials showing date of last delivery by reference to exhibit disclosing such date.

—As to description of premises.

Cited in *McClintock v. Rush*, 63 Pa. 203; *Kennedy v. House*, 41 Pa. 39, 80 A. D. 594,—holding that description of building in mechanic's lien is sufficient if it identifies the building; *Kezartee v. Marks*, 15 Or. 529, 16 Pac. 407; *Cary Hardware Co. v. McCarty*, 10 Colo. App. 200, 50 Pac. 744,—holding description in mechanic's lien statement sufficient where it enables one acquainted with locality to identify the premises; *Union Lumber Co. v. Simon*, 150 Cal. 751, 89 Pac. 1077, holding description sufficient as against lienor to support mechanic's lien, if it identifies property by reference to facts; *Holland v. Garland*, 13 Phila. 544, 35 Phila. Leg. Int. 324, upholding description of building as dwelling house of two stories and specified dimensions, occupying lot of stated number on specified plat, and constructed by named person; *Hassenfus v. Philadelphia Packing & Provision Co.* 15 Pa. Co. Ct. 650, 4 Pa. Dist. R. 57, on sufficiency or description of premises in mechanic's lien.

Cited in reference notes in 36 A. S. R. 156, on sufficiency of description of property in notice of claim of mechanics' lien.

Cited in notes in 14 A. D. 694, on sufficiency of description of location of building in mechanic's lien; 47 A. D. 401, on description in mechanics' lien certificate.

—As to name of owner of building.

Cited in *McCay's Appeal*, 37 Pa. 125, holding that claim for work done under agreement with contractor must show name of owner of building; *Barclay's Appeal*, 11 W. N. C. 359; *Fox v. Ketterlinus*, 10 W. N. C. 506,—on necessity that mechanic's claim show name of owner of building; *Bristol v. Golden*, 8 Luzerne Leg. Reg. 207, on propriety of naming, in lien, owner of building to whom materials were furnished and who has since died; *Stott v. Irwin*, 2 Chester Co. Rep. 137, holding that omission of middle initial of defendant's name, in mechanic's lien, postponed it as against lien giving correct name.

—As to name of contractor.

Cited in *Stevenson v. Dick*, 13 Phila. 132, 36 Phila. Leg. Int. 470, holding that mechanic's claim need set out name of contractor only where claimant's contract was made with him; *Ryman v. Wolf*, 5 Kulp, 475, holding that, if it does not appear that there was contractor other than owner, claim need not set out name of contractor; *Ryman v. Wolf*, 6 Kulp, 325, holding that, where husband orders materials as agent of wife, lien need not name him as contractor; *Ward v. Black*, 7 Phila. 342, 27 Phila. Leg. Int. 100, denying sufficiency of lien stating that wife owned premises and that materials were charged against husband, but not showing that wife contracted debt or that husband was contractor.

Who may raise objection or intervene in cases of mechanics' liens.

Cited in *Re Wells*, 2 Del. Co. Rep. 172, holding that formal defects in mechanic's claim may be objected to by any person interested; *Kimes v. Walt*, 11 Lanc. L. Rev. 271, holding that contractor having good defense to lien cannot move to strike out default judgment thereon against owner of building.

Distinguished in *Watts v. Eckels*, 26 Pa. Co. Ct. 439, 11 Pa. Dist. R. 570, holding that on sci. fa. *sur* mechanic's lien person interested in proceeds of sale of lien property cannot intervene before judgment.

51 AM. DEC. 478, BLIGHT v. SCHENCK, 10 PA. 285.**Power of grantor to affect title after delivery of deed.**

Cited in reference note in 84 A. D. 564, on grantor's subsequent acts as affecting title under deed acknowledged, executed, and delivered.

Formal sufficiency of conveyances.

Cited in *Olcott v. Gabert*, 86 Tex. 121, 23 S. W. 985, holding that conveyance to named bishop in trust for church, to hold to himself and assigns, gave him legal estate which he had power to convey; *First Nat. Bank v. Holmes*, 85 Pa. 231, 4 W. N. C. 449, 34 Phila. Leg. Int. 408; *Rendlemann v. Willard*, 15 Mo. App. 375,—holding that deed of assignment vests interests in creditors as soon as it is recorded, whether assignee accepts or not.

Recital in tax deed as evidence.

Cited in *Coxe v. Deringer*, 82 Pa. 236, 3 W. N. C. 97, 33 Phila. Leg. Int. 374, holding tax deed reciting sale sufficient evidence of sale, in absence of counter-vailing proof.

Presumption of acceptance of deed.

Cited in reference note in 84 A. D. 564, on grantee's presumptive acceptance of deed.

Presumption as to delivery of instrument.

Cited in *Smith v. Hawthorn*, 22 Pa. Co. Ct. 519, holding that, where assignment of insurance policy was attested as to sealing and delivery, *prima facie* case of delivery was made out.

— Of mortgage.

Distinguished in *Pennsylvania Co. v. Dovey*, 64 Pa. 260, 27 Phila. Leg. Int. 126, holding that, where mortgage was defectively executed, presumption of delivery and acceptance did not arise.

— Of deed generally.

Cited in *Ingles v. Ingles*, 150 Pa. 397, 30 W. N. C. 490, 24 Atl. 677, holding proof of signing, attesting, acknowledging, and recording of deed, *prima facie* evidence of delivery; *Schurtz v. Colvin*, 55 Ohio St. 274, 45 N. E. 527, holding that, where deed is found in grantee's hands, delivery and acceptance are presumed; *Diehl v. Emig*, 65 Pa. 320, 2 Legal Gaz. 219, holding proof of grantor's production of deed bearing signature of himself and witness, and acknowledgment before magistrate, sufficient to establish *prima facie* case of execution, including delivery, of deed thereafter lost; *Painter v. Campbell*, 207 Pa. 189, 56 Atl. 409, on necessity for explicit proof of nondelivery of deed.

Cited in reference note in 58 A. D. 617, as to when delivery of deeds may be inferred.

Distinguished in *Critchfield v. Critchfield*, 24 Pa. 100, holding proof of execution of deed retained by grantor, who declared that he had given the land to his son, the grantee, insufficient to establish delivery.

— From recording of deed.

Cited in *Harvey v. Jones*, 1 Disney (Ohio) 65, holding record of deed only *prima facie* evidence of delivery; *Napier v. Elliott*, 146 Ala. 213, 119 A. S. R. 17, 40 So. 752, holding registration of deed not conclusive evidence of delivery.

Cited in reference notes in 64 A. D. 647, on recording deed as *prima facie* evidence of delivery; 67 A. D. 270, on recording deed as proof of delivery.

Cited in note in 5 L.R.A. 121, on registration as evidence of delivery of deed.

Distinguished in *Boardman v. Dean*, 34 Pa. 252, holding presumption of delivery from registration of deed rebuttable as against *mala fide* purchaser from grantee.

Sufficiency of delivery of deeds, etc.

Cited in *Bogie v. Bogie*, 35 Wis. 659, holding that there was sufficient delivery where parties simultaneously executed deed and return mortgage drawn by magistrate who executed certificate of acknowledgment and handed to each the instrument running to him; *Herr's Estate*, 15 Lanc. L. Rev. 409, on sufficiency of delivery of deed of land purchased by donor, where vendor, at donor's request, made deed running to donee and delivered it to donor.

Cited in reference note in 56 A. D. 442, on what is sufficient delivery of deed.

Cited in notes in 8 E. R. C. 597, on sufficiency of delivery of deed; 53 A. S. R. 541, on persons by and to whom deed may be delivered; 53 A. S. R. 545, on intention and acceptance on delivery of deed; 12 L.R.A. 172, on necessity of manual delivery of deed to transfer title.

Distinguished in *Cameron v. Gray*, 202 Pa. 566, 52 Atl. 132, denying sufficiency of delivery of deed executed in last illness by grantor who retained possession of it, although informed that delivery was necessary; *Donnelly v. Rafferty*, 172 Pa. 587, 33 Atl. 754, holding that where attorney of parties agreeing to execute deed gave it to notary, who procured signatures, etc., of part of them and delivered it to attorney, deed did not show delivery as to signing parties.

— By recording.

Cited in *McCurdy's Appeal*, 65 Pa. 290, 27 Phila. Leg. Int. 244, 2 *Lég. Gaz.* 226, holding corporate trust mortgage sufficiently delivered where duly executed, acknowledged, recorded, and acted on as valid, though never in manual possession of trustee; *Eckert v. Lewis*, 4 Phila. 422, 18 Phila. Leg. Int. 4, holding that, where deed was executed on third of month and delivered to grantee and recorded on seventeenth, legal delivery occurred on seventeenth.

Cited in reference note in 31 A. S. R. 918, on delivery of deeds by recording.

Cited in note in 53 A. S. R. 548, on recording deed as delivery.

— To third person.

Cited in *Linton v. Brown*, 20 Fed. 455, upholding deed declaring trust of grantor's lands, where it was delivered to third person, who recorded it after grantor's death; *McCalla v. Bane*, 45 Fed. 828, upholding delivery of deed in escrow to be delivered to "the parties" after death of grantor, who expressed his wish that they should not be recorded until after his death; *Arnegaard v. Arnegaard*, 7 N. D. 475, 41 L.R.A. 258, 75 N. W. 797, holding that grantor delivering deed to third person with intention to part with control, and with instructions to record it after his death, could not divest title of grantees by afterward getting possession of deed; *Piper's Estate*, 11 Phila. 141, 33 Phila. Leg. Int. 228, upholding assignment of mortgage left with third person, although subsequently found among assignor's papers after his death; *Stinger v. Com.* 26 Pa. 422, holding deed given to third person, to be handed over to grantee on his request, sufficiently delivered, although found in deceased grantor's papers; *Kyte v. Kyte*, 8 Kulp, 1, holding that, where nominal grantee acquiesces in beneficial grantee's possession of deed and thereafter makes deed to him, manual delivery to former is unnecessary; *Indiana Trust Co. v. Byram*, 36 Ind. App. 6, 72 N. E. 670, 73 N. E. 1094, on sufficiency of delivery of mortgage to mortgagee's agent, who was also mortgagor's attorney.

Cited in reference note in 63 A. D. 525, on delivery of writing as escrow.

Cited in notes in 12 L.R.A. 175, on delivery of deed in escrow; 54 L.R.A. 866, on delivery of deed to person previously authorized or designated by grantee.

Effect of grantee's possession of escrow before happening of contingency or performance of condition.

Cited in *Landon v. Brown*, 160 Pa. 538, 28 Atl. 921, holding title of grantee in escrow obtaining deed before performance of condition, voidable only; *Booth v. Williams*, 11 Phila. 266, 33 Phila. Leg. Int. 128, 2 W. N. C. 504, holding that, where mortgage was assigned in escrow, wrongful delivery thereof to assignee gave her title that was voidable only.

Cited in reference note in 58 A. S. R. 391, on fraudulent delivery of deed held in escrow.

— On rights of grantee's transferee.

Cited in *McConnell v. Rowland*, 48 W. Va. 276, 37 S. E. 586; *Hubbard v. Greeley*, 84 Me. 340, 17 L.R.A. 511, 24 Atl. 799,—holding that bona fide purchaser from grantee in escrow, who wrongfully obtained and recorded deed, obtains good title as against grantor and his subsequent grantees; *Clark v. Harper*, 215 Ill. 24, 74 N. E. 61, holding grantor delivering deed to grantee or his agent on condition, estopped to contest it as against innocent third person misled by grantee's use of deed in violation of condition; *Carusi v. Savary*, 6 App. D. C. 330, holding grantor placing contingent deed in safety deposit box to which grantee had access, estopped to deny it as against mortgagee of grantee, who abstracted it before happening of contingency; *Haven v. Kramer*, 41 Iowa, 382, holding grantor in escrow delivered by depositary in violation of instructions, estopped to assert title against bona fide purchaser from grantee; *Dempwolf v. Greybill*, 213 Pa. 163, 83 Atl. 645, holding that purchaser for value may act on faith that his grantor's deed was signed, sealed, acknowledged, and delivered in accordance with its purport; *Breneman v. Mayer*, 24 Tex. Civ. App. 164, 58 S. W. 725, holding inefficacy of deed reserving vendor's lien to convey title, no defense to purchase-money notes in hands of bona fide transferee; *Chicago, I. & E. R. Co. v. Linn*, 30 Ind. App. 88, 65 N. E. 552, holding conditional deed obtained through misrepresentations from depositary by grantee, ineffectual, where condition was not performed as to third person taking with notice; *Schurz v. Colvin*, 55 Ohio St. 274, 45 N. E. 527, upholding lien of bona fide mortgagee of grantee in escrow, who fraudulently got possession of deed without complying with condition for payment of purchase money; *Bailey v. Crim*, 9 Biss. 95, Fed. Cas. No. 734, upholding lien of bona fide mortgagee of grantee whose deed was delivered in escrow and recorded by depositary without grantor's knowledge.

Cited in reference notes in 65 A. D. 324, on validity in hands of innocent purchaser of deed delivered by one with whom it had been left in escrow before performance of conditions; 76 A. D. 188, on rights of innocent purchasers for value.

Cited in notes in 17 L.R.A. 512, on effect of delivery in escrow as to bona fide purchaser from grantee who has wrongfully obtained and recorded the deed; 28 A. D. 688, on title acquired by bona fide purchaser from fraudulent purchaser.

Distinguished in *Allen v. Ayer*, 26 Or. 589, 39 Pac. 1, holding that bona fide purchaser from grantee who never took possession, under deed delivered to grantee by broker without grantor's consent, took no title.

Criticized in *Harkreader v. Clayton*, 56 Miss. 383, 31 A. R. 369, holding that, where grantee in escrow secured possession of deed without performing condition for payment of purchase money, his purchaser could not set up bona fides of his purchase against heirs of original grantor.

Liability as between innocent persons.

Cited in *Stranahan Bros. Catering Co. v. Coit*, 55 Ohio St. 398, 4 L.R.A. (N.S.)

506, 45 N. E. 634, on rule that of two innocent persons one making loss possible must suffer.

51 AM. DEC. 486, FRALEY v. BISPHAM, 10 PA. 320.

Warranty on sale of goods.

Cited in *Shisler v. Baxter*, 109 Pa. 443, 58 A. R. 738, 42 Phila. Leg. Int. 405, holding that mere representations of quality of article sold do not constitute express warranty, in absence of fraud; *Benhead v. Scott*, 1 Phila. 84, 7 Phila. Leg. Int. 150, holding mere naked affirmation not an express warranty.

Cited in reference note in 58 A. D. 678, on vendor's liability in sale by sample.

— Implied warranty, generally.

Cited in *Carson v. Baillie*, 19 Pa. 375, 57 A. D. 659, denying right of purchaser of "lard grease" to sue on implied warranty of character of article, where he bought on faith of his own inspection.

Cited in reference notes in 55 A. D. 329; 73 A. D. 268,—on warranty implied from sales by sample.

Cited in notes in 6 A. D. 114, on implied warranties; 54 A. D. 145, on implied warranty in sale by sample; 70 L.R.A. 660, 661, on nature and extent of warranty on sale of goods by sample.

— Implied warranty of quality.

Cited in *Whitaker v. Eastwick*, 31 Phila. Leg. Int. 165, 2 Legal Chron. 166, holding that there is implied warranty of title and generally of species in sale, but not of quality; *Whitaker v. Eastwick*, 75 Pa. 329, 2 Legal Chron. 166, 6 Legal Gaz. 221; *Matthews v. Hartson*, 3 Pittsb. 86,—holding that vendor of chattels does not impliedly warrant their quality; *Boyd v. Wilson*, 83 Pa. 319, 24 A. R. 176, 3 W. N. C. 521, 34 Phila. Leg. Int. 106; *Selser v. Roberts*, 105 Pa. 242; *Hoffner v. Logan Square Bldg. & L. Asso.* 41 Phila. Leg. Int. 450,—holding that sale by sample without fraud or other act fixing sample as standard does not imply warranty of quality; *Howland Pulp Co. v. Jessup & M. Paper Co.* 26 Pa. Co. Ct. 159, 10 Pa. Dist. R. 623, holding that fact that wood pulp was "billed at 85.3 per cent air-dry test" did not create warranty of quality; *Gunther v. Atwell*, 19 Md. 157, holding that sale of "heavy Clarksville tobacco" did not imply warranty of quality; *Diebold Safe & Lock Co. v. Huston*, 55 Kan. 104, 28 L.R.A. 53, 39 Pac. 1035, holding that words "fireproof safe" in contract of sale thereof did not imply warranty of quality; *Moore v. McKinlay*, 5 Cal. 471, denying that in sale of seeds there was implied warranty that they would germinate, especially where vendee refused to inspect them; *Fox v. Paynter*, 1 W. N. C. 373, holding buyer of coal represented to be of best quality mined in Schuylkill region, not entitled, in suit for price, to complain of quality, where he bought without inspection; *Louis Werner Saw Mill Co. v. Ferree*, 201 Pa. 405, 50 Atl. 924, holding that buyer accepting, without complaint, quantity and grade of goods to be furnished at agreed price, must pay, although quality is inferior.

Cited in notes in 23 E. R. C. 462, 464, on implied warranty of quality on sale of chattel; 102 A. S. R. 613, on implied warranty of quality on sale of goods by sample.

General characteristics of account stated.

Cited in notes in 62 A. D. 86, on definition and elements of account stated; 27 L.R.A. 817, on effect of refusal to pay on existence of accounts stated.

Admissibility of notice or letter in favor of writer.

Cited in *Bush v. Ferry*, 7 Phila. 195, 27 Phila. Leg. Int. 140, holding notice con-

taining matter foreign to its professed object, and calculated to prejudice addressee, inadmissible in favor of writer; *Dempsey v. Dobson*, 174 Pa. 122, 52 A. S. R. 816, 32 L.R.A. 761, 34 Atl. 459, holding unanswered letter containing argumentative presentation of writer's view of his rights, inadmissible in his own favor; *Allen v. Peters*, 4 Phila. 78, 17 Phila. Leg. Int. 205, holding that writer of unanswered letter may introduce it in evidence to show demand or notice to addressee.

51 AM. DEC. 488, FISHER v. STRICKLER, 10 PA. 348.

Nature and effect of contract affecting property after promissor's death.

Cited in *Vogel's Estate*, 27 Pittsb. L. J. N. S. 80, holding legatee surrendering will to legatee in prior will of testator, on latter's promise to give, at his death, his estate to former, not entitled to probate lost will on latter's death without compliance, but bound to resort to latter's estate; *Russell v. Switzer*, 63 Ga. 711, on contract that property of family shall be for common use of members and shall, on death of two of them, pass to third, as covenant to stand seised to uses.

Natural love and affection as consideration.

Cited in *Taylor v. Mitchell*, 87 Pa. 518, 30 A. R. 383, 6 W. N. C. 378, 36 Phila. Leg. Int. 97, on necessity for recital of consideration of natural love and affection in contract between persons whose relationship renders it obvious.

51 AM. DEC. 489, COM. v. STAUFFER, 10 PA. 350.

Validity and effect of condition or limitation in deed or will.

Cited in *Bennett v. Vinton Lumber Co.* 28 Pa. Super. Ct. 495, holding that, where purchaser of standing timber undertakes to cut it by specified date, the portion remaining uncut at such date reverts to grantor.

— In restraint of marriage.

Cited in *Vaughn v. Lovejoy*, 34 Ala. 437, upholding condition or limitation in restraint of marriage annexed to devise by husband; *Dumey v. Schoeffler*, 24 Mo. 170, 69 A. D. 422, upholding condition in devise to wife to be void if she remarried; *Lancaster v. Flowers*, 198 Pa. 614, 48 Atl. 896, 23 Pa. Co. Ct. 613, 9 Pa. Dist. R. 241, upholding condition in devise to wife, in form of devise over if she should remarry; *Schaeffer v. Messersmith*, 10 Pa. Co. Ct. 366, on validity of condition in restraint of marriage annexed to devise by husband; *Hogan v. Curtin*, 88 N. Y. 162, 42 A. R. 244, upholding condition that legacy to daughter should be inoperative if she should marry without consent, where it was not purely personal, sale of realty being necessary to pay it; *Kennedy v. Alexander*, 21 App. D. C. 424, denying validity of provision in devise and bequest to daughter in fee, that she should hold only so long as she remained unmarried; *Wolverton v. Haupt*, 3 Walk. (Pa.) 46, 2 Chester Co. Rep. 398, upholding habendum of deed of land to wife, by which she was to hold so long as she bore grantor's name, although in premises it was granted to her, her heirs, etc.; *Kromer's Estate*, 22 Pa. Co. Ct. 327, upholding provision in will giving to widow life estate in testator's property, that, if she should remarry, her rights should be determined by intestate laws; *Little v. Birdwell*, 21 Tex. 597, 73 A. D. 242, upholding limitation of devise of life estate to wife, to period of her widowhood; *Clark v. Tension*, 33 Md. 85, upholding limitation in devise to wife so long as she should remain testator's widow; *Re Fox*, 1 Pearson (Pa.) 437, 1 Legal Gaz. 53, holding that where house was devised to wife during period she remained testator's widow,

"and after her death," etc., she took estate during widowhood only; *Morton's Estate*, 14 Pa. Dist. R. 121, holding that bequest of income of sum to niece for life, or so long as she should remain unmarried created valid limitation; *Bruch's Estate*, 6 North. Co. Rep. 183, holding that bequest of annuity to person so long as she should remain unmarried created limitation working forfeiture on her marriage; *Holtz's Estate*, 3 Phila. 525, 16 Phila. Leg. Int. 389, holding bequest of income of sum to woman so long as she should continue wife or widow of testator's son, not in restraint of marriage, and terminable by her remarriage; *McCullough's Appeal*, 12 Pa. 197, upholding provision giving wife support and maintenance off testator's land so long as she should remain his widow.

Cited in reference notes in 69 A. D. 427, on validity of conditions in restraint of marriage; 73 A. D. 250, on effect of conditions in will in restraint of marriage; 53 A. D. 112, on bequests in restraint of marriage.

Cited in notes in 38 A. D. 158, on validity of devises and conditions in restraint of marriage; 1 L.R.A. 837, on conditions in wills in restraint of marriage; 4 A. D. 115, on validity of devise in restraint of marriage; 2 L.R.A.(N.S.) 546, on validity of legacy in restraint of marriage; 95 A. S. R. 216, on validity of restrictions in restraint of marriage.

Distinguished in *Hough's Estate*, 13 Phila. 279, 36 Phila. Leg. Int. 442, 7 W. N. C. 559, upholding condition against remarriage in bequest of personality to widow, where there was bequest over; *Holbrook's Estate*, 213 Pa. 93, 110 A. S. R. 537, 2 L.R.A.(N.S.) 545, 62 Atl. 368, 5 A. & E. Ann. Cas. 137, holding that marriage terminated legacy under will giving it for life "or so long as she remains unmarried," with gift over on death or marriage; *Appleby v. Appleby*, 100 Minn. 408, 117 A. S. R. 709, 10 L.R.A.(N.S.) 590, 111 N. W. 305, 2 A. & E. Ann. Cas. 563, upholding provision in antenuptial agreement whereby intended wife undertook to secure to husband certain income so long as he should remain unmarried.

Criticized in *Langfelds' Estate*, 4 Pa. Co. Ct. 82, 18 Phila. 134, 44 Phila. Leg. Int. 26, upholding provision in will reducing amount of income given to widow if she should remarry.

Disapproved in *Vaughn v. Lovejoy*, 34 Ala. 437, upholding condition or limitation in restraint of marriage annexed to bequest by husband; *Dumey v. Schoeffler*, 24 Mo. 170, 69 A. D. 422, upholding condition in bequest to wife to be void if she remarried.

51 AM. DEC. 493, MUSSELMAN v. ESHLEMAN, 10 PA. 394.

Sale of property held by trustee, executor, or pledgee.

Cited in *Dunda's Estate*, 18 Phila. 205, 44 Phila. Leg. Int. 284, 26 W. N. C. 481, upholding sale by one *cestui que trust* to another in which trustees were appraisers, where there was no fraud and complaining party confirmed sale.

Cited in note in 13 L.R.A. 494, on setting aside trustee's sale.

—Purchase by the fiduciary, generally.

Cited in *Shelby v. Creighton*, 65 Neb. 485, 101 A. S. R. 630, 91 N. W. 369, holding trustee's purchase of trust property, voidable only and subject to ratification or repudiation by *cestui que trust*; *McGuirk v. Friel*, 9 Del. Co. Rep. 22, holding title of trustee to land conveyed to him by one who purchased at his sale and for his benefit, voidable only; *Henninger v. Boyer*, 10 Pa. Co. Ct. 506, holding purchase of trust property by third person in interest of trustee, voidable only.

Cited in reference notes in 57 A. D. 168, on validity of purchase by administra-

tor at his own sale; 57 A. D. 136, on right of administrator or executor to purchase at sale of decedent's estate; 56 A. D. 93, on whether administrator or executor may purchase property of estate for his own benefit.

Cited in note in 12 A. D. 86, on executor's right to become purchaser of assets of estate.

— Time for attacking purchase by fiduciary.

Cited in *Bland v. Fleeman*, 58 Ark. 84, 23 S. W. 4, holding that heirs' right of action to set aside administrator's purchase from one who purchased at his sale, arose when they were apprised of his purchase; *Morrell v. Trotter*, 15 Phila. 201, 39 Phila. Leg. Int. 256, 12 W. N. C. 143, holding that time during which pledgee may set aside pledgee's purchase at his own sale, without actual fraud, begins to run at date of sale; *Hollinshead v. Whitaker*, 16 Phila. 62, 40 Phila. Leg. Int. 36, holding same as to trustee buying, without fraud, from one who purchased at his sale; *Taggart v. Reilly*, 3 Phila. 196, 15 Phila. Leg. Int. 316, holding that title of bona fide grantee of one who as executor sold the land and afterward took conveyance from purchaser cannot be attacked after delay of thirty-three years; *Church v. Winton*, 196 Pa. 107, 46 Atl. 363, holding that delay of twenty-one years barred right of *cestui que trust* to set aside trustee's purchase at sale under execution on judgment recorded by trustee against *cestui*.

51 AM. DEC. 495, FITCH'S APPEAL, 10 PA. 461.

Proceeds of execution sale.

Cited in *Meherin v. Saunders*, 110 Cal. 463, 42 Pac. 966, denying right of constable to impeach return as to amount received on execution, by showing that he received check which was never paid.

— Application of generally.

Cited in *Vanvalzal v. Croman*, 1 Pa. Dist. R. 190, 11 Pa. Co. Ct. 44, denying right of constable to levy on property so as to share in proceeds of sale under prior levy by sheriff; *Pearson's Appeal*, 2 Monaghan (Pa.) 678, on sheriff's right to set off against plaintiff's claim to fund, latter's promise to indemnify him against failure to appraise exemption.

— Towards expenses incurred by levying.

Cited in *Graham v. McLean & B. Mach. Co.* 1 Chester Co. Rep. 73, 7 Luzerne Leg. Reg. 27, 35 Pila. Leg. Int. 70, on right of sheriff to charge for services of watchman to guard loose tools on which levy was made.

Distinguished in *Nodgick v. Volangowicz*, 4 Kulp, 39, upholding right of sheriff to claim expenses of feeding cattle levied on, where defendant did not offer to give bond and retain possession.

51 AM. DEC. 496, KRAUSE v. DORRANCE, 10 PA. 462.

Liability of collection agency for misconduct of its attorney.

Cited in *Bradstreet v. Everson*, 72 Pa. 124, 13 A. R. 665, 1 Luzerne Leg. Reg. 738, 4 Legal Gaz. 407, holding collection agency receiving claim and remitting it to their own attorney, liable for his failure to return funds collected; *Morgan v. Tener*, 83 Pa. 305, 3 W. N. C. 398, holding collection agency sending claim to their attorney, liable for its loss through his misconduct.

Cited in reference note in 53 A. D. 507, on liability of attorney for negligence.

When statute of limitations starts to run against fiduciary.

Cited in notes in 16 E. R. C. 359, as to when statute of limitation runs against

right to accounting from agent; 99 A. D. 393, on lapse of time as bar in case of express trust.

Distinguished in *Zacharias v. Zacharias*, 23 Pa. 452, holding that, where son of deceased who had money belonging to another living in his family, promised to keep it for such other, statute of limitations began to run at time of promise.

— **Attorney.**

Distinguished in *Douglas v. Corry*, 46 Ohio St. 349, 15 A. S. R. 604, 21 N. E. 440, holding that statute of limitations begins to run against attorney collecting money without fraud, at time of collection; *Campbell v. Boggs*, 48 Pa. 524, holding that in case of attorney's culpable negligence in failing to notify client within reasonable time of collection of money statute begins to run against him from time of such negligence.

51 AM. DEC. 498, FARMERS' & M. BANK v. GALBRAITH, 10 PA. 490.

Effect of execution of contract of sale of interest in land.

Cited in *Shontz v. Brown*, 27 Pa. 123, on rule that after conveyance parties have no recourse except for fraud or on covenants in deed; *Davenport v. Whisler*, 46 Iowa, 287, holding that after acceptance of deed grantee's relief from defects or encumbrances depends solely on covenants for title.

— **On right to recover for deficiency.**

Cited in *Leopold v. Schneck*, 4 Walk. (Pa.) 290, holding that after execution of contract of sale of timber on certain tract for lump sum vendee cannot sue for deficiency; *Hassel v. Denlinger*, 24 Lanc. L. Rev. 323, holding vendee in possession under contract for sale of certain number of acres for lump sum, not entitled, in action for such sum, to deduction for deficiency of $1\frac{1}{4}$ per cent; *Coughenour v. Stauff*, 77 Pa. 191, holding that where contract of sale of land is executed by deed, or security taken for purchase money, rule is not to open contract for deficiency even where sale is by the acre; *Landreth v. Howell*, 24 Pa. Super. Ct. 210; *Brumbaugh v. Chapman*, 45 Ohio St. 368, 13 N. E. 584,—holding that, where specific tract described as containing certain number of acres is sold at certain rate per acre, grantee cannot, after accepting deed, recover for deficiency, in absence of covenant as to number of acres; *Rodgers v. Olshoffsky*, 110 Pa. 147, 2 Atl. 44, 17 W. N. C. 264, 43 Phila. Leg. Int. 228, 16 Pittsb. L. J. N. S. 455, holding that grantee accepting deed and giving bond for payment cannot, in absence of fraud, have deduction for deficiency in action on bond; *Baker v. Barley*, 34 Pa. Super. Ct. 169, denying right of grantee, after accepting deed of 23 acres, to open judgment for purchase money in order to make deduction for deficiency on ground of vendor's representations that tract contained 30 acres.

Cited in reference notes in 57 A. D. 520; 62 A. D. 665; 68 A. D. 214,—on vendee's right to relief in case of deficiency in quantity of land.

51 AM. DEC. 499, COM. v. MOLTZ, 10 PA. 527.

Operation and effect of statutes of limitation.

Cited in reference note in 55 A. D. 587, on binding effect of statute of limitations in equity when remedies at law and equity are concurrent.

— **Against fiduciary.**

Cited in *Re Oliver*, 12 Pittsb. L. J. N. S. 456, holding defense of statute of limitations not available to administrator of guardian, in ward's action for

amount due on guardian's account; *Barnes v. Maring*, 23 Ill. App. 68, on whether administrator stands in position of trustee for creditors so as to prevent operation of statute of limitations; *Eachus's Estate*, 2 Del. Co. Rep. 5, holding that ward's release of guardian cannot be inferred from lapse of time; *Neel's Appeal*, 9 Sadler (Pa.) 76, 11 Atl. 636; *Gress's Appeal*, 14 Pa. 463,—on operation of statute of limitations against ward and in favor of guardian; *Re Kleinhenz*, 28 Pittsb. L. J. N. S. 306, holding that statute of limitations did not begin to run in favor of trustee in resulting trust until discovery of fraud by *cestui que trust*.

Cited in reference notes in 60 A. D. 212; 64 A. D. 636; 82 A. D. 491,—on applicability of statute of limitations to trusts; 23 A. S. R. 481; 40 A. S. R. 108,—on limitations of actions in cases of express trusts; 61 A. D. 317, on statute of limitations as bar to implied but not to express trusts.

Cited in note in 16 E. R. C. 270, on when cause of action for breach of fiduciary duty barred.

Requisites of acts or declarations to raise estoppel.

Cited in *Boggs v. Merced Min. Co.* 14 Cal. 279; *Gull River Lumber Co. v. Keefe*, 6 Dak. 160, 41 N. W. 743; *Brant v. Virginia Coal & I. Co.* 93 U. S. 326, 23 L. ed. 927,—holding that for application of rule of estoppel there must be intended deception, or gross negligence amounting to constructive fraud; *Farmers' & M. Bank v. Farwell*, 7 C. C. A. 391, 19 U. S. App. 256, 58 Fed. 639, holding that negligence not amounting to breach of duty is not constructive fraud and will not raise estoppel; *Vanleer's Appeal*, 24 Pa. 224, holding that estoppel arises where it would be fraud for one to impair truth or efficacy of his declarations or acts; *Meason v. Kaine*, 67 Pa. 126, 3 Legal Gaz. 98, remarking that estoppel rests on principle that one has been induced by another to place himself in position from which it would be fraud in the latter to shift him; *Perrine v. Holcomb*, 3 Luzerne Leg. Reg. 32, holding that requisites of estoppel are that misrepresentation or silence of one having knowledge cause another without knowledge, to act to his injury; *Stewart v. Parnell*, 147 Pa. 523, 23 Atl. 838, 29 W. N. C. 537, holding that party alleging estoppel *in pais* must have been induced, by the concealment, to act so as to incur prejudice if he is not permitted to rely on estoppel; *Ayres v. Wattson*, 57 Pa. 360, 25 Phila. Leg. Int. 316, holding that estoppel in equity arises from some act or declaration by which injury to another is effected or attempted; *Davis v. Davis*, 26 Cal. 23, 85 A. D. 157, holding that basic principle of equitable estoppel is to prevent consequences of fraud.

Cited in reference notes in 55 A. D. 118; 80 A. D. 172,—on what constitutes estoppel *in pais*; 68 A. D. 603, on doctrines of equitable estoppels; 52 A. D. 750, on estoppel by admissions, representations, silence, or conduct generally; 47 A. S. R. 480, on false representation as raising estoppel *in pais*.

Distinguished in *Henshaw v. Bissell*, 18 Wall. 255, 21 L. ed. 835, holding that for application of rule of estoppel there must be intended deception or gross negligence amounting to constructive fraud.

— As to interest in land.

Cited in *McAfferty v. Conover*, 7 Ohio St. 99, 70 A. D. 57, holding that, to raise estoppel *in pais* to deny boundary, act or declaration must be wilful; *Thompson's Appeal*, 126 Pa. 367, 17 Atl. 643, on care to be observed in applying doctrine that owner of real property may, by acts *in pais*, preclude himself from asserting title.

Cited in note in 38 A. R. 317, on mistake as defense to claim of estoppel in regard to boundary line.

— **Necessity that act or declaration be directed at person acting thereon.**

Cited in *Mecouch v. Loughery*, 12 Phila. 416, 35 Phila. Leg. Int. 222, holding that to raise estoppel declaration must be made to the person who acts on it, and who, after exercise of due diligence, has reason to rely on it; *Ream v. Harnish*, 45 Pa. 376, holding one not estopped by declarations as against person who was not one to whom they were made, and who did not rely on them; *Morgan v. Spangler*, 14 Ohio St. 102, holding stranger acting on faith in another's acts or declarations not entitled to claim that the other is estopped to assert the truth.

— **Sufficiency of acts or declarations to raise estoppel.**

Cited in *Verrier v. Guillou*, 14 Phila. 2, 37 Phila. Leg. Int. 50, holding obligee in bond not denying obligor's claim of payments, estopped to plead, in action on bond, statute of limitations against counterclaim based on such payments; *Horn v. Cole*, 51 N. H. 287, 12 A. R. 111, 5 Legal Gaz. 49, holding owner representing that goods were owned by another, in order to avoid attachment, estopped to show untruth of representation in trover for attachment of goods as belonging to such other; *Miller v. Hampton*, 37 Ala. 342, holding that giving, by defendant in detinue, of bond that does not recite facts showing possession in him, not estoppel *in pais* against him to deny possession.

— **As to interest in land.**

Cited in *Chapman v. Chapman*, 59 Pa. 214, holding one led by silence to rest upon his title and to make improvements, entitled to be protected by estoppel; *Miller's Appeal*, 84 Pa. 391, 4 W. N. C. 405, 34 Phila. Leg. Int. 348, holding owner of land inducing another, by positive act but in ignorance of ownership, to purchase it from third person estopped to claim it as against purchaser; *Beaupland v. McKeen*, 28 Pa. 124, 70 A. D. 115, denying right of one encouraging another to buy land and acting as his agent for commission, to buy up and assert superior title; *Smith v. McNeal*, 68 Pa. 164, holding that one's declarations that land was owned by another for whom he was agent would estop former to claim logs cut therefrom; *Stevens v. Dennett*, 51 N. H. 324, holding person signing deed as witness without disclosing that he claimed right to use well on land, estopped to assert such right against purchaser; *Millingar v. Sorg*, 55 Pa. 215, 25 Phila. Leg. Int. 172, holding one selling and pointing out wrong tract of land and afterwards buying, for another, a tract, but getting the one he should have pointed out on his sale, estopped to claim latter tract; *Johnson v. Byler*, 38 Tex. 606, holding vendor of land agreeing to take Confederate money if vendee could sell therefor, estopped to assert vendor's lien against transferee of vendee after refusal to accept such money; *Diamond Coal Co. v. Fisher*, 19 Pa. 267, holding county buying land sold for taxes and unlawfully selling for further taxes before end of first period of redemption, not entitled to rely on invalidity of second sale; *Philadelphia & R. Coal & I. Co. v. Taylor*, 5 Legal Gaz. 393, 1 Legal Chron. 361, holding one standing by and seeing another pay former's copartners more for colliery than they would without easement of air shaft, estopped to deny easement; *Retting v. Becker*, 11 Pa. Super. Ct. 395, holding judgment creditor representing to another that debtor held land free from debt, estopped to assert lien as against such other, who made loan to debtor; *Beardsley v. Foot*, 14 Ohio St. 414, 84 A. D. 405, holding one assuring prospective purchaser of land that he had no liens thereon

estopped to assert liens after purchase; *First Nat. Bank v. Marsall & I. Bank*, 28 C. C. A. 42, 54 U. S. App. 510, 83 Fed. 735, holding bank failing to disclose, on inquiry, that it held liens on person's land, not estopped to assert them as against subsequent mortgage taken by another bank making the inquiry; *Reel v. Elder*, 62 Pa. 308, 1 A. R. 414, 26 Phila. Leg. Int. 345, holding wife whose husband procured divorce in another state, not estopped to claim dower against subsequent purchaser from husband, by declarations that she was married to another, made after purchase.

Requisites of proof to raise estoppel.

Cited in *Hill v. Epley*, 31 Pa. 331; *Bucher v. Meixell*, 5 Pa. Dist. R. 375; *Hawkins v. Oswald*, 2 Woodw. Dec. 395,—holding that facts relied on to raise estoppel must be affirmatively established; *Schwab v. Edge*, 214 Pa. 602, 64 Atl. 80, holding that, to establish estoppel affecting interest in land, evidence must be clear and unequivocal; *Huss v. Jacobs*, 210 Pa. 145, 59 Atl. 991, holding that no estoppel can be raised from inference or argument.

Duty and liability of guardian or executor.

Cited in *Pennell's Estate*, 18 Phila. 75, 43 Phila. Leg. Int. 184, 18 W. N. C. 198, 2 Pa. Co. Ct. 436, holding that settlement of deceased guardian's estate by his executor does not relieve latter from duty of accounting to ward.

Cited in note in 51 A. D. 529, on necessity that liability of executor or administrator be fixed before action on bond.

Conclusiveness and effect of confirmation of account of guardian or executor.

Cited in *Com. use of Sterner v. Dechant*, 4 Kulp, 213, holding absolute confirmation of guardian's account, conclusive on all parties; *Sergeant v. Ewing*, 30 Pa. 75, holding confirmation of report of auditor appointed to settle executor's account, filed on petition of creditor who presented no claim, not bar to action by creditor against executor to recover claim against estate.

51 AM. DEC. 506, HINDS v. SCOTT, 11 PA. 19.

Validity and assailability of execution, levy, or sale.

Cited in *Glass v. Gilbert*, 58 Pa. 266, holding that sale under lev. fa. on mortgage could not be collaterally attacked by one unconnected with mortgagor's title.

Distinguished in *Frey v. Wurtzel*, 1 Woodw. Dec. 147, holding that court looks at slight irregularities in sale under levy of fi. fa., in case of gross inadequacy of price paid.

— In cases of dormant judgments, generally.

Cited in *Crago v. Darte*, 1 Pa. Co. Ct. 54, holding execution on dormant judgment voidable only; *Gillespie v. Switzer*, 43 Neb. 772, 62 N. W. 228, holding execution sale under dormant judgment voidable only and not subject to collateral attack; *Sloan v. McMullen*, 5 Pa. Dist. R. 430, denying right to issue execution on judgment after expiration of statutory period of duration of lien.

— Who are affected by statute limiting duration of judgment liens.

Cited in *Trego's Estate*, 1 Chester Co. Rep. 12; *McCahan v. Elliott*, 103 Pa. 634, 41 Phila. Leg. Int. 418,—holding that statute limiting time of lien of judgment does not apply as to judgment debtor; *Wolfskill's Estate*, 15 Lanc. L. Rev. 193, on same rule; *Comstock v. Kilchenstein*, 14 W. N. C. 388, 14 Pittsb. L. J. N. S. 330, holding that execution on dormant judgment may be set aside on mo-

tion of defendant; *Sylvester v. DeWitt*, 34 Pa. Super. Ct. 205, holding that objection to testatum *fi. fa.* on dormant judgment cannot be raised by subsequent judgment creditors, under statute limiting time of lien.

Cited in reference note in 51 A. D. 567, on limitation of judgment liens.

Cited in note in 28 A. D. 734, on inapplicability to debtor or his heirs or devisees of statute limiting judgment lien.

General effect of execution and levy.

Cited in *Schwartz v. Banks*, 13 Phila. 540, 34 Phila. Leg. Int. 250; *Kindig v. Atkinson*, 13 Phila. 542, 34 Phila. Leg. Int. 196,—holding that levy places property in custody of law and prevents acquisition of superior liens by subsequent creditors; *Shearer v. Brinley*, 76 Pa. 300, 31 Phila. Leg. Int. 252, 2 Legal Chron. 217, holding that *fi. fa.*, levy, and condemnation creates lien on land and places it in custody of law to pay debt.

Cited in reference notes in 64 A. D. 464, on judgment and execution liens; 68 A. D. 187, on when execution becomes lien; 99 A. D. 271, on lien as incident to levy of execution; 26 A. D. 70, on lien as necessary and inseparable incident of seizure on execution.

Conclusiveness of sheriff's deed.

Cited in *Jackson v. Gunton*, 26 Pa. Super. Ct. 203; *Cock v. Thornton*, 108 Pa. 637, 16 W. N. C. 117, 42 Phila. Leg. Int. 314,—holding that after acknowledgment of sheriff's deed title cannot be collaterally questioned, except for fraud or want of authority.

Cited in reference note in 63 A. D. 361, on effect of misrecital of judgment in sheriff's deed.

Necessity and sufficiency of sheriff's return.

Cited in *Gibson v. Winslow*, 38 Pa. 49, holding that sheriff's omission to make return did not invalidate sale; *Wallace v. Scholl*, 9 Pa. Super. Ct. 284, holding that return of writ of attachment is no part of its execution; *Kelly v. Green*, 53 Pa. 302, 24 Phila. Leg. Int. 52, holding that for purposes of information to court sheriff's deed is return; *Boyer v. Webber*, 22 Pa. Super. Ct. 35, holding record showing fact of sale, acknowledgment of deed to purchaser in open court, and entry in sheriff's deed book, sufficient record of return.

Cited in reference notes in 39 A. S. R. 87, as to whether sheriff's deed on execution sale is invalidated by nonreturn of writ; 56 A. D. 436; 63 A. D. 361,—on execution purchaser's title as affected by absence of, or irregularities in, return.

Effect of making of return on sheriff's liability.

Cited in *Weaver v. Lyon*, 2 Sadler (Pa.) 403, 5 Atl. 782, on rule that by return or making deed, sheriff fixes himself for price of bid.

Presumptive delivery of deeds.

Cited in reference note in 56 A. D. 442, on presumption of delivery from possession of deed.

51 AM. DEC. 513, CUMBERLAND VALLEY R. CO. v. HUGHES, 11 PA. 141.

Liability of quasi public corporations for negligence.

Cited in *Worster v. Forty-Second Street & G. Street Ferry R. Co.* 50 N. Y. 203, holding street railroad company liable for injury to horse, resulting from failure to repair tracks; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. 290,

3 A. R. 549, holding canal company maintaining bridge over canal in obedience to charter provision, liable for injury to traveler on highway through collapse of bridge.

Cited in reference notes in 90 A. D. 56, on liability of railroad company maintaining structure causing injury to person on highway; 67 A. D. 327, on doctrines of negligence and contributory negligence as applied to railroad companies; 67 A. D. 327, on duty of management of railroad to exercise strictest vigilance; 4 A. S. R. 84, on liability for defects in roadbed; 61 A. D. 641, on railroad company's liability for injury to another's car through neglect to repair track; 62 A. D. 270, on liability of passenger carriers; 62 A. D. 327, on passenger carriers and rule governing their responsibility.

Cited in note in 8 A. D. 442, on nonliability of quasi public corporations for negligence of officers.

51 AM. DEC. 515, COM. USE OF STUB v. STUB, 11 PA. 150, Reaffirmed on later appeal in 28 Pa. 497.

Liability of sureties on official bonds.

Cited in reference note in 63 A. S. R. 63, on liability of estate of deceased surety on official bond.

Distinguished in *Smith v. Com.* 59 Pa. 320, holding ascertainment of sheriff's liability for escape of prisoner held under writ of execution not prerequisite to action against sureties on his bond; *Com. v. Steigerwalt*, 18 Lanc. L. Rev. 301, holding proceeding against detective not prerequisite to action against sureties on his official bond.

Liability of surety on bond of administrator, guardian, or trustee.

Cited in *Harmon v. McDonald*, 187 Mass. 578, 73 N. E. 883, 3 A. & E. Ann. Cas. 64, holding that discharge in bankruptcy, on surety's petition, of deceased administrator who had appropriated funds, precluded action on bond against surety.

Cited in reference notes in 57 A. D. 364; 58 A. D. 609; 82 A. D. 554; 85 A. D. 131; 15 A. S. R. 547; 24 A. S. R. 300; 26 A. S. R. 824; 62 A. S. R. 742; 100 A. S. R. 557; 105 A. S. R. 895,—on liability of sureties on bonds of executors and administrators; 78 A. D. 178, on liability of sureties for funds received by administrator before appointment; 73 A. S. R. 46, on liability of sureties for administrator's personal debt; 72 A. D. 317, on when liability of sureties on administrator's bond terminates; 85 A. S. R. 277, on what duties covered by executor's bond; 3 A. S. R. 531; 9 A. S. R. 598; 79 A. S. R. 675,—on action on guardian's bond; 56 A. S. R. 542, on liability of sureties for misappropriation of funds by guardian.

—Fixing of principal's liability before action.

Cited in *Kauffman v. Com.* 5 Sadler (Pa.) 385, 8 Atl. 600; *Com. v. Kean*, 19 Pa. Super. Ct. 576; *Com. v. Dill*, 1 Phila. 556, 12 Phila. Leg. Int. 80; *Com. v. Wilson*, 7 W. N. C. 62,—holding that surety of administrator may be sued on bond after amount of latter's liability has been fixed by decree of probate court; *Boyd v. Com.* 36 Pa. 355, holding that confirmation of auditor's report determining amount of assets in trustee's hands, constitutes sufficient foundation for action against surety on latter's bond; *Hibberd v. Bailey*, 64 C. C. A. 143, 129 Fed. 575, holding that action may be maintained against surety of administrator under Pennsylvania law, after amount of his personal responsibility has been ascertained by decree of orphans' court; *Territory ex rel. Hall v.*

Bramble, 2 Dak. 189, 5 N. W. 945; *Re Wiseman*, 123 Fed. 185,—holding surety on administrator's bond, not liable until amount of latter's liability is fixed by decree of probate court; *Com. v. Hilgert*, 55 Pa. 236, holding that to fix liability of sureties on administrator's bond for sale of real estate, there must be separate account of proceeds of real estate; *Pennsylvania Co. v. Swain*, 189 Pa. 626, 42 Atl. 297 (affirming 21 Pa. Co. Ct. 177, 7 Pa. Dist. R. 406), on proceeding against committee of lunatic to fix their liability as prerequisite to action, against sureties on their bond.

Cited in reference notes in 93 A. S. R. 42, on prerequisite to action on bond of executor, administrator, or guardian; 61 A. D. 233, on proceedings upon executors' and administrators' bonds.

Cited in note in 52 L.R.A. 188, as to when judgment against executors, administrators, or guardians is conclusive evidence against surety on bond.

Administrator's right of action against predecessor or his sureties.

Cited in reference notes in 65 A. D. 746, on administrator's right of action against predecessor; 72 A. D. 317, on administrator's right of action against sureties of former administrator.

51 AM. DEC. 534, READING v. COM. 11 PA. 196.

Mandamus to compel observance of public or quasi public duties and rights.

Cited in *Com. ex rel. O'Connor v. McCuen*, 75 Pa. 215, 51 Phila. Leg. Int. 348, 2 Legal. Chron. 261; *Williams v. Cooper* Court C. P. Judge, 27 Mo. 225,—holding that mandamus will not issue unless petitioner has clear right and no other specific remedy; *Carlisle School Dist. v. Humrich*, 18 Pa. Co. Ct. 322, holding that mandamus will not issue except in case of last necessity, where relator has no other remedy; *Com. ex rel. Freeman v. Westfield*, 11 Pa. Co. Ct. 369, 1 Pa. Dist. R. 495, holding that, to warrant issuance of mandamus on relation of private party, he must suffer special damage not otherwise remediable; *People ex rel. Pumpysansky v. Keating*, 62 App. Div. 348, 71 N. Y. Supp. 97 (dissenting opinion), on rule that mandamus should not issue except where right is clear.

Cited in reference notes in 54 A. D. 604, on when mandamus lies; 22 A. S. R. 563, on right to issuance of mandamus; 55 A. D. 806, on right to mandamus where other effectual remedy exists; 52 A. D. 490, on necessity that petitioner for mandamus show clear legal right and no other specific remedy; 81 A. D. 647, on mandamus being resorted to when there are no other adequate means of redress; 67 A. D. 553; 89 A. D. 730,—on need that no other adequate remedy exists to warrant mandamus.

Cited in notes in 13 L.R.A. 120, defining "mandamus;" 98 A. S. R. 865, on definition and prerequisites to issuance of mandamus; 58 A. D. 407, on requisites for obtaining mandamus; 28 A. R. 448, on issuance of mandamus at suit of private persons for performance of public duty.

Disapproved in *Pumphrey v. Baltimore*, 47 Md. 145, 28 A. R. 446, upholding right of private person to move for mandamus to enforce public duty not due the government as such.

— Against public corporation or officer.

Cited in *Com. ex rel. Dist. Atty. v. Westchester*, 9 Pa. Co. Ct. 542, 8 Lanc. L. Rev. 236, holding mandamus not proper remedy to compel municipality to remove poles placed on sidewalks by street railway; *Heffner v. Com.* 28 Pa. 108, denying right of landowner to compel, by mandamus, performance by municipi-

pality of statutory duty to open certain alley; *Com. ex rel. Murphy v. Norristown*, 17 Pa. Co. Ct. 187, 12 Montg. Co. L. Rep. 9, holding that where municipality's liability to repair street is only matter at issue mandamus is proper remedy; *Com. ex rel. Zoll v. Killinger*, 1 Pearson (Pa.) 257, holding that mandamus would not issue on relation of private person to compel supervisor of town to build bridge; *Re Manheim Twp.* 5 Clark (Pa.) 400, denying mandamus on application of citizens of town, to compel school directors to build schoolhouse, where statute made forfeiture of office penalty for failure to perform duty; *Com. ex rel. Stahl v. James*, 214 Pa. 319, 63 Atl. 743, denying person's right to mandamus to compel town councilmen to admit him to vacancy in council, where he was not legally nominated; *Lancaster Fireman's Relief Asso. v. Rathfon*, 18 Lanc. L. Rev. 273, denying mandamus to compel city treasurer to pay to fireman's relief association portion of insurance tax held for its benefit; *Edison Electric Illuminating Co. v. Jacobs*, 8 Kulp, 120, granting mandamus to compel city controller to certify contract for lighting city streets for which appropriation had been made.

Cited in reference note in 96 A. S. R. 311, on mandamus to compel performance of public duty by public corporation.

Distinguished in *Porter Twp. v. Jersey Shore*, 82 Pa. 275, 33 Phila. Leg. Int. 444, 3 W. N. C. 301, holding overseers of township, securing order of removal of pauper to adjoining township, entitled to compel, by mandamus, compliance with order by overseers of latter; *Sisson v. Bailey*, 1 Luzerne Leg. Reg. 56, holding that owner of sheep killed by dogs may compel county commissioners to pay over their appraised value from dog tax fund.

—Against quasi-public corporation or officer.

Cited in *Lorraine v. Pittsburg*, J. E. & E. R. Co. 27 Pa. Co. Ct. 359, denying right of individual shipper to petition for mandamus to compel railroad to furnish cars; *Birmingham F. Ins. Co. v. Com.* 92 Pa. 72, 37 Phila. Leg. Int. 51, denying right to mandamus to compel transfer of stock on books of insurance corporation where there was legal remedy; *Com. ex rel. Grier v. Coxe*, 1 Legal Chron. 89, holding mandamus proper remedy to compel inspections of election of corporate directors, to accept and count proxies voted by relator.

Right to injunction in matters affecting public rights.

Cited in *Times Pub. Co. v. Ladomus*, 11 Phila. 339, 33 Phila. Leg. Int. 130, on right of landowner to enjoin erection of building on adjoining lot, beyond street line.

Cited in reference note in 54 A. D. 681, on injunction to prevent public or private nuisance.

—Mandatory injunction.

Cited in *Continental Coal Co. v. Pennsylvania R. Co.* 13 Pa. Dist. R. 702, holding coal company entitled to bring bill for mandatory injunction to compel railroad to furnish cars and sidings, and not bound to seek remedy by mandamus; *Buck Mountain Coal Co. v. Lehigh Coal & Nav. Co.* 50 Pa. 91, 88 A. D. 534, 21 Phila. Leg. Int. 380, denying right of private party to enjoin company owning canal that was damaged by flood, from neglecting to repair it and render it navigable.

Source and nature of municipal powers.

Cited in note in 2 L.R.A. 142, on municipal corporations as agencies of government property is disposed of by judicial sale.

— **As to nuisances in street, generally.**

Cited in note in 39 L.R.A. 680, on municipal power over selling in streets as nuisances.

— **Revocability, as license, of municipal authorization of nuisance.**

Cited in *Winter v. Montgomery*, 83 Ala. 589, 3 So. 235, holding municipal permission legalizing obstruction in street, which would otherwise be nuisance, a mere license and revocable.

Cited in note in 54 A. D. 167, on consideration as element affecting revocability of license.

51 AM. DEC. 536, INGERSOLL v. LEWIS, 11 PA. 212.

Interruption of statute of limitations as against adverse occupant of land.

Cited in *Hillside Coal & I. Co. v. Pitt*, 4 Lack. L. News 335, suggesting that commencement of action of ejectment against occupant of land interrupts running of statute in his favor; *Texas & N. O. R. Co. v. Spreights*, 94 Tex. 350, 60 S. W. 659, holding that adverse occupant's agreement to purchase from owner interrupted running of statute.

Cited in reference notes in 57 A. D. 695; 61 A. D. 305,—on interruption of running of statute of limitations by occupant's acknowledgment of owner's title.

— **By owner's entry or survey.**

Cited in *Bradford v. Guthrie*, 3 Pittsb. 213, 4 Brewst. (Pa.) 351, holding that, to interrupt statute of limitation, entry on land must be made with intention to claim it, manifested by act or declaration; *Hood v. Hood*, 25 Pa. 417, holding that, to toll statute of limitations, entry must be neither accidental nor on invitation of occupant, but for purpose inconsistent with his title; *Hoopes v. Garver*, 15 Pa. 517, holding that survey of tract by claimant with knowledge of possessor, who made no objection and who did not claim part in dispute, may be found to interrupt statute of limitations.

Cited in reference notes in 62 A. D. 334, on entry by owner as tolling statute of limitations; 61 A. D. 305, on avoidance of statute of limitations as against adverse occupant by entry by owner or his agent.

Distinguished in *Hole v. Rittenhouse*, 19 Pa. 305, denying that entry under title no better than that of occupant interrupts statute of limitations; *Douglass v. Lucas*, 63 Pa. 9, holding that in case of resulting trust erection of lumber shanty by *cestui* and occasional cutting and carrying away of timber did not interrupt statute as against trustee; *McCombs v. Rowan*, 59 Pa. 414, holding mere survey insufficient to interrupt running of statute, when not made *animo clamandi*.

51 AM. DEC. 540, REARICH v. SWINEHART, 11 PA. 233.

Admissibility of parol evidence to contradict, control or vary writing.

Cited in *Heil v. Ginginger*, 1 Woodw. Dec. 259, holding parol evidence inadmissible to show that note and bond were given by wife for land conveyed by executor of husband, on understanding that they were to be charged against her interest in estate; *Heydt v. Frey*, 10 Sadler (Pa.) 84, 13 Atl. 475, 21 W. N. C. 265, 45 Phila. Leg. Int. 322, holding parol evidence inadmissible in executor's action on note, to show that amount thereof was given to maker's wife as advancement by her mother, the testatrix, on condition that he would sign note for interest during life of testatrix; *Emrick v. Groome*, 4 Pa. Dist. R. 511. hold-

ing parol evidence inadmissible to show that one selling drug business under written contract made prior parol promise not to re-engage in business; *Kostenbader v. Peters*, 80 Pa. 438, 33 Phila. Leg. Int. 266, 2 W. N. C. 531, holding parol evidence admissible to correct call in deed, where error was result of mistake; *Chalfant v. Williams*, 35 Pa. 212, holding parol evidence admissible to show that at time of execution of contract for sale of colliery for gross amount payable at certain rate per ton it was agreed vendees should not be bound to mine necessary amount of coal; *Lippincott v. Whitman*, 83 Pa. 244, 34 Phila. Leg. Int. 321, holding parol evidence admissible to contradict or vary written instrument, where it discloses facts warranting reformation in equity.

Cited in reference notes in 52 A. D. 693; 58 A. D. 711; 54 A. D. 172, 321,—on parol evidence to alter or vary written contract; 53 A. D. 436, on parol evidence to explain or vary contracts; 53 A. D. 55, on parol stipulation to vary written contract; 60 A. D. 482, on parol evidence to add to, vary, or explain, written instrument; 67 A. D. 80; 98 A. D. 441,—on evidence of prior parol negotiations to vary or control written contract; 60 A. D. 482; 68 A. D. 402,—on admissibility of prior or contemporaneous parol agreement to control writing.

Cited in notes in 6 L.R.A. 36, on admissibility of parol evidence tending to confirm written contract; 56 A. S. R. 668, on proof and practice as to variation of writing by subsequent parol agreement.

Distinguished in *Richardson v. Bennethum*, 1 Woodw. Dec. 494, holding parol evidence inadmissible to show parol agreement at time of execution of bond, that payment would not be demanded until two years after maturity; *Kirk v. Hartman*, 63 Pa. 97, denying right to introduce new term into written contract by parol evidence of declaration made at indefinite time, without fraud; *Martin v. Berens*, 67 Pa. 459, 28 Phila. Leg. Int. 69, holding parol agreement inadmissible to contradict contemporaneous written contract, where there is neither fraud nor mistake; *Philips v. Meily*, 106 Pa. 536, 15 W. N. C. 225, 42 Phila. Leg. Int. 18, holding parol evidence inadmissible to show that note sued on was given as receipt or memorandum for another note taken for collection; *Fulton v. Hood*, 34 Pa. 365; 75 A. D. 664, holding parol evidence inadmissible to show that at time of execution of power of attorney to confess judgment it was agreed that judgment should not be entered for ten years, except on contingency.

— In case of fraud, generally.

Cited in *Horn v. Brooks*, 61 Pa. 407, holding parol evidence admissible to show fraud in procuring execution of deed; *The Poconoket*, 67 Fed. 262, holding evidence of parol agreement that title to ship to be constructed under written contract should pass when work was begun, admissible, where it was cause of acceptance of builder's inadequate bond.

Cited in reference note in 54 A. D. 172, on admissibility of parol evidence to show fraud in written instrument or to prevent fraud.

— Fraud by unfair use of writing.

Cited in *Phillips Gas & Oil Co. v. Pittsburgh Plate Glass Co.* 213 Pa. 183, 62 Atl. 830; *Haag v. Keely*, 1 Woodw. Dec. 159; *Levy v. Moore*, 1 Phila. 325, 9 Phila. Leg. Int. 46; *Michael v. Moore*, 24 Lanc. L. Rev. 162,—holding that, where there is attempt to use written contract in violation of contemporaneous parol agreement, it is subject to influence of parol evidence; *Blue Label Safety Squib Co. v. Marsh*, 15 Pa. Dist. R. 95, holding that, where there is attempt to use written contract in violation of parol promise, evidence of latter is admissi-

ble to control its use but not to vary or contradict it; *Gandy v. Weckerly*, 220 Pa. 285, 123 A. S. R. 691, 18 L.R.A.(N.S.) 434, 69 Atl. 858, holding creditor of corporation entitled to show by parol evidence that note for corporate stock was given by him on president's promise not to call for payment until satisfaction of debt; *Hill v. Schucker*, 1 Woodw. Dec. 251, holding parol evidence admissible to show mother's parol agreement that notes contemporaneously given her by alleged father of her bastard child should be void if child should die; *White v. Black*, 14 Pa. Super. Ct. 459, holding parol evidence admissible to show that written lease introduced by defendant in action on parol lease was made long after commencement of term, to enable lessee to show, as against third person, that he was lawful tenant; *Hardwick v. Pollock*, 3 Pa. Dist. R. 245, 15 Pa. Co. Ct. 161, holding parol evidence admissible to show that contract for use of patented process at certain rate was made on express understanding that others should be required to pay same rate; *Winter v. Schmitz*, 24 Lanc. L. Rev. 156, holding that, where release of mechanic's lien was introduced as evidence of contract price, parol evidence was admissible to show that amount recited therein as contract price was too large.

Cited in reference note in 68 A. D. 402, on admissibility of parol evidence to prevent fraudulent use of deed.

Sufficiency of evidence to authorize reformation of written instrument.

Cited in *Lotz v. Reading Iron Co.* 10 Pa. Co. Ct. 497, holding that, to warrant reformation of written instrument, evidence must be clear, distinct, and entirely satisfactory; *Spencer v. Colt*, 89 Pa. 314, 7 W. N. C. 336, 36 Phila. Leg. Int. 394, upholding charge that parol agreement relied on as basis of reformation of written contract should be made out by clear, precise, and indubitable proof.

Enforceability of parol agreements.

Distinguished in *Shunk's Estate*, 1 Chester Co. Rep. 535, giving effect to parol agreement of holders of judgments against same debtor, that in case of inadequacy of assets they should share proportionately.

Disapproved in *Hall v. First Nat. Bank*, 173 Mass. 16, 73 A. S. R. 255, 44 L.R.A. 319, 53 N. E. 154, holding payee's parol promise to renew note until maker could pursue his business without such aid, unenforceable.

Proof of special matter — Necessity for notice or averment.

Cited in *Arnold v. Cole*, 42 W. Va. 663, 26 N. E. 312, holding lessee sued for rent due not entitled to prove payments under general plea of covenants performed; *Williams v. Williams*, 34 Pa. 312, holding that offer of testimony given by witness on former trial must set out its purport and purpose for which it is offered.

— Time for objecting to.

Cited in *Dushane v. Benedict*, 120 U. S. 630, 30 L. ed. 810, 7 Sup. Ct. Rep. 696, holding that objection of want of notice of special matter of defense admitted in evidence cannot be made on appeal for first time.

Requisites, sufficiency, and effect of tender.

Cited in reference note in 60 A. D. 200, on necessity, validity, and effect of tender.

Cited in note in 77 A. D. 472, on sufficiency of tender.

51 AM. DEC. 547, WEST BRANCH BANK v. CHESTER, 11 PA. 282.**Effect of judicial sale.**

Cited in *Com. v. Freedley*, 12 Pa. 358, holding lien of sheriff's recognizance discharged by sheriff's sale under prior lien.

Cited in note in 88 A. S. R. 359, on rights and remedies of mortgagee where mortgaged property is disposed of by judicial sale.

— For mortgage debt generally.

Cited in *Dougherty's Appeal*, 1 W. N. C. 593, on effect of sheriff's sale of mortgaged premises upon judgments obtained on notes or bonds secured by mortgage; *Denver v. Capelli*, 2 Colo. 236 (dissenting opinion), on effect of sale of land under judgment, taken on mortgage note or bond, on mortgage lien.

Distinguished in *Paul v. Hassall*, 18 Phila. 621, 42 Phila. Leg. Int. 17, holding that execution on judgment in action of debt upon bonds of canal company secured by mortgage will be restrained on application of trustees of mortgage, where statute provides that lien of mortgages shall in no matter be affected by sale on *fi. fa.* under act.

— As discharging mortgage or vendor's lien.

Cited in *Grattan v. Wiggins*, 23 Cal. 16, holding foreclosure and sale, when debt falls due, by assignee of one of several notes secured by mortgage, having first right to benefit of mortgage security, extinguishes mortgage; *Hirsch v. Tillman*, 13 Pa. Co. Ct. 251, 2 Pa. Dist. R. 662; *Downingtown Bldg. & L. Asso. v. McCaughey*, 1 Chester Co. Rep. 504,—to point that sheriff's sales under judgment on bond secured by mortgage discharges mortgage; *Com. v. Wilson*, 34 Pa. 68, holding that sale made on judgment for whole or part of debt, or for interest on part of debt secured by mortgage, divests mortgage lien; *Morris v. Campbell*, 186 Pa. 589, 65 A. S. R. 880, 40 Atl. 1014, holding that judgment entered upon bond accompanying mortgage relates back to date of mortgage, and that sheriff's sale under such judgment divests lien of mortgage; *Vieno v. Gibson*, 85 Tex. 432, 21 S. W. 1028, holding that, where assignee of two notes reserving vendor's lien, on maturity of first, forecloses lien in favor of first note, making no provision for second, purchasers at the sale take the land divested of lien of second note.

Distinguished in *Barker v. Bell*, 37 Ala. 354, holding lien of mortgage not discharged by sale of mortgaged premises under execution, for part of mortgage debt; *Topson v. Sipe*, 116 Pa. 588, 11 Atl. 873, 20 W. N. C. 161, 44 Phila. Leg. Int. 444, holding lien of judgment not divested by sheriff's sale of mortgaged land upon judgment obtained for arrears of interest due, when interest belongs to widow and principal to heirs.

Waiver of mortgage lien.

Cited in note in 50 L.R.A. 718, on waiver of lien of mortgage by attachment or execution.

Rights and title of purchaser on foreclosure.

Cited in *Poweshiek County v. Dennison*, 36 Iowa, 244, 13 A. R. 521, holding that sale of mortgaged premises in pursuance of foreclosure decree passes to purchasers all title and interest of both mortgagor and mortgagee; *Baldwin v. Howell*, 45 N. J. Eq. 519, 15 Atl. 236, holding that purchaser at foreclosure sale takes title which mortgagee had, under which proceedings were instituted.

Rights in proceeds of foreclosure sale.

Cited in *Perry's Appeal*, 22 Pa. 43, 60 A. D. 63, holding that assignees of several

mortgages made at same time for part of same debt and assigned at different times to different persons share *pro rata* in proceeds of execution sale of premises.

Cited in note in 24 L.R.A. 801, on *pro rata* rule as to notes falling due at different times secured by same mortgage.

Identity between principal debt and interest.

Cited in *Black v. Reno*, 59 Fed. 917; *Kramer v. Rebman*, 9 Iowa, 114,—holding mortgagee entitled to declare whole debt due and enforce foreclosure of mortgage upon failure to pay interest as stipulated in note and mortgage; *Goodman v. Cincinnati & C. R. Co.* 2 Disney (Ohio) 176, holding interest part of substance of mortgage debt; *Firman v. Hobensack*, 30 Pa. Co. Ct. 185, 14 Pa. Dist. R. 537, holding no distinction between judgment for interest and judgment for principal; *Hageman v. Esterly*, 11 Pa. Co. Ct. 609, 1 Pa. Dist. R. 704, on identity between principal of money debt and interest accruing from it; *Moyer v. Garrett*, 96 Pa. 376, 11 Pittsb. L. J. N. S. 335, 38 Phila. Leg. Int. 104; *Hummel v. Brown*, 24 Pa. 310,—holding interest substantial part of debt, when comprehended in terms of contract.

Jurisdiction of court of chancery in foreclosure proceedings.

Distinguished in *Fox v. Wharton*, 5 Del. Ch. 200, holding court of chancery empowered to hear and determine foreclosure proceedings.

When foreclosure suit maintainable.

Cited in *Scheibe v. Kennedy*, 64 Wis. 564, 25 N. W. 646, holding that mortgage may be foreclosed on failure to pay interest in accordance with provisions of note secured.

Cited in notes in 37 L.R.A. 740, on right to enforce mortgage for interest in default; 37 L.R.A. 755, on proceedings to enforce mortgage for part of mortgage debt after exhaustion of lien in prior proceedings.

51 AM. DEC. 551, ROBB v. MANN, 11 PA. 300.

Title of purchaser of land.

Cited in *Miller v. Zufall*, 113 Pa. 317, 6 Atl. 350, 18 W. N. C. 237, 43 Phila. Leg. Int. 530, 17 Pittsb. L. J. N. S. 132, holding that purchaser paying part of purchase money, equitable owner of estate; *Greaves v. Gamble*, 1 Legal Gaz. 3, 1 Legal Gaz. Rep. 1, holding that agreement for purchase of real estate vests equitable estate in purchaser, so that he will bear losses and reap benefits accruing between dates of purchase and confirmation.

Distinguished in *Bristol v. Bristol & W. Waterworks*, 25 R. I. 189, 55 Atl. 710, holding waterworks company bound to repair and keep works in good condition after absolute agreement to sell to municipal corporation, when property to be delivered is undetermined.

— At judicial sale generally.

Cited in *Kayser's Estate*, 9 Pa. Dist. R. 360, holding no distinction between private and judicial sales in respect to vesting of title under contract to sell land; *Tomlinson v. Trenton N. H. & L. Street R. Co.* 31 Pa. Co. Ct. 81, 15 Pa. Dist. R. 480, holding that purchaser of land at orphans' court sale may maintain bill in equity against street railway company for wrongful entry before delivery of deed to him.

Distinguished in *Woodland Oil Co. v. Shoup*, 107 Pa. 293, 42 Phila. Leg. Int. 202, holding title of former owner of land not divested until two years after treasurer's sale of unseated lands for nonpayment of taxes.

— **Before confirmation or acknowledgment of deed.**

Cited in Snyder's Estate, 2 Pa. Co. Ct. 546, holding that bidder at sheriff's sale acquires inceptive title moment property is knocked down to him, and runs risk of loss by fire before acknowledgment of his deed; *Hardenburg v. Beecher*, 104 Pa. 20, 14 Pittsb. L. J. N. S. 485, 41 Phila. Leg. Int. 196, holding that purchaser at sheriff's sale before deed acknowledged has inceptive title in land which will be bound by judgment; *Holmes's Appeal*, 108 Pa. 23, 16 Pittsb. L. J. N. S. 75, 42 Phila. Leg. Int. 336, holding that purchaser at executor's sale acquires inceptive title or interest in property so purchased at time it is struck down to him.

Doubted in Demmy's Appeal, 43 Pa. 155, on liability of purchaser at orphans' court sale for loss occurring between time of sale and confirmation.

Criticized in Troth's Estate, 1 Chester Co. Rep. 89, holding that doctrine of relation of title applicable to private sale does not apply to sale by assignee under order of court.

Rights of owner of possessory title to land.

Cited in Seely v. Alden, 61 Pa. 302, 100 A. D. 642, holding that one having only a possessory right to property may recover for injury to his use or enjoyment; *McNaught v. Swing*, 1 Chester Co. Rep. 467, holding actual possession or immediate right of possession essential to enable one to maintain trespass.

Nature of administrator's sale.

Cited in Halleck v. Guy, 9 Cal. 181, 70 A. D. 643, holding probate sales of real estate judicial sales.

Cited in reference note in 70 A. D. 647, on administrator's sale being judicial sale.

Application of rule caveat emptor to judicial sale.

Cited in reference notes in 83 A. D. 230, on *caveat emptor* as rule at judicial sale; 57 A. D. 602, on application of rule of *caveat emptor* to execution sales.

Validity of cumulative promise to perform existing legal obligation.

Cited in Wimer v. Wirth Twp. 104 Pa. 317, 14 Pittsb. L. J. N. S. 167, 41 Phila. Leg. Int. 281, holding cumulative promise to perform existing legal obligation, nullity, unless upon new consideration.

Discretion of court in admitting testimony where fraudulent procurement of negotiable paper is charged.

Cited in Crane v. Dexter Horton & Co. 5 Wash. 479, 32 Pac. 223, holding large latitude allowed courts in admitting testimony to show relations of parties, when fraud in procurement of negotiable paper is charged.

51 AM. DEC. 555, YOXTHEIMER v. KEYSER, 11 PA. 364.

Sufficiency of new promise to pay debt discharged in bankruptcy or insolvency.

Cited in Baltimore & O. R. Co. v. Clark, 19 Md. 509, holding that promise to pay debt discharged under insolvent laws must be express, absolute, and unconditional; *Comfort v. Eisenbeis*, 11 Pa. 13, holding recognition of debt as an existing one for any other purpose than to evade statute of limitations, where there is a moral obligation to pay, favorably received as evidence of promise to pay; *Bolton v. King*, 105 Pa. 78, 14 W. N. C. 361, 14 Pittsb. L. J. N. S. 499, 41 Phila. Leg. Int. 378; *Murphy v. Crawford*, 114 Pa. 496, 7 Atl. 142, 17 Pittsb. L. J. N. S. 181, 43 Phila. Leg. Int. 491,—holding that new promise to pay debt discharged in

bankruptcy must be clear, distinct, and unequivocal, without qualification or condition.

Cited in reference notes in 53 A. D. 495, on sufficiency of promise of bankrupt to pay discharged debt; 52 A. D. 782, on new promise to revive debt barred by discharge in bankruptcy; 66 A. D. 739, on waiver of defense of discharge in bankruptcy by debtor's subsequent promise to pay.

Cited in note in 27 A. D. 289, on promise to pay debt discharged in bankruptcy.

51 AM. DEC. 556, McDONALD v. SCAIFE, 11 PA. 381.

Measure of damages in replevin or trover.

Cited in *Singer Sewing Mach. Co. v. Yaduskie*, 11 Pa. Dist. R. 571, 26 Pa. Co. Ct. 298; *Backentoss v. Stahler*, 33 Pa. 251, 75 A. D. 592,—holding rule of damages in trover value of goods taken with interest; *Pure Oil Co. v. Terry*, 209 Pa. 406, 58 Atl. 814, holding damages in replevin suit, loss actually sustained; *Houghton v. Rock*, 8 Phila. 42, 28 Phila. Leg. Int. 308, holding measure of damages in replevin for detention of patented machine, interest on its cost value.

Cited in reference note in 93 A. D. 744, on measure of damages in replevin.

— When punitive damages allowable.

Cited in *Whitfield v. Whitfield*, 40 Miss. 352, holding measure of damages in replevin, where detention or conversion is attended by wilful wrong, matter for jury; *Burrage v. Melson*, 48 Miss. 237, holding that exemplary damages may be given for either party in replevin according to the facts; *Cox v. Burdett*, 23 Pa. Super. Ct. 346; *Forsyth v. Wells*, 41 Pa. 291, 80 A. D. 620; *Schofield v. Ferrers*, 46 Pa. 438; *Herdie v. Young*, 55 Pa. 176, 93 A. D. 739; *Wiley v. McGrath*, 194 Pa. 498, 75 A. S. R. 709, 45 Atl. 331,—holding that punitive damages may be allowed in replevin, where peculiar circumstances of outrage, oppression, and wrong in the taking or detention exist.

Cited in reference notes in 93 A. D. 744, on recovery of exemplary damages in replevin; 45 A. D. 621, as to when exemplary damages are allowed in replevin.

Right of equity to follow trust property.

Cited in *Reed's Appeal*, 34 Pa. 207, holding that equity will follow trust property as long as it can be identified.

51 AM. DEC. 559, IRWIN v. NIXON, 11 PA. 419.

Revival of judgments.

Cited in *Rice v. Moore*, 48 Kan. 590, 30 A. S. R. 318, 16 L.R.A. 198, 30 Pac. 10; *Eaton v. Hasty*, 6 Neb. 419, 29 A. R. 365; *Gillette v. Morrison*, 7 Neb. 265; *Bankers' L. Ins. Co. v. Robbins*, 59 Neb. 170, 80 N. W. 484,—holding revival of judgment but continuation of original action; *White v. Guthrie*, 2 Pa. Co. Ct. 7, to point that scire facias to revive judgment is continuance of original action; *Lyon v. Burns*, 20 Phila. 412, 47 Phila. Leg. Int. 222, 8 Pa. Co. Ct. 359, holding that judgment of revival by agreement is more than continuance of original judgment; *Lamb's Appeal*, 89 Pa. 407, 7 W. N. C. 189, holding that judgment of revival on writ of scire facias post annum et diem has all conclusive effect of original judgment, in determining amount due; *Latham v. Moore*, 32 S. C. 226, 10 S. E. 950, holding scire facias on judgment, continuance of action and must conform to record; *Townes v. Augusta*, 53 S. C. 396, 29 S. E. 851, holding that judgment revived according to statute within three years after active energy expires has continuous lien from date of entry, and preserves its priority over other liens.

Cited in reference note: in 69 A. S. R. 873, on revival of judgment by scire facias; 30 A. S. R. 321, on scire facias to review dormant judgment.

Cited in notes in 122 A. S. R. 72, on classification, nature, and object of scire facias; 94 A. D. 223, as to whether scire facias to revive judgment is new suit.

Practice in issuing execution on revived judgment.

Cited in *Grover v. Boon*, 124 Pa. 399, 16 Atl. 885, holding proper practice after judgment of revival, to issue execution upon original judgment

Limitation of judgment liens.

Cited in *Wolfskill's Estate*, 15 Lanc. L. Rev. 193; *McCahon v. Elliott*, 103 Pa. 634, 41 Phila. Leg. Int. 418,—holding lien of judgment on real estate after five years lost only as against other lien creditors or purchasers.

Conclusiveness of judgment on scire facias.

Cited in *Saint v. Cornwall*, 207 Pa. 270, 56 Atl. 440, holding judgment on scire facias conclusive on question of payment of mortgage against all persons served either as defendants or terre-tenants; *Church of St. Bartholomew v. Wood*, 80 Pa. 219, 2 W. N. C. 254, 7 Legal Gaz. 386, 32 Phila. Leg. Int. 421, holding innocent purchaser of church property which has been previously sold at sheriff's sale on judgment fraudulently obtained, not affected by fraud.

Cited in reference note in 53 A. D. 443, on effect of scire facias upon judgment.

Cited in notes in 122 A. S. R. 110, on effect of judgment on scire facias; 94 A. D. 243, 245, on judgment in scire facias to revive judgment.

Title acquired by purchase from fraudulent grantee.

Cited in note in 28 A. D. 734, on title acquired by bona fide purchaser from fraudulent vendee.

51 AM. DEC. 567, GREENOUGH v. GREENOUGH, 11 PA. 489.

Powers of legislature.

Cited in *State ex rel. Jameson v. Denny*, 118 Ind. 382, 4 L.R.A. 79, 21 N. E. 252; *Evansville v. State*, 118 Ind. 426, 4 L.R.A. 93, 21 N. E. 267; *State ex rel. Holt v. Denny*, 118 Ind. 449, 4 L.R.A. 65, 21 N. E. 274; *State ex rel. Yancey v. Hyde*, 121 Ind. 20, 22 N. E. 644,—holding legislative power, power to enact, amend, or repeal laws; *Coleman v. Newby*, 7 Kan. 82, holding that it is peculiar province of legislature to make laws.

Cited in notes in 43 A. D. 121, on legislative power to repeal corporate franchise under conditional reservation; 13 A. S. R. 135, on appointment of officers as executive function.

—Right to exercise judicial powers.

Cited in *Kuntz v. Sumption*, 117 Ind. 1, 2 L.R.A. 655, 19 N. E. 474, holding that judicial powers are lodged in courts; *State ex rel. Hovey v. Noble*, 118 Ind. 350, 10 A. S. R. 143, 4 L.R.A. 101, 21 N. E. 244, holding that legislature cannot confer judicial powers; *Langenberg v. Decker*, 131 Ind. 471, 16 L.R.A. 168, 31 N. E. 190, holding that legislature cannot create judicial power, nor vest it in any tribunal; *Turner v. Althaus*, 6 Neb. 54, holding that legislature cannot take private property of citizen and give it to another by exercise of legislative power in any form; *Reiser v. William Tell Sav. Fund Asso.* 39 Pa. 137, holding application of laws to cases as they arise, function of courts.

Cited in reference notes in 82 A. D. 155, on exercise by legislature of judicial powers; 53 A. D. 571; 55 A. D. 506; 63 A. D. 86; 10 A. S. R. 161,—on right of legislature to exercise judicial power; 59 A. D. 789, on right of legislature and

judiciary to exercise powers belonging to each other; 8 A. R. 156, on power of legislature by declaratory statute to control action pending in court.

— **Mixed jurisdiction of legislature.**

Cited in *State ex rel. Terre Haute v. Kolsem*, 130 Ind. 434, 14 L.R.A. 566, 29 N. E. 595, holding no power partly judicial and partly legislative; *Ervine's Appeal*, 16 Pa. 256, 55 A. D. 499, holding that legislature does not possess mixed jurisdiction, being partly legislative and partly judicial.

— **Right to compel judges to prepare syllabi.**

Cited in *Ex parte Griffiths*, 118 Ind. 83, 10 A. S. R. 107, 3 L.R.A. 398, 20 N. E. 513, holding that legislature cannot compel judges to prepare syllabi of decisions.

Powers of courts.

Cited in *State ex rel. Clark v. Haworth*, 122 Ind. 462, 7 L.R.A. 495, 24 N. E. 223, holding that courts cannot control legislative discretion; *Smythe v. Boswell*, 117 Ind. 365, 20 N. E. 263, holding that court may grant appeal upon proper application, where appeal within time limit was prevented by fraud, notwithstanding statutory limitation; *Forsyth v. Hammond*, 18 C. C. A. 175, 34 U. S. App. 552, 71 Fed. 443, holding act giving right to appeal to courts from order of county commissioners enlarging city boundaries, unconstitutional.

Powers of constitutional convention.

Cited in *Lawson v. Jeffries*, 47 Miss. 686, 12 A. R. 342, holding that constitutional conventions have no authority to perform judicial acts.

Constitutionality of statutes.

Cited in *Palairt's Appeal*, 67 Pa. 479, 3 Legal Gaz. 169, 28 Phila. Leg. Int. 173, holding act for extinction of irredeemable ground rents, unconstitutional as taking of private property without due process of law.

— **Retrospective statutes generally.**

Cited in *Steele v. Steele*, 64 Ala. 438, denying power of legislature to create a legal liability out of past transaction for which no liability or remedy existed at time of its occurrence; *Adams v. Palmer*, 51 Me. 480, holding that act of legislature cannot render valid prior release of dower which was voidable when executed and avoided before passage of act; *Marble Bldg. Asso. v. Hocker*, 3 Phila. 494, 16 Phila. Leg. Int. 356, holding act in relation to building associations has no effect upon loans contracted with building association prior to its passage; *Grim v. Weissenberg School Dist.* 57 Pa. 433, 98 A. D. 237, holding that legislature can cure by retroactive law any irregularity or want of authority in levying tax, if it had antecedent power to authorize tax; *Lowe v. Harris*, 112 N. C. 472, 22 L.R.A. 379, 17 S. E. 539, holding that legislature has no authority to give repealing statute such retroactive operation as will destroy rights already vested; *McNaughton v. Ticknor*, 113 Wis. 555, 89 N. W. 493, holding amendments construing existing statutes relative to enforcement of stockholder's liability, not invalid as to action not prosecuted to judgment when act became a law; *Evans-Snyder-Buel Co. v. McFadden*, 58 L.R.A. 900, 44 C. C. A. 494, 105 Fed. 293 (dissenting opinion), on constitutionality of retrospective act validating mortgage; *Com. ex rel. Elkin v. Moir*, 199 Pa. 534, 85 A. S. R. 801, 53 L.R.A. 837, 49 Atl. 351 (dissenting opinion), on constitutionality of retroactive legislation.

Cited in reference notes in 63 A. D. 624; 40 A. S. R. 660,—on validity of retrospective statutes; 90 A. D. 441, as to constitutionality of retrospective

or retroactive law; 78 A. D. 369, on validity of retrospective remedial laws not impairing vested rights; 78 A. D. 369, on validity of retrospective laws impairing vested rights or creating personal liabilities.

Cited in notes in 5 A. D. 315, on retrospective statutes; 41 L. ed. U. S. 96, 97, on retroactive laws and laws impairing vested rights.

— **Validity of curative acts generally.**

Cited in *Kimball v. Rosendale*, 42 Wis. 407, 24 A. R. 421, holding curative acts of legislature valid only when confined to validating acts which legislature might previously have authorized.

— **Act validating will invalid at time of testator's death.**

Cited in *McCarty v. Hoffman*, 23 Pa. 507, holding that subsequent legislation cannot make valid will out of instrument which has not effect of will at time of testator's death; *Camp v. Stark*, 81 Pa. 235, holding that estate passing to heirs because of failure properly to execute will cannot be divested by subsequent legislation before probate; *Camp v. Stark*, 10 Phila. 528, 30 Phila. Leg. Int. 21, holding that subsequent legislation cannot make valid will out of instrument which has not effect of will at time of its execution and death of testator, so as to divert descended estate.

— **Right of legislature to validate void judgment or judicial act.**

Cited in *Pryor v. Downey*, 50 Cal. 388, 19 A. R. 656, holding that legislature has no power to validate judgment void for want of jurisdiction; *Menges v. Dentler*, 33 Pa. 497, 75 A. D. 616, holding act of legislature validating sheriff's sale which had been decided by court to pass no title, void; *Lane v. Nelson*, 79 Pa. 407, 2 W. N. C. 216, 33 Phila. Leg. Int. 5; *Richards v. Rote*, 68 Pa. 255,—holding legislature without power to validate taking of property under judicial proceeding which was void for want of jurisdiction; *Com. v. Hawkins*, 5 Legal Gaz. 116, 30 Phila. Leg. Int. 117; *Richards v. Rote*, 3 Legal Gaz. 198,—holding legislative act purporting to validate void partition proceedings in orphans' court, unconstitutional; *Re Christiansen*, 17 Utah, 432, 70 A. S. R. 794, 41 L.R.A. 504, 53 Pac. 1003, holding that legislature cannot validate void divorce decree.

— **Validity of expository acts.**

Cited in *Lindsay v. United States Sav. & L. Asso.* 120 Ala. 156, 42 L.R.A. 783, 24 So. 171, holding act in relation to building and loan associations, which seeks to legalize past usurious transactions, expository and void; *Parker's Estate*, 8 Phila. 217, 28 Phila. Leg. Int. 365, 3 Legal Gaz. 374, 1 Legal Gaz. Rep. 322; *Haley v. Philadelphia*, 68 Pa. 45, 8 A. R. 153, 28 Phila. Leg. Int. 181; *Reiser v. William Tell Sav. Fund Asso.* 39 Pa. 137,—holding expository act of legislature destitute of retroactive force because act of judicial power; *Com. ex rel. Roney v. Warwick*, 172 Pa. 140, 33 Atl. 373, holding that legislature cannot pass expository act to compel courts for future to adopt particular construction of previously enacted statute; *Powell v. State*, 17 Tex. App. 345, holding that legislature has no power to interpret meaning of constitutional provision; *Munger v. Lenroot*, 32 Wis. 541 (dissenting opinion), on validity of expository acts.

— **Law governing sufficiency of execution of will.**

Cited in *Lisle's Estate*, 10 Pa. Dist. R. 713, 22 Pa. Super. Ct. 262, holding devises of realty construed by rule in force at date of execution of will; *Shinkle v. Crock*, 17 Pa. 159, holding act relating to wills validating their

execution by marks, not applicable to will of one who died before its enactment; *Alter's Appeal*, 67 Pa. 341, 5 A. R. 433, 28 Phila. Leg. Int. 53, 3 Leg. Gaz. 153, holding act of legislature passed to authorize court to hear testimony and, if mistake is proved, to reform will, invalid, where deceased had signed will of wife and rights of heirs had vested.

Distinguished in *Long v. Zook*, 13 Pa. 400, holding will within remedial provision of statute when made before passage of retroactive act, although death of testator did not occur until after its passage.

Sufficiency of execution of will generally.

Cited in reference notes in 55 A. D. 131; 59 A. D. 159,—on execution, publication, and attestation of wills; 33 A. S. R. 808, on sufficient signing of wills; 45 A. D. 719, as to how execution of will must be made in Pennsylvania.

Sufficiency of signing of testator's name by another.

Cited in *Waite v. Frisbie*, 45 Minn. 361, 47 N. W. 1069; *Murry v. Hennessey*, 48 Neb. 608, 67 N. W. 470,—holding statutory requirement that signing of will by another shall be by "express direction" excludes mere acquiescence in, or subsequent ratification of, signing; *McCoy v. Conrad*, 64 Neb. 150, 89 N. W. 665, holding that signing of will by another must be in pursuance of previously expressed direction of testator; *Re Vosburg*, 9 Pa. Co. Ct. 243, holding writing of testator's signature to will by another, when testator is not incapacitated, badge of fraud; *Baldwin's Estate*, 42 Phila. Leg. Int. 142, holding that testator's own name, and not that of another, must be signed to will, where he is unable from sickness to sign.

Distinguished in *Scott v. Hawk*, 107 Iowa, 723, 70 A. S. R. 228, 77 N. W. 467, holding that in Iowa testator's name need not be written by one of attesting witnesses, where former signs by mark.

Sufficiency of mark as signature to will.

Cited in *Plate's Estate*, 148 Pa. 55, 33 A. S. R. 805, 23 Atl. 1038, 39 W. N. C. 560, holding that execution of will by mark can only be made with intention of executing will.

Cited in note in 22 L.R.A. 371, on signing wills by mark.

Distinguished in *Reap v. Featherstone*, 4 Luzerne Leg. Reg. 4, holding signing by mark, with subscribing witness, valid.

Disapproved in *Thompson v. Thompson*, 40 Neb. 157, 68 N. W. 372, holding that testator may make cross as signature to will when he is of sound mind and cross is made with intent of making will.

Necessity of witnesses to will knowing nature of instrument.

Cited in *Allen v. Griffin*, 69 Wis. 529, 35 N. W. 21, holding it not necessary to validity of will that witnesses know nature of instrument.

Sufficiency of proof of execution of will.

Cited in *McClaskey v. Barr*, 47 Fed. 154, holding attestation of will by witness sufficient proof of compliance with statute, where oath of witness cannot be obtained; *Vernon v. Kirk*, 30 Pa. 218, holding attestation of will by two witnesses, sufficient proof of compliance with statute, if memory of one is defective as to circumstances attending its execution; *Gillis v. Gillis*, 96 Ga. 11, 51 A. S. R. 121, 30 L.R.A. 143, 23 S. E. 107, holding that proof of valid execution and attestation of will cannot be defeated at time of probate by failure of memory on part of any subscribing witness; *Leckey v. Cunningham*, 56 Pa. 370, holding proof by subscribing witnesses that they signed will in testator's

presence and at his request, and that he declared it to be his will, sufficient, though they did not remember that he signed it in their presence; *Re Smith*, 5 Legal Gaz. 100, holding that will to which alleged testator did not sign his name should be proved by two witnesses to have been signed by some person by his express direction.

Cited in reference notes in 67 A. D. 256, on proof of wills; 77 A. D. 462, as to whether witnesses' want of recollection is fatal to will; 30 A. S. R. 718, on proof of will by one witness or by one witness and corroborative circumstances; 68 A. D. 510, on proof of execution of will by other evidence than that of attesting witnesses.

Cited in notes in 10 A. D. 518, on sufficiency of proof of will; 77 A. S. R. 409, on number of witnesses required for proof of will; 44 L.R.A. 146, on proof of testator's signature by mark when attesting witness is forgetful.

Distinguished in *Barr v. Graybill*, 13 Pa. 396; *Snyder v. Bull*, 17 Pa. 54,—holding execution of will not sufficiently proved where witness did not intimate that he had forgotten any part of transaction, and swore that he did not hear testator give any direction whatever.

Probate of republished will.

Cited in *Re Smith*, 9 Phila. 362, 30 Phila. Leg. Int. 100, holding that probate of written republication of will must be same as proof required to establish will.

Construction of statutes as to revocation of wills.

Cited in *Clingan v. Mitcheltree*, 31 Pa. 25, holding that statutory rule regarding revocation of wills by burning or cancelation must be strictly adhered to.

51 AM. DEC. 576, BORLAND v. NICHOLS, 12 Pa. 38.

Right to dower in lands aliened during husband's lifetime.

Cited in *Jackson v. Isbell*, 109 Ala. 100, 19 So. 447, holding widow's dower interest in lands of husband sold in his lifetime under execution against him, not affected by her act diminishing her dower interest to value of her separate estate; *Gannon v. Widman*, 15 Pa. Co. Ct. 474, 3 Pa. Dist. R. 835, holding that wife loses her statutory dower but not her common-law dower where husband, by voluntary proceedings in bankruptcy, aliens land in his lifetime; *Stevenson's Estate*, 33 Pittsb. L. J. N. S. 419; *Blackman's Estate*, 6 Phila. 161, 23 Phila. Leg. Int. 125,—holding wife's right of dower not defeated by deed of voluntary assignment for payment of creditors, executed by husband alone.

Election by widow between will and dower.

Cited in *Bradford v. Kent*, 43 Pa. 474, holding widow electing not to take devise under will of husband, entitled to dower out of lands devised to devisees, of which he died seised and in possession.

Cited in reference notes in 57 A. D. 777; 61 A. D. 715,—as to when dower is barred by provision in will; 55 A. D. 577, on election by widow to take under the will in lieu of dower.

Cited in notes in 12 L.R.A. 230, as to when widow is put to her election between her rights under the will and under the law; 92 A. S. R. 696, on widow's duty to elect between benefits of will and right to dower or in community property.

Disapproved in *Sanders v. Wallace*, 118 Ala. 418, 24 So. 354, holding widow

not entitled to dower when she fails to dissent from husband's will in which provision is made for her.

— **Effect of taking under will on right to dower in land aliened during husband's lifetime.**

Cited in *Westbrook v. Vanderburgh*, 36 Mich. 30, holding widow not barred of dower in lands conveyed by husband in lifetime by deed in which she did not join, where she accepts provision made for her in husband's will; *Gray v. McCune*, 23 Pa. 447, to point that acceptance of devise under husband's will did not bar widow's right of dower in lands which husband had conveyed, and which formed no part of his estate.

Distinguished in *Fairchild v. Marshall*, 42 Minn. 14, 43 N. W. 563, holding widow not entitled to dower in lands conveyed by husband during coverture by deed of warranty in which she did not join, when she accepts inconsistent provisions of will; *Corry v. Lamb*, 45 Ohio St. 203, 12 N. E. 660, holding widow electing to take provision made for her in husband's will, not barred of dower in land of which he was seised as estate of inheritance during coverture, and which was sold on foreclosure of mortgage executed by him alone.

Construction of statutes.

Cited in *Renick v. Boyd*, 1 Chester Co. Rep. 267, to point that it is not to be presumed that legislature intended to make any innovation upon common law further than case required; *Rheinstrom v. Green*, 4 Luzerne Leg. Reg. 223, 7 Legal Gaz. 254, holding prior and subsequent statutes subject to same construction, where they have same object in view; *Pettit v. Fretz*, 33 Pa. 118, holding that obscure statute will be construed according to rules of common law.

51 AM. DEC. 580, FERRIS v. HENDERSON, 12 PA. 49.

Fraud, concealment, or mistake as affecting running of limitations.

Cited in *Martin v. Smith*, 1 Dill. 85, Fed. Cas. No. 9,164, holding that fraud will not avoid running of statute of limitations, where plaintiff is guilty of negligence in discovering it; *De Mares v. Gilpin*, 15 Colo. 76, 24 Pac. 568, holding that statute of limitations does not begin to run in equity, in cases of fraud or mistake, until fraud discovered; *Miller v. Powers*, 119 Ind. 79, 4 L.R.A. 483, 21 N. E. 455, holding mere silence by person liable to action, not such concealment as will prevent running of statute of limitations until after discovery of fraud; *Relf v. Eberly*, 23 Iowa, 487, holding that action must be commenced within five years after perpetration of fraud, where jurisdiction of law and equity concurrent; *Ainsfield v. More*, 30 Neb. 385, 46 N. W. 828, holding lapse of time applied by courts of equity in cases of mistake, in analogy to statute of limitations, reckoned from time of discovery of mistake; *Mitchell v. Buffington*, 38 Phila. Leg. Int. 366, 11 Pittsb. L. J. N. S. 462, 1 Chester Co. Rep. 211, 10 W. N. C. 361, holding that statute of limitations does not begin to run, where cause springs from frauds of defendant, until discovery of fraud; *Sankey v. McElevey*, 104 Pa. 265, 49 A. R. 575, 17 Pittsb. L. J. N. S. 131, 41 Phila. Leg. Int. 85, 14 W. N. C. 19, holding that statute of limitations does not begin to run against creditor, where debtor by fraud keeps his creditor in ignorance of cause of action, until latter obtains knowledge or is put upon inquiry as to accrual of action; *Rost's Estate*, 14 Lanc. L. Rev. 78; *Bear's Estate*, 11 Lanc. L. Rev. 65; *Kuhn's Appeal*, 87 Pa. 100, 35 Phila. Leg. Int. 316, 6 W. N. C. 19; *O'Dell v. Burnham*, 61 Wis. 562, 21 N. W. 635,—holding that

statute of limitations does not begin to run against equitable action for relief on ground of fraud, until fraud is discovered.

Cited in reference notes in 34 A. S. R. 556, on effect of ignorance on running of limitations; 61 A. D. 317, on applicability of statute of limitations to cases of fraud; 1 A. S. R. 788, on running of limitations after discovery of fraud only; 9 A. S. R. 531, on lapse of time before discovery of fraud as no bar to relief in equity; 58 A. D. 481, on statute of limitations not being stopped by fraudulent concealment.

Cited in notes in 76 A. D. 114, on fraud preventing running of statute of limitations; 16 E. R. C. 258, as to when statute of limitations runs against cause of action for fraud; 25 L.R.A. 567, on how far statutes of limitation will be regarded as having abrogated maxim that one cannot profit by his own wrong.

Criticized in *Smith v. Blachley*, 198 Pa. 173, 53 L.R.A. 849, 47 Atl. 985, holding that statute of limitations in action based upon fraud runs from date of fraudulent act, unless such fraud has been actively concealed by defendant.

Limitations of action in equity.

Cited in *Lakin v. Sierra Buttes Gold Min. Co.* 25 Fed. 337, as to whether equity courts will adopt, by analogy, statute of limitation.

Cited in reference notes in 65 A. D. 545, on application of statute of limitations to equity suits; 76 A. D. 630, on running of statute of limitations in equity; 60 A. D. 514, as to when statute of limitations begins to run in equity in case of fraud; 55 A. D. 587, on binding effect of statute of limitations in equity when remedies at law and equity are concurrent.

Nature of accidental omission from writing.

Cited in *Gump's Appeal*, 65 Pa. 476, holding that accidental omission from writing comes under head of mistake.

51 AM. DEC. 584, McGOWIN v. REMINGTON, 12 PA. 56.

Jurisdiction of equity.

Cited in *Paxton Fire Co. v. McCormick*, 27 Pa. Co. Ct. 553, holding that test of equity jurisdiction is absence of plain and adequate remedy at law.

Cited in reference notes in 58 A. D. 694, on question of jurisdiction; 66 A. D. 501, on relief in equity where there is an adequate remedy at law.

—To recover chattel generally.

Cited in *Simes v. Everson*, 46 Pa. 304, holding that equity will decree redelivery of note given for one purpose, after failure of contingency upon which its delivery depended.

—Chattels retained by bailee or agent.

Cited in *Dawson v. Insurance Co. of N. A.* 46 Phila. Leg. Int. 4, 6 Pa. Co. Ct. 214; *De La Guesta v. Insurance Co. of N. A.* 136 Pa. 658, 20 Atl. 505,—to point that equity will decree restitution of chattels detained by bailee or agent; *Pressed Steel Car Co. v. Hansen*, 34 Pittsb. L. J. N. S. 35, holding that court of equity has in proper case power to decree return of plants and drawing.

—Chattels having peculiar sentimental value.

Cited in *Beasley v. Allyn*, 15 Phila. 97, 39 Phila. Leg. Int. 264, 12 W. N. C. 90, holding that equity will decree restitution of chattel having peculiar sentimental value to plaintiff although worth nothing intrinsically.

Specific performance of contract.

Cited in *Nestel v. Knickerbocker L. Ins. Co.* 12 Phila. 477, 34 Phila. Leg. Int. 240, holding that equity will not specifically enforce contract to issue policy of insurance.

— Contract as to personalty generally.

Cited in *Ridenbaugh v. Thayer*, 10 Idaho, 662, 80 Pac. 229; *Livesley v. Johnston*, 45 Or. 30, 106 A. S. R. 647, 65 L.R.A. 783, 76 Pac. 13, 946,—holding that court will specifically enforce delivery of personalty, where award of damages would not put plaintiff in situation as beneficial as if agreement specifically enforced, or would afford only inadequate redress; *Smaltz's Appeal*, 39 Phila. Leg. Int. 304; *Western Nat. Bank v. Brooks*, 17 Phila. 141, 42 Phila. Leg. Int. 26; *Smaltz's Appeal*, 99 Pa. 310,—holding that courts of equity will grant relief by specific performance only when recovery in damages will be inadequate; *Spotts v. Eisenhauer*, 31 Pa. Super. Ct. 89; *Philadelphia & R. R. Co.'s Appeal*, 39 Phila. Leg. Int. 98, 12 Pittsb. L. J. N. S. 379,—holding that equity will not specifically enforce, as general rule, contract relating to personalty; *Mershon v. Wanamaker*, 29 Pa. Co. Ct. 177, 12 Pa. Dist. R. 585; *Kaul v. Henke*, 2 Pa. Dist. R. 236,—holding that decree for surrender of papers will be refused unless they have peculiar value which cannot be compensated in damages; *Philadelphia & R. R. Co. v. Stichter*, 11 W. N. C. 325, holding that court of equity will specifically enforce contract for sale of bond, in amicable proceeding to test right of defendant to execute bonds.

Cited in reference note in 63 A. D. 235, on bill for specific execution of contract relating to chattels.

Cited in note in 6 E. R. C. 646, on specific performance of contracts concerning chattels.

— Contract to sell corporate stock.

Cited in *Bryan v. Riddle*, 114 Pa. 465, 7 Atl. 72, 44 Phila. Leg. Int. 69, 17 Pittsb. L. J. N. S. 177, holding contracts relating to personal chattels, stocks, and securities, not specifically enforceable in equity; *Schimpff v. Dime Deposit & Discount*, 208 Pa. 380, 57 Atl. 767, holding that equity will not specifically enforce contract to sell corporate stock, where plaintiff has waited until stock quadrupled in value; *Steinmeyer v. Siebert*, 190 Pa. 471, 42 Atl. 880, 29 Pittsb. L. J. N. S. 383, 44 W. N. C. 61, holding that court of equity will sustain bill to recover stock fraudulently obtained by one standing in confidential relation to true owner; *Edelman v. Latshaw*, 159 Pa. 644, 28 Atl. 475, on jurisdiction of equity to decree specific reconveyance of stock sold under fraudulent representations.

Distinguished in *Riggs v. Reading & S. W. Street R. Co.* 191 Pa. 298, 43 Atl. 212, holding that equity will not decree specific performance of contract to sell corporate stock; *Foll's Appeal*, 91 Pa. 434, 36 Phila. Leg. Int. 495, 8 W. N. C. 23, holding that equity will not decree specific performance of contract to sell bank stock.

— Contract for timber having special value.

Cited in *Strause v. Berger*, 220 Pa. 367, 69 Atl. 818, holding that equity will specifically enforce contract for timber having special value to purchaser, where it is difficult to obtain it in market.

— Of contract for sale of saloon license and fixtures.

Cited in *Effinger v. Hain*, 18 Lanc. L. Rev. 3, 10 Pa. Dist. R. 107, holding

that court of equity will not specifically enforce contract to lease hotel and transfer liquor license; *Finnen's Estate*, 196 Pa. 72, 46 Atl. 289, holding that equity will not specifically enforce contract for sale of liquor license and saloon fixtures, in absence of exceptional grounds.

Retention of jurisdiction by court of equity for complete relief.

Cited in *Rainey v. H. C. Frank Coke Co.* 73 Fed. 389, 26 Pittsb. L. J. N. S. 352; *Re Emrich*, 2 N. B. N. Rep. 656, 101 Fed. 231, 30 Pittsb. L. J. N. S. 322; *Farmers' Loan & T. Co. v. Penn Plate Glass Co.* 50 L.R.A. 710, 43 C. C. A. 114, 103 Fed. 132; *Carmichael v. Adams*, 91 Ind. 526; *West Branch & S. Canal Co. v. Bank*, 2 Legal Gaz. 169; *Columbian Nat. Bank v. Williamsport Gas Co.* 17 Phila. 617, 41 Phila. Leg. Int. 498; *Shollenberger's Appeal*, 21 Pa. 337; *Souder's Appeal*, 57 Pa. 498, 25 Phila. Leg. Int. 404,—holding that court of equity having jurisdiction of subject will decide all matters necessary to enable it to make full and final determination of whole controversy; *Winton's Appeal*, 97 Pa. 385, 38 Phila. Leg. Int. 348, 11 W. N. C. 66, holding that court of equity which has once obtained jurisdiction of subject has power to enforce its own decree in reference thereto; *Ahl's Appeal*, 129 Pa. 49, 18 Atl. 475, 47 Phila. Leg. Int. 39, 25 W. N. C. 119, holding that court of equity which has once obtained jurisdiction of cause for one purpose may retain it for purposes of relief not specifically prayed for, but disclosed by evidence; *Phipps v. Kent*, 1 Chester Co. Rep. 158, holding that cross bill can only be sustained on matters growing out of relief sought in original bill; *Morss' Appeal*, 38 Phila. Leg. Int. 348, holding that court of equity has power to decree sale of premises on refusal of mortgagor to pay amount due; where court has directed reconveyance of property on payment of certain sum; *Ressler v. Witmer*, 1 Pearson (Pa.) 174; *Williams's Appeal*, 1 Mona. (Pa.) 274, 16 Atl. 810, 24 W. N. C. 365; *Bussaier v. Weekey*, 11 Pa. Super. Ct. 463; *Dare v. Bennett-Bretz Piano Co.* 30 Pa. Co. Ct. 481; *East Greenwich Inst. for Savings v. Shippie*, 20 R. I. 650, 40 Atl. 872,—holding that court of equity having cognizance of litigation will decide every question within circle of contest.

Cited in reference notes in 26 A. S. R. 533, on retention of equitable jurisdiction once acquired to give complete relief; 64 A. D. 105, on granting full relief in equity after jurisdiction acquired.

—After issuance of injunction.

Cited in *Märvine v. Drexel*, 68 Pa. 362, 28 Phila. Leg. Int. 68, holding that court of equity will decree that sale by executors be made in such manner as will serve joint interests of parties, at same time with injunction to restrain ruinous sale by them; *Porterfield's Appeal*, 77 Pa. 221, 33 Phila. Leg. Int. 4, holding that court of equity will decree account of damages or waste at same time with injunction to prevent multiplicity of suits; *Walter v. McElroy*, 151 Pa. 549, 25 Atl. 125, 23 Pittsb. L. J. N. S. 137, 31 W. N. C. 131, holding that account of damages sustained will follow as incident to right to injunction, and to avoid multiplicity of suits.

—Bills of discovery.

Cited in *Pittinger v. Kennedy*, 3 Legal Gaz. 277, 2 Luzerne Leg. Reg. 132, holding court of equity having jurisdiction to compel discovery and account of dividends and transfer of stock by corporation had authority to ascertain and compel payment of damages caused by refusal of company to permit transfer of stock; *Gloninger v. Hazard*, 42 Pa. 389; *Petty v. Fogle*, 16 W. Va. 497,—

holding that courts of equity will decline to take jurisdiction where accounts are all on one side, unless discovery is sought or required.

— **Partition and accounting.**

Cited in *Hanna v. Clark*, 189 Pa. 321, 41 Atl. 981, 43 W. N. C. 281, holding that court of equity has jurisdiction in case where bill filed for account and for partition founded upon equitable title.

— **In suits between partners.**

Cited in *Power v. Kirk*, 1 Pittsb. 510, 6 Pittsb. L. J. 403; *McCutcheon v. Aekland*, 1 Chester Co. Rep. 82,—holding that court of equity has power to assess damages where its jurisdiction has attached in suit by one partner against another who has wrongfully assigned firm's property.

— **Application of rule to orphans' court.**

Cited in *Odd Fellows' Sav. Bank Appeal*, 123 Pa. 356, 16 Atl. 606, 46 Phila. Leg. Int. 128, 19 Pittsb. L. J. N. S. 249, 23 W. N. C. 85, holding equitable jurisdiction of orphans' court when once attached, sufficient to embrace every relief necessary for full disposition of case; *McMurray v. Davis*, 35 Phila. Leg. Int. 103, on extent of orphans' court's jurisdiction after once attached.

51 AM. DEC. 590, BROWNFIELD v. BROWNFIELD, 12 PA. 136,

Parol evidence to explain ambiguity in writing.

Cited in reference note in 53 A. D. 55, on parol evidence to explain ambiguities in written instrument.

Cited in note in 62 A. D. 130, on parol evidence to explain written instruments.

— **In will generally.**

Cited in *Phelps's Estate*, 4 Pa. Dist. R. 258, 7 Kulp, 485, holding parol evidence admissible to explain latent ambiguity in will; *Miller's Estate*, 35 Pittsb. L. J. N. S. 295, holding parol testimony showing testatrix's circumstances and amount and character of her property, admissible to aid in interpretation of will.

Cited in reference notes in 10 A. S. R. 463, on admissibility of extrinsic evidence to explain will; 53 A. D. 501, as to when extrinsic evidence is admissible to explain will; 57 A. D. 737, on admissibility of evidence to correct or explain will; 78 A. D. 506, on admissibility of extrinsic evidence to explain ambiguity in will; 68 A. D. 702, on parol evidence to remove latent ambiguities in will; 57 A. D. 709, on parol evidence of mistake in will.

Cited in note in 50 A. S. R. 287, on exceptions permitting extrinsic evidence to explain will.

Distinguished in *Campbell v. Lowe*, 8 Md. 500, 66 A. D. 339, holding parol testimony inadmissible to explain ambiguities appearing upon face of will.

— **To identify legatee.**

Cited in *Miller's Estate*, 26 Pa. Super. Ct. 443, holding parol testimony admissible to show whom testator meant by "William Wilson's children," where he had no relatives answering such description, and will was silent as to identity of William Wilson; *Webster v. Morris*, 66 Wis. 366, 57 A. R. 278, 28 N. W. 353, holding extrinsic evidence admissible to show that bequest to "Ormo and Algoma Union Cemetery Association of Ormo" was to Union Cemetery Association, and not to Ormo Cemetery Association.

Cited in note in 50 A. S. R. 287, on extrinsic evidence to identify beneficiary under will.

— To identify subject of devise.

Cited in *Pate v. Bushong*, 161 Ind. 533, 100 A. S. R. 287, 63 L.R.A. 593, 69 N. E. 291; *Black v. Richards*, 95 Ind. 184,—holding that thing devised by will may be identified by parol evidence; *Thompson v. Kaufman*, 6 Pa. Dist. R. 522, holding parol evidence admissible to identify subject-matter of devise.

Cited in note in 16 L.R.A. 322, on parol evidence of mistake in description of land devised.

Admissibility of testator's declarations.

Cited in notes in 50 A. S. R. 282, on admissibility of declarations of testator to explain will; 107 A. S. R. 473, on admission of testator's declarations to aid in construction of will.

Construction of wills.

Cited in reference note in 55 A. D. 642, on jurisdiction and practice in construing devises and bequests in wills.

Misdescription of land in will.

Cited in note in 6 L.R.A. (N.S.) 959, on boundaries and area of land devised in will misdescribing the land.

Competency of depositions in support of demand for new trial.

Cited in *Com. v. Reber*, 10 Pa. Dist. R. 683, on competency of depositions in support of demand for new trial, which introduce matter not specified in reasons.

51 AM. DEC. 595, WATSON v. BAGALEY, 12 PA. 164.

What writings are assignments under act prohibiting preferences.

Cited in *Clark v. Sigua Iron Co.* 26 C. C. A. 423, 39 U. S. App. 753, 81 Fed. 310, 27 Pittsb. L. J. N. S. 464, holding no particular form of words necessary to constitute writing assignment; *McCleery v. Stoup*, 32 Pa. Super. Ct. 42, holding that assignment of chose in action or of fund need not be by any particular form of words or form of instrument; *M'Ilree v. Guy*, 1 Phila. 488, 11 Phila. Leg. Int. 90, holding act prohibiting preferences sufficiently extensive to embrace every mode in which property can be passed by one man to another; *Shafer's Estate*, 8 Pa. Dist. R. 221, holding assignment, however formal or disguised, which seeks to create preference by failing debtor, under ban of act prohibiting preferences; *Blabon v. Lewis*, 3 Phila. 454, 16 Phila. Leg. Int. 300, holding that deposit of money by debtor in hands of third person for equal division among creditors does not make such third person responsible to creditors; *Corn Exch. Nat. Bank v. Philadelphia Trust, S. D. & Ins. Co.* 11 Phila. 510, 33 Phila. Leg. Int. 401, Fed. Cas. No. 3,244, holding instrument which transfers property beyond reach of execution, in trust for benefit of assenting creditors, within purview of statutes regulating voluntary assignments for creditors; *Re Schaefer*, 194 Pa. 420, 45 Atl. 311, holding that any informal assignment which seeks to create preference by failing debtor comes under ban of act prohibiting preferences in assignments; *Vallance v. Miners' L. Ins. & T. Co.* 42 Pa. 441, holding assignment directly to creditors beneficially interested, whether in satisfaction of or as security for their debts, not within act prohibiting preferences; *Kern v. Powell*, 98 Pa. 253, 10 W. N. C. 547, holding assignment which, in express terms, gives preference to one of assignor's creditors, inoperative; *Fox v. Curtis*, 176 Pa. 52, 38 W. N. C. 321,

34 Atl. 952, holding assignment by insolvent partnership to third party, for benefit of two of its creditors only, void as preferment of creditors; *Wily v. Pearson*, 2 Woodw. Dec. 424, holding verbal contract of assignment, in consideration of subsisting and enforceable indebtedness, of interest in legacy remaining in hands of executors, good as against creditors of assignor who subsequently attach fund; *Bausman v. Burger*, 26 W. N. C. 355, as to effect of deposit by debtor under arrangement with creditors, on creditor not party to agreement; *Mississippi C. R. Co. v. Southern R. Asso.* 8 Phila. 107, 28 Phila. Leg. Int. 309, 3 Legal Gaz. 178, 4 Brewst. (Pa.) 79, 1 Campbell, 177, to point that fund in hands of trustee, realized by conversion of other property into money, and directed by assignor to be paid over to certain creditors, is actually impressed with trust in favor of persons beneficially entitled; *Haines v. Campbell*, 8 Wis. 187, holding assignment authorizing assignee to sell property upon credit, void as to creditors; *Norton v. Kearney*, 10 Wis. 443, holding assignment in which assignee is "to dispose of property to best advantage, in his discretion," valid.

Cited in reference note in 21 A. S. R. 899, on what is an equitable assignment.

Cited in note in 37 L.R.A. 356, as to whether a preference by mortgage or sale is an assignment for creditors.

Distinguished in *Griffin v. Rogers*, 4 Phila. 76, 17 Phila. Leg. Int. 148, holding delivery by one bank, under agreement with other banks of city, to garnishees acting on behalf of latter, of certain notes and bills as collateral security for advance of certain sum for redemption of its notes, not assignment in trust for creditors; *Beans v. Bullitt*, 57 Pa. 221, 25 Phila. Leg. Int. 260 (affirming 6 Phila. 239, 24 Phila. Leg. Int. 252), holding mere transmission of custody and management of property, not assignment for benefit of creditors.

— Power of attorney to collect and distribute money.

Cited in *Wallace v. Wainwright*, 87 Pa. 263, 36 Phila. Leg. Int. 27, holding assignment by failing debtor to attorney for some of his creditors, of numerous claims and judgments, "in payment of their demands," assignment for benefit of creditors; *Lucas v. Railroad*, 3 Phila. 215, 15 Phila. Leg. Int. 325, holding that transfer of property by debtor in trust for payment of his debts will not fall within statutes which regulate assignments, unless made in due form and purporting to be assignment; *Winner v. Hoyt*, 60 Wis. 227, 57 A. R. 257, 28 N. W. 380, holding chattel mortgages and assignments of accounts transferring entire property of insolvent debtors to certain creditors, with intent that one creditor should convert such property and divide same *pro rata* among favored creditors, general assignment with preferences; *Sandmeyer v. Dakota F. & M. Ins. Co.* 23 S. D. 346, 50 N. W. 353, holding transfer of property by debtor to third person to pay creditors, without transfer of absolute title, does not divest debtor of title in property, so that such third person can collect debts due debtor in his own name.

Distinguished in *Johnson v. Ogilbee*, 2 Phila. 79, 13 Phila. Leg. Int. 92, holding that power of attorney to collect debt due one, with direction to pay another part of proceeds is not assignment, where no part of debt collected.

— Orders to pay money to become due under contract.

Cited in *Trumbower v. Ivey*, 2 Pa. Co. Ct. 471, holding that order to collect and appropriate wages to become due from any future employment may become irrevocable assignment by appropriation of wages to particular use, but that it is subject to revocation as a power of attorney any time before execution.

— Orders transferring debt.

Cited in *Oakes v. Oram*, 43 Phila. Leg. Int. 520, as to order transferring debt constituting equitable and available assignment.

What may be assigned.

Cited in *Bittenbender v. Sunbury & E. R. Co.*, 40 Pa. 269, holding that assignment may be made of any property of which assignor has actual or potential possession.

Cited in note in 5 A. D. 380, as to registry of stock transfers.

Necessity of recording assignment for benefit of creditors.

Cited in *Re Glen Iron Works*, 20 Fed. 674, 17 Phila. 551, 41 Phila. Leg. Int. 243, 40 W. N. C. 514; *Driesbach v. Becker*, 34 Pa. 152,—to point that assets or moneys collected by assignee under unrecorded assignment are liable to attachment by creditor of assignor; *Dettra v. Bollman*, 9 Lanc. L. Rev. 1, holding unrecorded assignment in trust, valid as against assignor and creditors until latter take proper measures to avoid it; *Heath v. Page*, 63 Pa. 108, 3 A. R. 533, 27 Phila. Leg. Int. 252, to point that assignment by debtor for benefit of creditors is void as to creditors generally, unless recorded within thirty days.

51 AM. DEC. 598, OVERHOLT'S APPEAL, 12 PA. 222.**What is partnership real estate.**

Cited in *Abbott's Appeal*, 50 Pa. 234, 22 Phila. Leg. Int. 324, holding real estate purchased by firm for partnership purposes partnership property, though conveyed in deed to partners as tenants in common.

Cited in reference note in 48 A. S. R. 69, on how intent shown that realty shall be deemed partnership property.

Cited in note in 19 E. R. C. 484, on land as partnership property.

Distinguished in Volmar v. Greer, 7 Phila. 454, 27 Phila. Leg. Int. 389, holding title to real estate which is taken without any assertion on its face that it is to be taken as partnership property, held by partners as tenants in common.

Rights of creditors in partnership real estate.

Cited in *Re Coddling*, 12 Pittsb. L. J. N. S. 212, 9 Fed. 849, holding judgment against partnership for partnership debt, entered by confession of all partners, lien upon partnership real estate; *Bean v. Mercer*, 1 Chester Co. Rep. 335, holding that judgments against firm are liens against separate real estate of partners; *Erwin's Appeal*, 39 Pa. 535, 80 A. D. 542, holding judgments for firm debts payable out of proceeds of real estate purchased and held for partnership purposes, in preference to judgments against parties individually.

Cited in reference note in 48 A. S. R. 76, on purchasers and encumbrancers of partnership realty without notice.

Cited in note in 28 L.R.A. 170, on position of judgment creditors as to partnership real estate.

Criticized in *Re Erb*, 1 Pearson (Pa.) 98, holding that judgment creditor of partner has lien on property purchased with partnership funds for partnership purposes, but conveyed by articles of agreement to partners as tenants in common.

Doctrine in regard to distribution of fund in court.

Cited in *Rice's Appeal*, 79 Pa. 169, 31 Phila. Leg. Int. 220, 6 Legal Gaz. 244, on doctrine in regard to distribution of fund in court.

Right to demand issue to try facts arising on distribution of money from sheriff's sale.

Cited in *Re Wormser*, 8 Kulp, 236, holding that right to issue under act of 1836 depends on materiality of facts alleged in affidavit of applicant; *Souder's Appeal*, 57 Pa. 498, 25 Phila. Leg. Int. 404, holding issue under act of 1836, demandable of right at any time before decree; *Moore v. Dunn*, 147 Pa. 359, 23 Atl. 596, 48 Phila. Leg. Int. 116, 10 Pa. Co. Ct. 79, 28 W. N. C. 63, holding issue under act of 1836 not matter of right on filing affidavit that there are material facts in dispute, without stating what they are.

51 AM. DEC. 601, McMAHON v. SLOAN, 12 PA. 229.

Rights of innocent purchaser from ostensible owner.

Cited in *Leigh Bros. v. Mobile & O. R. Co.* 58 Ala. 165, holding that mere possession of chattel does not clothe one with transferable interest so as to protect purchaser as against true owner; *Moore v. Robinson*, 62 Ala. 537; *Jetton v. Tobey*, 62 Ark. 84, 34 S. W. 531,—holding that mere possession of chattel does not enable possessor to confer better title than he actually has; *Columbus Buggy Co. v. Turley*, 73 Miss. 529, 55 A. S. R. 550, 32 L.R.A. 260, 19 So. 232, holding that innocent purchaser of goods from vendee in possession having right to resell same acquires title, although title is reserved in vendor until payment made; *City Bank v. Easton Boot & Shoe Co.* 6 North. Co. Rep. 32, holding that bona fide purchaser may acquire title as against real owner when custodian is engaged in common business of selling such property and has apparent authority from owner; *Lewis v. Browning*, 32 Pa. Co. Ct. 264, 13 Luzerne Leg. Reg. 9, holding that continuance of bailment of horse for two years raises no duty of reclamation in bailor; *Hildeburn v. Nathans*, 1 Phila. 569, 12 Phila. Leg. Int. 254; holding owner not disbarred from asserting his title to chattels by intrusting them to another and enabling latter to hold himself out as owner; *Rorabaugh v. Schrubb*, 25 Pa. Co. Ct. 573, holding that innocent purchaser of due bill from payee in possession will take title, notwithstanding real ownership is in another; *Sensenig v. Seiberling*, 22 Lanc. L. Rev. 74; *Davis v. Bigler*, 62 Pa. 242, 1 A. R. 393,—holding that owner of property or goods intrusted to servants and bailees does not lose his property by breach of mandatory; *Agnew v. Johnson*, 22 Pa. 471, 62 A. D. 303, holding that purchaser of personal property takes no better title than his vendor; *Quinn v. Davis*, 78 Pa. 15, 7 Legal Gaz. 173, 32 Phila. Leg. Int. 169, holding transfer of possession to another, not such act as will divest one of his title to chattel.

Cited in reference notes in 12 A. S. R. 299, on title of purchaser of personal property; 70 A. D. 230, on purchaser of personalty taking no better title than vendor had; 70 A. D. 230, as to when purchaser obtains good title notwithstanding true owner's claim.

Cited in note in 3 A. S. R. 196, on necessity for consent of owner of chattel to divest him of title.

—Purchaser at execution sale.

Cited in *Mann v. English*, 7 Pa. Co. Ct. 637, holding deposit of plant with florist for winter does not debar owner from asserting his right thereto as against execution officer in possession.

Burden of proof in action on chattel fraudulently obtained.

Cited in note in 3 A. S. R. 206, on burden of proof in actions on lost, stolen or fraudulently obtained chattel.

Admissibility of declarations of one wrongfully selling another's property.

Cited in note in 3 A. S. R. 206, on admissibility of acts and declarations of one wrongfully selling property of another.

Right of creditor to seize property fraudulently assigned.

Cited in *Haines v. Campbell*, 8 Wis. 187, holding that property fraudulently assigned may be seized by bona fide creditor in hands of assignee.

51 AM. DEC. 608, ALLEN v. MACLELLAN, 12 PA. 328.**Validity of divorce decree on service out of state.**

Cited in note in 19 L.R.A. 817, on validity of decree of divorce obtained on publication or service out of state where defendant did not appear.

Power of court to vacate judgment or decree obtained by fraud.

Cited in *Nealis v. Dicks*, 72 Ind. 374, holding that judgment obtained by violation of compromise will be set aside.

— In divorce suit generally.

Cited in *Nicholson v. Nicholson*, 113 Ind. 131, 15 N. E. 223, holding courts empowered to set aside and vacate divorce decree obtained by fraud upon court, unless restricted by statutory limitations; *Earle v. Earle*, 91 Ind. 27, holding courts empowered to set aside and vacate divorce decrees obtained by fraud upon court; *De Graw v. De Graw*, 7 Mo. App. 121, holding that relief for fraud in obtaining jurisdiction in divorce action can be obtained only in court possessed of original record, and by proceedings for that purpose; *Yorke v. Yorke*, 3 N. D. 343, 55 N. W. 1095, holding that courts of general jurisdiction have inherent power to set aside and annul divorce decree procured by fraud and deceit; *Adams v. Adams*, 51 N. H. 388, 12 A. R. 134; *Given v. Given*, 25 Pa. Super. Ct. 467; *Wanamaker v. Wanamaker*, 10 Phila. 466, 30 Phila. Leg. Int. 265, 2 Pearson (Pa.) 166; *Nickerson v. Nickerson*, 16 Phila. 154, 40 Phila. Leg. Int. 240, 13 W. N. C. 210,—holding that divorce obtained by fraud will be annulled and set aside; *Weir v. Weir*, 22 Lanc. L. Rev. 84, holding that divorce decree will be vacated when founded on false and fraudulent evidence, and respondent had no notice of proceedings; *King v. King*, 28 Pa. Co. Ct. 313, 34 Pittsb. L. J. N. S. 177, holding that divorce decree will be vacated where husband, knowing wife's whereabouts, made publications in obscure paper, and caused subpoena to be returned *non est inventus*; *Boyd's Appeal*, 38 Pa. 241, holding court empowered to vacate divorce decree obtained by fraud on court on part of husband, even after husband's death.

Cited in reference notes in 78 A. S. R. 878, on vacation of divorce decree; 40 A. S. R. 509, on vacation of judgments for divorce obtained by fraud; 9 A. S. R. 826, on setting aside divorce obtained by husband by fraud.

Cited in notes in 60 A. S. R. 658, on vacation, on motion, of decrees of divorce; 61 A. D. 461, on possibility of and grounds for vacating and annulling divorces.

Distinguished in *Lewis v. Lewis*, 15 Kan. 181, holding that want of actual notice will not annul divorce decree legally and duly entered, after service by publication and mailing of copy of petition and notice.

— Decree for divorce rendered at previous term.

Cited in *Wisdom v. Wisdom*, 24 Neb. 551, 8 A. S. R. 215, 39 N. W. 594; *Peterson v. Peterson*, 6 W. N. C. 449; *Fidelity Ins. Co.'s Appeal*, 93 Pa. 242, 8 W. N. C. 395; *Peterson v. Peterson*, 13 Phila. 82, 36 Phila. Leg. Int. 4; *Smith v. Smith*, 3 Phila. 489, 16 Phila. Leg. Int. 356,—holding that court has power to

vacate divorce decree entered at previous term, when fraud has been practised upon court.

Cited in reference note in 75 A. D. 486, on right to set aside at subsequent term decree of divorce obtained by fraud.

Distinguished in *Greene v. Greene*, 2 Gray, 361, 61 A. D. 454; *Parish v. Parish*, 9 Ohio St. 534, 75 A. D. 482,—holding that divorce decree, although obtained by fraud, cannot be set aside on original bill filed at subsequent term.

— **When subsequent marriage or rights of innocent parties intervene.**

Cited in *Medina v. Medina*, 22 Colo. 146, 43 Pac. 1001; *Carlisle v. Carlisle*, 96 Mich. 128, 55 N. W. 673,—holding that subsequent marriage and issue born does not divest court of its power to vacate divorce decree; *Lawrence v. Nelson*, 113 Iowa, 277, 57 L.R.A. 583, 85 N. W. 84, holding that decree of divorce may be set aside for fraud, although innocent party injuriously affected; *Holmes v. Holmes*, 63 Me. 420, holding that subsequent marriage does not divest court of its power to annul divorce decree fraudulently obtained; *Mahen v. Title Guarantee & T. Co.* 95 Ill. App. 365 (dissenting opinion), on power of courts to vacate fraudulent decrees of divorce where second marriage intervenes.

Cited in reference note in 43 A. S. R. 647, on annulment of judgment of divorce after subsequent marriage.

Who may attack divorce decree on ground that it was fraudulently obtained.

Cited in *Dow v. Blake*, 148 Ill. 76, 39 A. S. R. 156, 35 N. E. 761, holding that one cannot attack divorce decree upon ground that it was obtained through fraud committed by himself; *Re Burdick*, 162 Ill. 48, 44 N. E. 413, holding party to fraudulent judgment, or one in privity to such party, or one possessed of rights injuriously affected thereby, only ones entitled to attack fraudulent judgment after term expires.

Nature of bill to impeach divorce decree.

Cited in *Ex parte Smith*, 34 Ala. 455, holding bill to impeach divorce decree for fraud, an original bill in nature of bill of review.

Effect of reversal of decree of divorce after remarriage.

Distinguished in *Bailey v. Bailey*, 45 Hun, 278, holding one marrying in good faith after having recovered decree of divorce and before its reversal on appeal, not guilty of adultery.

51 AM. DEC. 611, JONES v. JONES, 12 PA. 350.

Power of legislature to grant divorce.

Cited in *Re Clinton Street*, 7 Phila. 644, 27 Phila. Leg. Int. 5, 2 Brewst. (Pa.) 599, holding that authority given to courts to grant powers and privileges operates as abandonment on part of legislature of right to grant like powers and privileges; *Higbee v. Higbee*, 4 Utah, 19, 5 Pac. 693, holding granting of divorce not rightful subject of legislation, where general law on subject of divorce is in force.

Cited in note in 18 L.R.A. 96, on how far granting of legislative divorces conflicts with judicial power.

Distinction between judicial and ministerial acts.

Cited in note in 79 A. D. 474, on distinction between judicial and ministerial acts of quasi judicial officers.

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Proof as to enactment of statute.

Cited in reference notes in 40 A. S. R. 231; 119 A. S. R. 902,—on proof of the enactment of statutes, 66 A. D. 687, on enrolment of statute as unimpeachable record; 85 A. D. 357, on evidence received in order to determine whether statute was so passed as to be invalid.

Cited in notes in 47 A. S. R. 815, 821, on proof and impeachment of enactment of statutes; 14 L.R.A. 460, on consideration of extrinsic evidence to show unconstitutionality of statutes affecting private rights; 85 A. D. 358, on rebutting presumption that enactment of statute was legal.

— By legislative journals.

Cited in reference notes in 69 A. D. 504; 85 A. S. R. 531,—on legislative journals as evidence; 54 A. D. 466, on legislative journals as evidence of passage of statute in constitutional form; 66 A. D. 687, on right to examine legislative journals to discover mode of passing statute.

Cited in note in 58 A. D. 574, on legislative journals as evidence of due passage of statutes.

Presumption from silence of legislative journal as to compliance with Constitution.

Cited in *Cronise v. Cronise*, 54 Pa. 255, 24 Phila. Leg. Int. 292, holding presumption that every legislative act of divorce is for just cause, not conclusive as to case being outside jurisdiction of courts; *Angle v. Chicago*, St. P. M. & O. R. Co. 151 U. S. 1, 38 L. ed. 55, 14 Sup. Ct. Rep. 240 (dissenting opinion), on presumption of compliance with constitutional requirements when journal silent; *Ex parte Howard-Harrison Iron Co.* 119 Ala. 484, 72 A. S. R. 928, 24 So. 516, holding no presumption from silence of journals that house has disregarded constitutional requirement in passage of act.

Attack on statute illegally enacted.

Cited in note in 85 A. D. 357, on what attacks may be made on statutes showing illegal enactment.

Power of courts to inquire into agencies employed by legislature in enactment of law.

Cited in *Farmers' Loan & T. Co. v. Chicago*, P. & S. R. Co. 39 Fed. 143, holding that judiciary cannot interfere with legislative department by inquiry into correctness of information leading to enactment of law.

Annotation cited with special approval in *Currie v. Southern Pacific Co.* 21 Or. 566, 28 Pac. 884, holding that courts have power to look into journals of legislative assemblies.

Duty of party to pursue strictly extraordinary remedy.

Cited in *Election Cases*, 65 Pa. 20, to point that party adopting new and extraordinary statutory remedy, out of course of common law, must pursue it to the letter; *Sheppard v. Bell*, 2 Legal Gaz. 64 (dissenting opinion), on duty of party adopting new and extraordinary statutory remedy, out of course of common law, to pursue it to letter; *Re Contested Elections*, 7 Phila. 41, 25 Phila. Leg. Int. 396, 2 Brewst. (Pa.) 1, to point that authority of courts of limited jurisdiction must appear on face of their proceedings.

51 AM. DEC. 624, LADD v. KING, 1 R. I. 224.**Entire contracts.**

Cited in reference note in 56 A. D. 338, on entire contracts.

Validity of parol modification of written contract.

Cited in *Heisley v. Swanstrom*, 40 Minn. 200, 41 N. W. 1029, holding that modification of written contract imposing new terms and obligations upon party must be in writing; *Hicks v. Aylsworth*, 13 R. I. 562, to point that time for accepting option in regard to land could not be extended by parol; *Bangs v. Parret*, 16 R. I. 615, 18 Atl. 250, holding performance according to orally substituted terms, available to either party, in like manner as performance according to original contract; *Herreshoff v. Misch*, 21 R. I. 524, 45 Atl. 145, holding that suit cannot be maintained on written contract varied by parol.

Cited in reference notes in 53 A. D. 436, on parol evidence to explain or vary contracts; 100 A. D. 170, on parol alteration of time of payment or performance of contracts within statute of frauds.

Cited in note in 56 A. S. R. 664, on variation of writing by subsequent parol agreement changing time of performance.

51 AM. DEC. 630, SAHLMAN v. MILLS, 3 STROBH. L. 384.**Sufficiency of constructive delivery of chattels.**

Cited in *Bowe v. Ellis*, 3 Misc. 92, 22 N. Y. Supp. 369, holding virtual or constructive delivery sufficient to prove acceptance and receipt of ponderous and bulky articles by purchaser.

Cited in reference notes in 58 A. D. 93, on actual delivery not being essential to validity of sale as between parties; 61 A. D. 299, as to when constructive instead of actual or manual delivery may be made; 62 A. D. 359, on effect of selection of articles sold as delivery; 20 A. D. 797, on measuring and setting apart goods as essential to perfect sale; 82 A. D. 667, as to whether chattel must be set aside and identified before title passes by sale.

Cited in note in 49 A. D. 338, on receipt and possession of goods in hands of bailee at time of verbal sale under statute of frauds.

51 AM. DEC. 634, STOVER v. DUREN, 3 STROBH. L. 448.**Presumption of payment after lapse of time.**

Cited in *Wright v. Evans*, 10 Rich. Eq. 582, holding presumption from lapse of twenty years not irrebuttable; *Myers v. O'Hanlon*, 12 Rich. Eq. 196; *McQueen v. Fletcher*, 4 Rich. Eq. 152,—holding presumption of payment arising from lapse of twenty years, presumption of fact, which shifts burden of proof; *Boyce v. Lake*, 17 S. C. 481, 43 A. R. 618, holding that lapse of twenty years raises presumption of payment as to sealed notes and bonds, rebuttable only by such facts as would revive unsealed note barred by statute of limitations; *Pyles v. Bell*, 20 S. C. 365, holding presumption of payment after lapse of twenty years, one of fact, which may be rebutted by acknowledgments; *Ex parte Epting*, 22 S. C. 399, holding claim for legacy prosecuted twenty-four years after decree ascertaining amount and directing its investment, barred; *White v. Moore*, 23 S. C. 456, holding debt regarded as paid after lapse of twenty years; *Sartor v. Beaty*, 25 S. C. 293, on presumption of payment of debt after lapse of twenty years without acknowledgment; *Gibbes v. Holmes*, 10 Rich. Eq. 484, on presumption of payment arising from lapse of twenty years; *Ellison v. Torpin*, 44 W. Va. 414, 30 S. E. 183 (dissenting opinion), on presumption of payment arising from lapse of time shifting burden of proof.

Cited in reference note in 3 A. S. R. 515, on presumption of payment from lapse of time.

— **Right of court to make presumption.**

Distinguished in *Re Hagood*, 38 S. C. 361, 16 S. E. 1003, holding that court has power in all equity cases to apply presumption of payment arising from lapse of time.

— **Sufficiency of admission to rebut presumption.**

Cited in *Willingham v. Chick*, 14 S. C. 93, holding distinct admission of subsisting legal obligation of debt, unaccompanied by any conduct or expression indicative of unwillingness to pay, necessary to rebut presumption of payment after lapse of twenty years; *Dickson v. Gourdin*, 26 S. C. 391, 2 S. E. 303, holding that presumption of payment arising from lapse of twenty years can only be rebutted by such proof as would take action upon promissory note out of statute of limitations; *Foster v. Hunter*, 4 Rich. Eq. 16, holding that lapse of time less than twenty years entitles admissions of debtor to full weight as rebutting presumption of satisfaction; *Tucker v. Hunt*, 6 Rich. Eq. 183, on sufficiency of foreclosure of mortgage to rebut presumption of payment of bond arising from lapse of time.

Distinguished in *Colvin v. Phillips*, 25 S. C. 228, holding naked admission of subsisting legal obligation, sufficient to rebut presumption of payment up to that time, if made before presumption has become complete.

Sufficiency of acknowledgment to remove bar of limitation.

Cited in reference note in 97 A. D. 571, on sufficiency of promise or acknowledgment to take debt out of statute of limitations.

Presumption of satisfaction from arrest on ca. sa.

Cited in *Strode v. Broadwell*, 36 Ill. 419, holding arrest of defendant on ca. sa. satisfaction of judgment.

Cited in reference note in 56 A. D. 378, on satisfaction of levy.

51 AM. DEC. 637, McCOLMAN v. WILKES, 3 STROBH. L. 465.

Necessity of possession to maintain trespass *quare clausum fregit*.

Cited in *Evans v. Corley*, 8 Rich. L. 315, holding that possession of plaintiff in action of trespass *quare clausum fregit*, as against mere trespasser without title or possession, will extend to limits of his color of title; *State v. Gadsden*, 20 S. C. 456, holding possessor under verbal, vague, and voluntary permission from owner of field to plant therein patch of turnips, without consideration or mention of any part of field, not in such possession as to entitle possessor to bring malicious trespass against owner's wife; *Gilmore v. Roberts*, 18 S. C. 551, holding that since adoption of Code party having title to property may recover damages for trespass without regard to possession.

Cited in reference notes in 63 A. D. 53, as to when trespass may be maintained; 53 A. D. 207, on possession required to maintain trespass *quare clausum fregit*; 39 A. S. R. 795, on necessity for possession to maintain action for trespass; 53 A. D. 208, on sufficiency of possession to maintain trespass *quare clausum fregit* against mere wrongdoer.

Necessity of title to maintain trespass.

Cited in *Geiger v. Kaigler*, 15 S. C. 262, holding that mere prior possession in action of trespass to try title does not dispense with necessity of plaintiff proving title; *Dorn v. Beasley*, 6 Rich. Eq. 408, holding that plaintiff in trespass to try title can recover only on strength of his own title; *Harrelson v. Sarvis*, 39 S. C. 14, 17 S. E. 368, holding that plaintiff can recover land from one in possession only upon strength of his own title.

Cited in reference note in 72 A. D. 123, on burden of defendant in trespass to show title in himself.

Defenses in trespass.

Cited in reference note in 23 A. S. R. 699, on what may be set up as a defense in action for trespass.

Remedy for injury to real estate held adversely.

Cited in note in 85 A. D. 322, on remedy for injuries to real estate held adversely to plaintiff.

Possession of tenant as that of landlord.

Cited in reference notes in 54 A. S. R. 764, on tenant's possession as possession of landlord; 29 A. S. R. 509, on possession of tenant or agent as that of landlord or principal.

What is constructive possession.

Cited in *Lieberman v. Clark* (*Wheeler v. Clark*) 114 Tenn. 117, 69 L.R.A. 732, 85 S. W. 258, to point that constructive possession is that possession which law annexes to title; *Binda v. Benbow*, 9 Rich. L. 15, holding that constructive possession will yield to actual possession in contest between two.

— Possession of part as constituting possession of whole.

Cited in *Santee River Cypress Lumber Co. v. James*, 50 Fed. 360, holding actual possession of part by one entering upon land under color of title, possession of whole tract, except parts in actual possession of others.

Cited in reference notes in 74 A. D. 189, as to when adverse possession of part extends to whole; 93 A. D. 448, on possession of part of tract of land as possession of all.

51 AM. DEC. 646, BACON v. SONDELEY, 3 STROBH. L. 542.

Right of party dealing with agent whom he supposes to be principal.

Cited in *Builders' Supply Co. v. North Augusta Electric & Improv. Co.* 71 S. C. 361, 51 S. E. 231, holding that one may recover from improvement company for materials sold agent upon discovery of fact that former is undisclosed principal of latter.

Cited in notes in 2 L.R.A. 812, on liability of agent on contract made for undisclosed principal; 2 E. R. C. 470, on election to hold principal or agent on discovering undisclosed principal.

Effect of death of party on agency.

Cited in note in 23 L.R.A. 710, on effect on contract of agency of death of party thereto.

Enforceability of contract of decedent.

Cited in note in 68 A. D. 759, on enforceability of contracts of decedents.

51 AM. DEC. 649, WOODWARD v. JAMES, 3 STROBH. L. 552.

Sufficiency of undue influence to avoid instrument.

Cited in *Slayback v. Witt*, 151 Ind. 376, 50 N. E. 389, holding that conveyance by aged woman to her son will not of itself raise presumption of undue influence.

Cited in reference note in 96 A. D. 705, defining "undue influence."

— Will.

Cited in *Gilbert v. Gilbert*, 22 Ala. 529, 58 A. D. 268, holding that undue influence sufficient to avoid will must constrain testator to do what is against his will, but which from fear, desire of peace, or some other feeling he is unable

to resist; *King v. Borchard*, 117 Cal. 288, 49 Pac. 192, holding that undue influence which will avoid will must operate upon mind of testator at time of making will, and must relate to will itself; *Harvey v. Sullens*, 46 Mo. 147, 2 A. R. 491, holding that will executed by person so enfeebled that he is mere passive instrument in hands of those who produce will is procured by undue influence; *Foster v. Dickerson*, 64 Vt. 233, 24 Atl. 253, holding that will, to be set aside for undue influence, must have been executed by one influenced to that extent that his free agency and independence are gone; *Re Jackman*, 26 Wis. 104, holding solicitations or arguments which appeal to motives of natural affection on part of testator, not undue influence.

Cited in reference notes in 56 A. D. 430, on undue influence affecting validity of wills; 93 A. D. 628, on what undue influence will vitiate a will; 58 A. D. 272, on what constitutes undue influence invalidating will; 68 A. D. 158, on requisites of undue influence capable of vitiating will.

Cited in notes in 31 A. S. R. 687, on amount of evidence of undue influence necessary to invalidate will; 31 A. S. R. 676, as to whether undue influence must be unlawful to invalidate will; 31 A. S. R. 680, on prejudices and aversions which invalidate will; 31 A. S. R. 685, on preference between relatives as evidence of undue influence in execution of will.

Presumption and burden of proof as to undue influence.

Cited in reference note in 31 A. S. R. 681, on burden of proof and presumption as to undue influence in execution of will.

Evidence of testamentary capacity.

Cited in reference note in 54 A. D. 423, on evidence necessary to establish testamentary capacity.

New trial where verdict is against the evidence.

Cited in reference notes in 38 A. S. R. 186, on granting new trial when verdict is against weight of evidence; 65 A. D. 606, on new trial where verdict is unmistakably contrary to evidence.

51 AM. DEC. 653, JONES v. WEATHERSBEE, 4 STROBH. L. 50.

Admissibility of evidence of former recovery under general issue.

Cited in *Southern P. R. Co. v. United States*, 168 U. S. 1, 42 L. ed. 355, 18 Sup. Ct. Rep. 18, holding former recovery given in evidence, equally conclusive, in its effect, as if it were specially pleaded by way of estoppel.

Cited in notes in 69 A. D. 705, as to what defenses must be specially pleaded; 63 A. D. 632, on right to prove former recovery under general issue without specially pleading it; 63 A. D. 632, on distinction between pleading former recovery in bar and proving it under general issue.

Estoppel by former judgment.

Cited in *Mauldin v. Gossett*, 15 S. C. 565, holding order confirming report of referee as to amount of money in sheriff's hands derived from sale of lands, binding on sheriff and all other parties, if court possessed of power to adjudicate questions involved; *Willoughby v. Northeastern R. Co.* 52 S. C. 166, holding that issue once adjudicated in cause by court of competent jurisdiction cannot again be litigated between same parties or privies in suit on same or different cause of action.

Cited in reference notes in 55 A. D. 304, as to when judgment is bar to subsequent action for same cause; 55 A. D. 571, on conclusiveness of judgment of

court of concurrent jurisdiction between the same parties on the same matter.

Cited in note in 53 A. D. 337, on conclusiveness of judgment upon parties and privies.

Distinguished in *Boyle v. Wallace*, 81 Ala. 352, 8 So. 194, holding that less than two judgments in favor of defendant in ejectment is not bar against further suit for same land, between same parties, founded on same title.

Liability of cotenants.

Cited in reference note in 63 A. D. 650, on liability to cotenant for flowing common lands by dam on other property.

Cited in notes in 28 L.R.A. 829, 833, on liability of cotenants to account for use and occupation and rents and profits; 59 L.R.A. 862, on who are liable for damming back water of stream.

Adverse possession by cotenant.

Cited in reference notes in 70 A. D. 363, as to when possession of tenant in common adverse to cotenants; 53 A. D. 487; 69 A. D. 443,—as to what constitutes ouster of tenant in common by cotenant.

Ejectment against cotenant.

Cited in note in 50 A. S. R. 844, on ejectment by one cotenant against another.

Grant of nonsuit.

Cited in reference note in 60 A. D. 711, on grant of nonsuit where there is not sufficient evidence to justify verdict.

Cited in note in 24 A. D. 624, on requisites of motion by defendant for nonsuit.

51 AM. DEC. 659, BANK OF HAMBURG v. WRAY, 4 STROBH. L. 87.

Liability of agent acting without authority from principal.

Cited in *Newberry v. Slafter*, 98 Mich. 468, 57 N. W. 574, holding agent who undertakes to contract on behalf of another, and contracts in manner not binding on principal, personally responsible; *Lagrone v. Timmerman*, 46 S. C. 372, 24 S. E. 290, holding falsehood and deceit, not necessary to charge agent personally with contract he had no authority to make; *Wallace v. Langston*, 52 S. C. 133, 29 S. E. 552, holding one who signs bond using apt words to bind himself, liable, although without instrument at time of equal rank to bind his principal.

Cited in notes in 2 E. R. C. 496, on implied warranty of authority of agent; 48 A. S. R. 916, on personal liability to third persons of agent assuming without authority to make contract for corporation; 22 A. S. R. 509, on agent's liability where he mistakenly believes himself authorized; 22 A. S. R. 510, on agent's liability where he misrepresents authority intending to deceive.

Indorser's promise to pay after failure to give notice of nonpayment.

Cited in note in 29 L.R.A. 311, on sufficiency of promise by indorser after failure to give notice of dishonor.

51 AM. DEC. 663, GRACEY v. DAVIS, 3 STROBH. EQ. 55.

Effect on creditors of fraudulent conveyance.

Cited in note in 67 L.R.A. 878, on effect on legal title as to creditors of conveyance of land in fraud of creditors.

Effect, as to creditors, of setting aside deeds.

Cited in *Curlee v. Rembert*, 37 S. C. 214, 15 S. E. 954, holding that effect of setting aside deeds is to leave creditors to enforce their claims according to their legal priorities; *Mann v. Poole*, 44 S. C. 65, 21 S. E. 543, holding that deed set aside is, as to creditors, as if it had never existed; *Ryttenberg v. Keels*, 39 S. C. 203, holding that effect of setting aside assignment is to place creditors as if it had never been executed.

Distinguished in *Belknap v. Greene Bros.* 56 S. C. 119, 34 S. E. 26, holding proceeds of after-acquired lands by judgment debtor, payable ratably to all live judgments at time of acquisition notwithstanding date.

Power of court upon vacating deed for fraud.

Cited in *Wagener v. Mars*, 27 S. C. 97, 2 S. E. 844, holding that court of equity, upon vacating deed for fraud, may decree that land shall be sold and proceeds applied to debts of grantor.

Judgments as liens.

Cited in note in 17 L.R.A. 346, on effect of judgments as liens.

Interference with liens by court.

Cited in reference note in 74 A. S. R. 342, on interference by courts with liens attaching by law.

Priority between creditors.

Cited in reference note in 90 A. D. 296, on priority as between judgment creditors in reaching real estate of debtor.

Cited in note in 1 L.R.A. 639, on judicial preference obtained by lien created by creditors' suit.

51 AM. DEC. 665, HOLEMAN v. FORT, 3 STROBH. EQ. 66.**Operation and effect of deed to woman and her children.**

Cited in *Beecher v. Hicks*, 7 Lea, 207, holding that conveyance of land directly to woman and her children without more, she then having children, vests title in her and her children equally; *Mellichamp v. Mellichamp*, 28 S. C. 125, 5 S. E. 333, holding after-born child, entitled to equal share with others under deed of conveyance in fee to woman and children she already has and may hereafter bear by present husband; *Arrington v. Roper*, 3 Tenn. Ch. 572, holding that deed *in presenti* to woman named and her children, she then having children, will vest title in her and her children equally.

Construction of word "heirs."

Cited in *Cloud v. Calhoun*, 10 Rich. Eq. 358; *McCown v. King*, 23 S. C. 232; *Shaw v. Robinson*, 42 S. C. 342, 20 S. E. 161; *Bailey v. Patterson*, 3 Rich. Eq. 156,—holding that it is always open to inquiry whether testator used word "heirs" according to its strict acceptation or to denote children or next of kin; *Reeves v. Cook*, 71 S. C. 275, 51 S. E. 93, holding grant to heirs of living person which she has or may have by present husband, construed to mean children.

Validity of deed conveying land to heirs of living person.

Cited in *Lott v. Thompson*, 36 S. C. 38, 15 S. E. 278, on validity of deed conveying lands to heirs of living person.

51 AM. DEC. 671, WOOD v. INGRAHAM, 3 STROBH. EQ. 105.**Necessity of delivery of deed.**

Cited in *Fain v. Smith*, 14 Or. 82, 58 A. R. 281, 12 Pac. 365, holding delivery essential to validity of deed based upon consideration of love and affection.

Cited in reference notes in 39 A. S. R. 73, on necessity for delivery of deed; 69 A. D. 419, on necessity to its validity of delivery of deed; 93 A. D. 459, on necessity for formal delivery of deed to grantee.

Cited in note in 12 L.R.A. 172, on necessity of manual delivery of deed to transfer title.

Essentials to delivery of deed.

Cited in *Carrigan v. Byrd*, 23 S. C. 89, holding intention to deliver and act evincing purpose to part with control of instrument, necessary to constitute delivery of deed.

Cited in reference notes in 56 A. D. 442, on what is sufficient delivery of deed; 51 A. D. 217, on what constitutes delivery of deed; 38 A. S. R. 467, on what does not constitute delivery of deed; 56 A. D. 442, on acts, etc., from which delivery of deed may be inferred.

Cited in note in 53 A. S. R. 551, on illustrations of insufficient delivery of deed.

Validity of voluntary conveyance.

Cited in note in 9 L.R.A. 413, on validity of voluntary conveyance.

51 AM. DEC. 675, BUSH v. BUSH, 3 STROBH. EQ. 131.

Protection of bona fide purchaser.

Cited in *Fretwell v. Neal*, 11 Rich. Eq. 559, holding plea of purchaser without notice, operative, when proved, to defeat suits of equitable owners; *Richardson v. Chappell*, 6 S. E. 146, holding that court will not look into adequacy of consideration in considering equity of purchaser from devisee for valuable consideration, where purchase is bona fide; *Clark v. Smith*, 13 S. C. 585, on protection of purchaser for valuable consideration without notice.

Cited in reference notes in 68 A. D. 64, on title acquired by bona fide purchaser; 68 A. D. 552, on rights of bona fide purchasers of land; 56 A. D. 761, on title acquired by purchaser at sheriff's sale; 84 A. D. 162, on rule that execution purchaser acquires only such land as debtor had.

Who are bona fide purchasers.

Cited in *Peay v. Seigler*, 48 S. C. 496, 59 A. S. R. 731, 26 S. E. 885, holding that one must have paid the purchase money as well as have secured the legal title before notice of equities to be a bona fide purchaser without notice; *Cooke v. Pool*, 25 S. C. 593 (dissenting opinion), on necessity of absence of notice to entitle one to invoke protection afforded bona fide purchaser for value.

Cited in reference notes in 67 A. D. 74, on effect of consideration on bona fides of purchase under recording acts; 54 A. D. 668, on notice of prior title before payment of purchase money as affecting plea of bona fides; 65 A. D. 324, on necessity of denying notice where defense of "bona fide purchaser without notice" is relied on.

— Necessity of payment of purchase money before notice is received.

Cited in *Maybin v. Kirby*, 4 Rich. Eq. 105; *Brown v. Wood*, 6 Rich. Eq. 155; *Lynch v. Hancock*, 14 S. C. 66,—holding plea of purchaser for valuable consideration without notice, not available unless party has both paid purchase money and acquired legal title before notice; *Jordan v. Pollock*, 14 Ga. 145; *Paul v. Fulton*, 25 Mo. 156,—holding that purchase money should be paid before notice received to constitute one bona fide purchaser for value without notice; *People ex rel. Hill v. Crissey*, 46 Hun, 19, holding purchaser who takes subject to rights of prior assignee, not entitled to protection as bona fide purchaser beyond amount actually paid before notice; *Zorn v. Savannah & C. R. Co.* 5 S. C. 90, holding that plea of

purchase for valuable consideration without notice must distinctly aver that consideration mentioned in deed was bona fide and truly paid.

Liability of wife's land for husband's debts.

Cited in reference notes in 72 A. D. 577, as to when wife's property subject to execution for husband's debts; 57 A. D. 162, on right of purchaser at execution sale of wife's property for husband's debts.

51 AM. DEC. 678, WILSON v. BAILER, 3 STROBH. EQ. 258.

Words creating separate estate in married woman.

Cited in Foster v. Kerr, 4 Rich. Eq. 390, holding that bequest of slaves to *feme covert*, "to her and heirs of her body, and to them alone," does not confer separate estate on wife in exclusion of rights of husband; Raines v. Woodward, 4 Rich. Eq. 399, holding deed of slaves for use, benefit, and behoof of *feme covert* for life, not inconsistent with their being subject to husband's marital rights; Martin v. Bell, 9 Rich. Eq. 42, 70 A. D. 200, holding separate estate created in daughters by words in bequest declaring that the property "shall in no wise be subject to debts of their husbands, in no case whatsoever;" Wade v. Fisher, 9 Rich. Eq. 382, holding gift by way of trust to wife's own or special use and benefit, not for her separate use so as to obstruct marital rights; Charles v. Coker, 2 S. C. 122, holding that trust to pay income of settled property to married woman "for and during joint lives of her and her husband, taking her receipt therefor," gives to her sole and separate estate in income; Bouknight v. Epting, 11 S. C. 71, holding no separate estate created in married woman by words in deed conveying lands to one for his daughter E., wife of G. E., to have and to hold unto said E. E., her heirs and assigns forever; Howard v. Henderson, 18 S. C. 184, holding no separate estate created under deed conveying homestead to one in trust for himself for life with remainder to married woman for life with contingent remainders over; Wadsworthville Poor School v. Bryson, 34 S. C. 401, 13 S. E. 619, holding that paper containing obligation on part of husband to return money to wife "to dispose of as she sees proper to do," sufficiently shows intent to create separate estate in wife.

Cited in reference note in 60 A. D. 497, on what words create separate estate in wife.

Rights of married woman as to her separate estate.

Cited in Ellis v. Woods, 9 Rich. Eq. 19 (dissenting opinion), as to separate interest in married woman being in derogation of husband's common-law right.

Distinguished in Nix v. Bradley, 6 Rich. Eq. 43, holding that mere gift to separate use of woman without gift over or other restriction of her power of alienation does not in any respect limit her power of alienation while discovered.

51 AM. DEC. 682, BOMAR v. MAXWELL, 9 HUMPH. 620.

What constitutes baggage.

Cited in United States v. The Anna, Fed. Cas. No. 14,457, holding that personal luggage only includes wearing apparel and bed and bedding of passengers required for their comfort and convenience during voyage; Illinois C. R. Co. v. Matthews, 114 Ky. 973, 102 A. S. R. 316, 60 L.R.A. 846, 72 S. W. 302, holding that baggage refers only to what passenger takes with him for his own personal use and convenience and which he has committed to care of carrier; Davis v. Cayuga & S. R. Co. 10 How. Pr. 330, holding set of harness maker's tools, valued at \$10, in trunk with clothing, baggage; McKee v. Owen, 15 Mich. 115; Taylor v.

Monnot, 1 Abb. Pr. 325, 4 Duer, 116; Johnson v. Stone, 11 Humph. 419,— holding that term baggage includes money in trunk to that extent which may be convenient to meet traveling expenses; Oakes v. Northern P. R. Co. 20 Or. 392, 23 A. S. R. 126, 12 L.R.A. 318, 26 Pac. 230, holding that baggage refers only to such articles as are usually carried for personal use of passenger, or for his convenience, instruction, or amusement on journey; Coward v. East Tennessee, V. & G. R. Co. 16 Lea, 225, 57 A. R. 227, holding watch and chain and diamond pin, wearing apparel, and included in term "baggage"; Yazoo v. M. Valley R. Co. v. Baldwin, 113 Tenn. 205, 81 S. W. 599, holding that articles included in term baggage depend upon habits, taste, resources, condition, and station of passenger.

Cited in reference notes in 56 A. D. 470, on what constitutes baggage; 56 A. D. 487, on what is baggage of passenger.

Cited in notes in 8 A. R. 303, 304; 99 A. S. R. 347,—on what baggage includes; 71 A. D. 159, 161, 163, on what is baggage to which passenger is entitled; 11 L.R.A. 760, on articles worn or carried by hand as baggage; 71 A. D. 161; 99 A. S. R. 349,—on money as baggage; 99 A. S. R. 350, on jewelry as baggage.

Liability for baggage.

Cited in reference note in 56 A. D. 470, 487, on liability of carrier of passengers for baggage.

Implication of contract to carry baggage from sale of ticket.

Cited in Saunders v. Southern R. Co. 62 C. C. A. 523, 128 Fed. 15, holding contract to carry without additional compensation reasonable amount of personal baggage, implied from sale of ticket.

51 AM. DEC. 685, HEPBURN v. KERR, 9 HUMPH. 726.

Assignability of equity of redemption.

Cited in Huffaker v. Bowman, 4 Sneed, 189, holding assignment by debtor of his equity of redemption, valid; Graves v. McFarlane, 2 Coldw. 167, holding that bargainer in trust deed, or defendant in execution, has right to transfer his equity by assignment; Herndon v. Pickard, 5 Lea, 702, holding debtor's right to redeem land sold at judicial sale, right which he may sell or which will descend to his heirs; Stark v. Cheatham, 2 Tenn. Ch. 300, holding that equity of redemption of mortgagor may be sold or assigned by him; Carlin v. Jones, 55 Ala. 624, as to who may redeem lands sold under power in mortgage.

Held obiter in McClean v. Harris, 14 Lea, 510, holding that right of redemption on part of creditors, cannot be cut off by debtor's sale of the land after sale on execution before lapse of time allowed for redemption.

Disapproved in Powers v. Andrews, 84 Ala. 289, holding that junior mortgagee or assignee of equity of redemption cannot redeem under statute.

Assignment of note as passing security.

Cited in McCallum v. Jobe, 9 Baxt. 168, 40 A. R. 84, to point that sale of note carried security with it, and paper title was unnecessary to invest purchaser with all benefits of mortgage.

Equitable interest after execution sale.

Cited in note in 42 A. D. 475, on equitable interest after execution sale.

Right to reach debtor's right to redeem in equity.

Cited in Smith v. Anders, 21 Ala. 783, holding mortgagor's right to redeem, mere equitable right, which can only be enforced against unwilling purchaser in equity; Weakley v. Cockrill, 2 Tenn. Ch. 316, holding that debtor's right to redeem land sold by execution may be reached in equity.

Who may redeem from foreclosure sale.

Cited in note in 21 A. S. R. 247, on who may redeem from foreclosure sale.

51 AM. DEC. 688, MANNING v. WELLS, 9 HUMPH. 746.

Liability of innkeeper for loss of goods.

Cited in *Hulett v. Swift*, 42 Barb. 230, holding liability of innkeeper of same character as that of common carrier.

Cited in reference notes in 66 A. D. 752, on liability of innkeeper for goods of guest; 53 A. S. R. 476, on innkeeper's liability for loss of boarders' goods; 61 A. D. 530, on innkeeper's liability for loss of guest's property; 71 A. D. 326, on prima facie liability for negligence of innkeeper where guest's property is lost while in his charge.

Cited in notes in 8 L.R.A. 97, as responsibility of innkeeper; 7 A. D. 454, on extent of innkeeper's liability; 6 L.R.A. 484, on liability of innkeepers as bailees; 6 L.R.A. 485, on liability of innkeeper as insurer of property committed to his care; 99 A. S. R. 578, on liability of innkeepers as insurers for injury to or loss of property of guest; 69 A. D. 221, on kind of goods for which innkeeper is liable.

— Of permanent boarder.

Cited in *Carter v. Hobbs*, 12 Mich. 52, 83 A. D. 762, holding that goods of permanent boarder are not protected as those of guest; *Taylor v. Downey*, 104 Mich. 532, 53 A. S. R. 472, 29 L.R.A. 92, 62 N. W. 716, holding that hotel keeper, not liable for loss of money by permanent boarder, where ordinary care used in selection of night clerk who stole same; *Jeffords v. Crump*, 12 Phila. 500, 35 Phila. Leg. Int. 36, 5 W. N. C. 10, holding innkeeper not liable for goods of boarder stolen from inn, unless guilty of gross negligence; *Meacham v. Galloway*, 102 Tenn. 415, 73 A. S. R. 886, 46 L.R.A. 319, 52 S. W. 859, holding hotel proprietor, not liable for loss or theft of goods of boarder unless himself or servants guilty of wrongful or negligent act; *Nichols v. Halliday*, 27 Wis. 406, holding that boarding-house keeper has lien on effects of boarder, under statute, to extent only that innkeeper had upon goods of his guests at common law.

Distinguished in *Hancock v. Rand*, 94 N. Y. 1, 46 A. R. 112, holding one who keeps separate apartments for boarders and transients, liable as innkeeper for loss of goods to guest registered as former, when he was not aware of fact.

Who is a guest.

Cited in *Curtis v. Murphy*, 63 Wis. 4, 53 A. R. 242, 22 N. W. 825, holding one taking room for purpose of prostitution, not guest.

Cited in notes in 7 A. D. 454; 62 A. D. 590; 105 A. S. R. 932,—on who are guests at inn; 46 A. R. 119, on who are guests, in regard to innkeeper's liability; 62 A. D. 586, as to who are guests at inn and when they cease to be so; 62 A. D. 589, on effect on his status as guest of agreement with innkeeper as to time of stay; 99 A. S. R. 583, on difference between boarders and guests within rule as to innkeeper's liability for loss of property of guests.

Necessity of justice's warrant giving general statement of cause of action.

Cited in *Odell v. Koppee*, 5 Heisk. 88, holding that warrant to answer certain party in action for sum under \$250 does not properly set out cause of action.

51 AM. DEC. 690, DUDLEY v. BOSWORTH, 10 HUMPH. 9.

Trust arising from purchase of land by one person in name of another.

Cited in *Gass v. Gass*, 1 Heisk. 613, holding that purchase of land by one for

himself and another in his own name, out of moneys of such other person, raises trust in favor of person whose fund is so used.

Cited in reference notes in 65 A. D. 786; 46 A. S. R. 513,—on resulting trusts; 56 A. S. R. 843, as to when resulting trust arises; 63 A. D. 424, on creation of resulting trust where one person pays for land and another takes title; 65 A. D. 501, on resulting trust in favor of one paying consideration where conveyance is taken in name of another; 67 A. D. 630, on character of transaction at its inception determining whether purchase in name of another is advancement or resulting trust; 67 A. D. 630, on presumption of advancement in purchase by parent in child's name.

Cited in notes in 51 A. D. 755; 34 L. ed. U. S. 1091,—on resulting trusts; 34 L. ed. U. S. 1092, on trusts resulting *eo instanti*; 2 L.R.A. 817, on presumptions as to trusts between family relatives.

— **As affected by relation of parties.**

Cited in *Pool v. Phillips*, 167 Ill. 432, 47 N. E. 758, holding conveyance to wife at instance of husband, presumed to be gift; *Seibold v. Christman*, 7 Mo. App. 254, holding no presumption of resulting trust, where husband purchases real estate with his own money and causes conveyance to be made to wife; *Hall v. Hall*, 107 Mo. 101, 17 S. W. 811, holding that rebuttal of presumption of resulting trust arising from relation of parties to each other will itself be overcome when all facts point clearly to intention on part of purchase to create trust; *Lockhard v. Brodie*, 1 Tenn. Ch. 384, holding relation of parties, sufficient for purpose of rebutting presumption of resulting trust arising from payment of purchase money.

Burden of rebutting presumption of trust.

Cited in *Plass v. Plass*, 122 Cal. 3, 54 Pac. 372, holding that burden of proof rests upon nominal purchaser to show that party from whom consideration moved did not mean purchase to be in trust for himself.

Parol evidence as to consideration or to raise resulting trust.

Cited in *Goodspeed v. Fuller*, 46 Me. 141, 71 A. D. 572, to point that parol evidence is admissible to show that consideration was paid by some one other than grantee, and thus raise resulting trust.

Cited in reference note in 67 A. D. 630, on establishing and contradicting resulting trust by parol.

Cited in notes in 20 L.R.A. 109, on parol evidence as to consideration for deed to establish trust in third person; 14 E. R. C. 752, on right to show by extrinsic evidence a consideration not expressed or additional to that expressed in deed.

Right of donor to change advancement into debt or trust.

Cited in *Brook v. Latimer*, 44 Kan. 431, 21 A. S. R. 292, 11 L.R.A. 805, 24 Pac. 946, holding that advancement is irrevocable gift, and donor cannot change it into debt or trust; *McCoy v. Pearce*, 1 Shannon, Cas. 87, 1 Thomp. Tenn. Cas. 145, holding advancement, not affected by declarations of donor.

Enforceability of resulting trust in conveyance made to defraud creditors.

Cited in *Gaugh v. Henderson*, 2 Head, 628, on enforcement of resulting trust in case of conveyance made to defraud creditors.

Necessity of resulting trust arising out of facts existing at time of purchase.

Cited in *McClure v. Doak*, 6 Baxt. 364, holding that resulting trust must arise out of state of facts existing at time of purchase, and attach to title at that time.

51 AM. DEC. 694, VANBIBBER v. SAWYERS, 10 HUMPH. 81.**Status of purchaser and surety at master's sale.**

Cited in *Dibrell v. Williams*, 3 Coldw. 528, holding that purchasers at master's sale become parties to suit by motion; *Majors v. McNeilly*, 7 Heisk. 294, holding that surety at chancery sale becomes quasi party to case, and may petition for what relief he may be entitled to.

Jurisdiction over purchaser at judicial sale.

Cited in reference note in 64 A. S. R. 726, on jurisdiction of court over purchaser at judicial sale.

Power of court over final judgments after close of term.

Cited in *Planters Bank v. Fowlkes*, 4 Sneed, 461, holding that court loses all control over case by finally disposing of it without granting writ of possession, and that party will be compelled to resort to court of law to obtain possession of land purchased; *Johnson v. Tomlinson*, 13 Lea, 604, holding decrees upon order *pro confesso* after personal service upon party *sui juris*, final; *State v. Dalton*, 109 Tenn. 544, 72 S. W. 456, holding that court after adjournment of term has no longer any power over its final judgments.

51 AM. DEC. 696, BATES v. LANCASTER, 10 HUMPH. 134.**Rights and liabilities of stakeholders.**

Cited in *Perkins v. Clemm*, 23 Ark. 221, holding that stakeholder of money bet upon race may recover it by action against person with whom he has deposited it; *Huncke v. Francis*, 27 N. J. L. 55 (dissenting opinion), on right of better to recover money in hands of stakeholder, if demanded before money paid to winner.

Cited in reference notes in 70 A. D. 791, on actions against stakeholders; 57 A. D. 778, as to when money deposited on wager may be recovered back from stakeholder.

51 AM. DEC. 697, BUTLER v. BOYLES, 10 HUMPH. 155.**Right of judge or arbitrator to question witness.**

Cited in *Hill v. State*, 5 Lea, 725, holding that trial judge may ask question of witness overlooked by counsel; *Graham v. McReynolds*, 90 Tenn. 673, 18 S. W. 272, holding that court may ask competent questions of witness if he takes care not to indicate his opinion of weight or importance of evidence he seeks to elicit.

Cited in note in 57 L.R.A. 880, on power of court to examine witnesses to elicit facts or supply evidence.

When award final.

Cited in *Williams v. Rumbough*, 5 Lea, 606, holding that there is no publication of award where it is signed by two of three arbitrators and handed to clerk to copy, with intent to sign same and send it to third arbitrator and all further proceedings are dropped on his calling attention to certain errors therein.

Cited in reference note in 56 A. D. 317, as to when award will be set aside for causes other than mistake.

Cited in notes in 14 A. D. 216, on altering final award; 3 E. R. C. 508, on right of arbitrator to change or alter award; 25 A. R. 47, as to what will invalidate arbitrators' award.

51 AM. DEC. 698, BANK OF TENNESSEE v. HILL, 10 HUMPH. 176.**When equity will prohibit use of defense of statute of limitations.**

Cited in *Monroe v. Herrington*, 110 Mo. App. 509, 85 S. W. 1002, holding mere reliance on debtor's promise to pay if not sued, no ground for cutting him off from defense of statute of limitations; *Chilton v. Scruggs*, 5 Lea, 308, holding that equity court will not prohibit party from setting up defense of statute of limitations to suit at law merely upon mistake of plaintiff as to existence of injunction prohibiting him from bringing suit.

Cited in reference notes in 65 A. D. 545, on application of statute of limitations to equity suits; 9 A. S. R. 531, as to equity being governed by statute of limitations; 55 A. D. 587, on binding effect of statute of limitations in equity when remedies at law and equity are concurrent; 34 A. S. R. 92, on relief in equity from statute of limitations; 62 A. S. R. 830, on injunction against pleading statutes of limitations.

Cited in notes in 75 A. D. 87, as to when injunction against pleading statute of limitations will not be granted; 16 E. R. C. 375, on fraudulent concealment as suspending statute of limitations.

51 AM. DEC. 701, WITT v. RUSSEY, 10 HUMPH. 208.**Conclusiveness of judgments.**

Cited in reference note in 55 A. D. 535, on conclusiveness of judgment of justice of the peace until reversed.

Cited in note in 53 A. D. 337, on conclusiveness of judgment upon parties and privies.

Right to collaterally attack judgment.

Cited in *Clark v. Stroud*, 1 Swan, 274, holding defense of former recovery unavailing if plea and proof show case in which former judgment is void for want of jurisdiction; *Starkey v. Hammer*, 1 Baxt. 438, holding that evidence which guided court rendering decree cannot be looked to for purpose of collaterally attacking same; *Stanley v. Sharp*, 1 Heisk. 417, holding that judgment not void on its face cannot be attacked in collateral proceeding, and shown by parol to be nullity; *Montgomery v. Rich*, 3 Tenn. Ch. 660, to point that judgment of justice of peace cannot be collaterally attacked by parol testimony.

Cited in reference notes in 62 A. D. 331, on collateral assaults on judgments: 58 A. D. 609, as to whether judgment is subject to collateral attack; 76 A. D. 428, on right to attack collaterally judgment of court of general jurisdiction.

Distinguished in *Wolf v. Eakerly*, 10 Heisk. 124, holding that defendant in replevin, for property claimed under execution issued by justice, might show want of jurisdiction of former disclosed by proceedings themselves.

Right of judgment defendant to show want of jurisdiction.

Cited in *Mason v. Westmoreland*, 1 Head, 555, holding that judgment in justice's court against indorser for more than \$50 cannot be reached by certiorari to quash judgment and execution.

51 AM. DEC. 702, WINCHESTER v. BEARDIN, 10 HUMPH. 247.**Right of one compelled to pay debt of another to recover from latter.**

Cited in *Stipe v. Stipe*, 2 Head, 169, to point that payment of judgment in slander which another is legally bound to pay entitles one to recover for money paid; *McNeilly v. Cooksey*, 2 Lea, 39, holding surety not required to exhaust every possible means of litigation, nor to litigate at all, in order to be entitled to

subrogation; *Holt v. Davis*, 3 Head, 629, holding that surety to stayer may maintain action of debt on simple contract for money paid, where stayer liable by his delay; *Stafford v. Montgomery*, 85 Tenn. 329, 2 S. W. 438, holding that surety must pay judgment before being entitled to relief against stayer.

Cited in reference notes in 9 A. S. R. 580, on liability to repay imposed by voluntarily paying money for use of another; 30 A. S. R. 692, on right to indemnity of party paying damages for negligence of another.

Conclusiveness of judgment.

Cited in reference note in 62 A. D. 331, on conclusiveness of judgments of justices of peace.

Validity of judgment invalid as to some of parties.

Cited in *Davis v. Reaves*, 7 Lea, 585, holding that judgment may be void as to party not served, though valid as to one served; *Crank v. Flowers*, 4 Heisk. 629, holding that judgment may be valid as to one, though voidable as to another.

Cited in reference notes in 32 A. S. R. 668, as to whether judgment void as to one defendant is void as to all; 92 A. D. 592, on validity of judgment against all of several defendants when part only served.

Cited in note in 91 A. S. R. 368, on entirety of judgments void as against some of the parties.

Who are "defendants."

Cited in *Pollard v. Huston*, 7 Lea, 689, holding void "defendants" in motion to discontinue means defendants served with process.

51 AM. DEC. 707, BATSON v. MURRELL, 10 HUMPH. 301.

Running of limitations against claims against estate — Right of personal representative to waive statute.

Cited in *Pulliam v. Pulliam*, 10 Fed. 23; *Pulliam v. Pulliam*, 10 Fed. 53,—holding that executor cannot waive statute in favor of dead men's estate; *Sanderson v. Sanderson*, 17 Fla. 820, holding that administrator may or may not plead general statute of limitations against claim not barred in lifetime of intestate and otherwise justly due.

Cited in notes in 104 A. S. R. 745, on right to waive privilege of statute of limitations; 78 A. S. R. 188, 189, on power of executors to waive statute of limitations.

— Claim in favor of personal representative.

Cited in *Byrn v. Fleming*, 3 Head, 658, holding that administrator cannot enforce satisfaction of claim due to himself, if at time of administration it was barred by general statute of limitations; *Wharton v. Marberry*, 3 Sneed, 603, holding that administrator cannot retain out of assets in his hands enough to pay debt due himself, but barred by statute of limitations at time of settlement; *Harrison v. Henderson*, 7 Heisk. 315, holding that personal representative may retain for his debt by withholding, within period allowed by statute of limitations, sufficient amount of money coming into his hands, and obtain credit therefor in court; *Shields v. Alsop*, 5 Lea, 508, holding that administrator must exercise his right of retainer of money due himself in his settlement with court within period of statute of limitations.

Cited in reference note in 71 A. D. 194, on right of administrator to retain debt due himself from estate when barred by limitations.

Administrator as creditor generally.

Cited in reference notes in 92 A. S. R. 406, on administrator as creditor; 61 A. D. 544, on right of administrator to retain debt due him from estate.

Rights of agents, etc., to purchase for their own benefit.

Cited in reference note in 53 A. D. 125, on right of agents, trustees, executors, administrators, guardians, and attorneys to purchase for their own benefit.

51 AM. DEC. 709, WILLIAMS v. ALLEN, 10 HUMPH. 337.**What necessary to pass title to personalty.**

Cited in *Jones v. Pearce*, 25 Ark. 545, holding no sale complete so as to vest in vendee immediate right of property so long as anything remains to be done between buyer and seller in relation to goods; *Fuller v. Bean*, 34 N. H. 290, holding mere assumption of ownership or control by purchaser, not sufficient evidence of delivery without proof of consent or acquiescence; *Bond v. Greenwald*, 4 Heisk. 453, holding sale of cotton on which work is to be done, complete when ginned, baled, and weighed by vendor as per contract; *Hardwick v. American Can Co.* 113 Tenn. 657, 88 S. W. 797, holding that executory contracts of sale do not pass title until appropriation, in mode agreed upon, of specific goods to contract; *Wells-Jones Plow Co. v. Deeds*, 1 Tenn. Ch. App. 400, holding that sale of personalty passes title as between parties, when property has been designated and set apart by vendor, if such be intent of parties, although vendor is not to make delivery until afterwards.

Cited in reference notes in 53 A. D. 620; 39 A. S. R. 44,—as to when sale of personalty is complete; 58 A. D. 93, on actual delivery not being essential to validity of sale as between parties; 82 A. D. 667, as to whether chattel must be set aside and identified before title passes by sale; 59 A. D. 57, on effect of something remaining undone between buyer and seller on passing of title; 62 A. D. 359, on effect of selection of articles sold as delivery; 14 A. S. R. 541, on loss falling on vendor so long as sale in unconsummated.

— When goods must be weighed.

Cited in *Kaufman v. Stone*, 25 Ark. 336, holding weighing not necessary to constitute good delivery of cotton, where no agreement that it should be weighed; *Chapin v. Potter*, 1 Hilton, 366 (dissenting opinion), on necessity of weighing goods remaining in possession of vendor to pass title.

— Necessity of payment.

Cited in *Johnston v. Eichelberger*, 13 Fla. 230, holding that property does not pass without payment or actual delivery, where no credit agreed on or necessarily implied; *Bush v. Barfield*, 1 Coldw. 92, holding sale absolute without payment or delivery when everything vendor has to do with goods is complete.

51 AM. DEC. 712, CALLAHAN v. PATTERSON, 4 TEX. 61.**Necessity of privy examination of married woman.**

Cited in *Green v. Chandler*, 25 Tex. 148, holding that title bond to wife's land from husband and wife without private examination of latter does not pass such title as purchaser can make his vendee under agreement for good title accept; *Cross v. Evarts*, 28 Tex. 523, holding compliance with statute requiring private examination, essential to alienation of wife's separate estate; *Selover v. American Russian Commercial Co.* 7 Cal. 266, holding indorsement by wife on stock certificate, void without privy examination.

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Cited in reference note in 67 A. D. 288, on necessity that acknowledgment of deed of *feme covert* show she was separately examined.

Liability for wife's debts.

Cited in reference notes in 80 A. D. 123, on husband's liability for wife's necessities; 73 A. D. 326, on husband's duty to support wife or pay those who do so in reasonable manner; 58 A. D. 124, on separate property of *feme covert* being answerable for debts contracted for its benefit; 64 A. S. R. 205, on liability of wife for family expenses.

— Debts contracted before marriage.

Cited in *Nash v. George*, 6 Tex. 234, denying husband's liability for wife's debts contracted before marriage; *Howard v. North*, 5 Tex. 290, 51 A. R. 769, holding that judgment against both husband and wife may be satisfied out of property of either; *Taylor v. Murphy*, 50 Tex. 291, holding community property liable for debts of wife contracted before marriage.

Cited in reference note in 95 A. D. 418, on liability of wife's separate property for debts contracted before coverture.

Wife's control over separate estate.

Cited in reference notes in 58 A. D. 124, on power of *feme covert* over her separate estate; 63 A. D. 558, on wife's power over separate estate, and its liability for her debts.

Cited in note in 53 A. D. 399, on control of married woman over her separate estate.

Necessity of husband joining in wife's deed.

Cited in *Dow v. Gould & C. Silver Min. Co.* 31 Cal. 646, upholding statute requiring deed of married woman's separate property to be signed by her husband as well as herself.

Cited in reference note in 39 A. S. R. 672, on validity of married woman's deeds.

51 AM. DEC. 717, MITCHELL v. ZIMMERMAN, 4 TEX. 75.

Right of trial court to submit issue not raised by evidence.

Cited in *Northern Texas Traction Co. v. Jamison*, 38 Tex. Civ. App. 55, 85 S. W. 305, holding that trial court commits error when he submits to jury issue not raised both by pleadings and evidence.

When transaction is fraudulent.

Cited in *Mallette v. Ft. Worth Pharmacy Co.* 21 Tex. Civ. App. 267, holding negligence not fraud; *Davis v. Driscoll*, 22 Tex. Civ. App. 14, 54 S. W. 43, holding ignorant or careless mistake fraud; *Miller v. Powers*, 119 Ind. 79, 4 L.R.A. 483, 21 N. E. 455, holding widow signing and acknowledging assignment of insurance policy on husband's life without reading, on assignee's statement that it was a receipt for money paid, guilty of laches preventing her from having assignment set aside; *McCall v. Sullivan*, 1 Tex. App. Civ. Cas. (White & W.) 11, holding sale of insolvent maker's note fraudulent; *Hays v. Bonner*, 14 Tex. 629, holding representation that vendor had good title when he had no title, fraud.

Cited in reference notes in 24 A. S. R. 411, as to what constitutes false representation; 81 A. D. 58, as to what false representation amounts to fraud; 68 A. D. 280, on misrepresentation of material fact as fraud; 9 A. S. R. 730, on what representations avoid contract; 80 A. D. 183, on actions for fraudulent representations generally; 42 A. S. R. 448, on actions for misrepresentations in

sale of land; 68 A. D. 88, on what constitutes fraudulent conduct and representations, and liability therefor; 82 A. D. 634, as to what is fraud and how established in cases where confidential relationship existed; 67 A. D. 685, on effect of misrepresentation as to matters equally open to both parties; 90 A. D. 430, on existence of confidential relations between buyer and seller where facts are equally accessible to both; 90 A. D. 426, on misrepresentation by vendor as fraud vitiating sale.

Cited in notes in 11 A. S. R. 350, on false representations which will vitiate or avoid contract; 40 L. ed. U. S. 545, on fraud and false representations and their effect; 35 L.R.A. 417, on expression of opinion as fraud; 35 L.R.A. 429, on statement of opinion as to one's own property where facts are not equally known or there is active fraud or concealment.

— Duty to disclose material facts.

Cited in Texas Elevator and C. Co. v. Mitchell, 7 Tex. Civ. App. 222, 28 S. W. 45, holding assignee bound to inform assignor of judgment of material facts affecting its value.

Cited in reference notes in 58 A. D. 771, on fraudulent concealments; 90 A. D. 425, on suppression and concealment of material facts as rendering sale fraudulent.

Materiality of fraudulent purpose in cases of actual fraud.

Cited in McCord-Collins Commerce Co. v. Levi, 21 Tex. Civ. App. 109, 50 S. W. 606; Loper v. Robinson, 54 Tex. 510,—holding misrepresentations fraudulent, though innocently made; Henderson v. San Antonio & M. G. R. Co. 17 Tex. 580, 67 A. D. 675, holding result same whether misrepresentation be wilful fraud or not; Home Ins. Co. v. Eakin, 2 Tex. App. Civ. Cas. (Willson) 587; Kempner v. Wallis, 2 Tex. App. Civ. Cas. (Willson) 516,—holding it immaterial whether party making misrepresentation knew it to be untrue; Hunt County Oil Co. v. Scott, 28 Tex. Civ. App. 213, 67 S. W. 451; Cetti v. Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787,—holding purpose of fraudulent conduct or statement, immaterial, where case of actual fraud is made; Beatty v. Bulger, 28 Tex. Civ. App. 117, 66 S. W. 893, holding that misrepresentation may be actionable whether party knows it to be false or not; Smith v. Fly, 24 Tex. 345, 76 A. D. 109, holding innocent misrepresentation fraudulent if material; Cetti v. Dunman, 26 Tex. Civ. App. 433, 64 S. W. 787, holding innocence of representation immaterial, where judgment was fraudulently procured.

Cited in reference notes in 67 A. D. 685, on necessity for intent to deceive to liability for misrepresentation; 77 A. D. 689, on unintentional misrepresentation of material fact as fraud; 58 A. D. 771, on seller's misrepresentations not vitiating sale unless he knew their untruth; 64 A. D. 559, on proof of *scienter* in action for false representations.

Cited in notes in 18 A. S. R. 560, on knowledge of falsity in action for false representations; 90 A. D. 427, on innocent misrepresentation by vendor as to quantity of land as fraud.

Right to rely on fraudulent statement.

Cited in reference note in 71 A. D. 173, as to when one is not justified in relying upon alleged fraudulent statements.

When rule of caveat emptor does not apply.

Cited in Miller v. Powers, 119 Ind. 79, 4 L.R.A. 483, 21 N. E. 455, holding that contracting party must use reasonable diligence to ascertain character of writing she signs; David v. Moore, 46 Or. 148, 79 Pac. 415, holding that rule of

caveat emptor does not apply where vendor of real property makes representations concerning which purchaser has neither knowledge nor means of knowledge; *Altgelt v. Mernitz*, 37 Tex. Civ. App. 397, 83 S. W. 891, holding purchaser at executor's sale entitled to abatement of purchase price where he was led to purchase upon executor's misrepresentations as to title; *Hawkins v. Wells*, 17 Tex. Civ. App. 360, 43 S. W. 816, holding vendee of land, not entitled to have sale rescinded for defect in title, where he has equal information with innocent vendor as to validity of title.

Cited in reference notes in 71 A. D. 218, on doctrine of *caveat emptor* as between vendor and vendee; 90 A. D. 425, on effect of rule of *caveat emptor* upon fraudulent concealment or misrepresentation of material fact.

Distinguished in *Walton v. Reager*, 20 Tex. 103, extending rule of *caveat emptor* to administrator's sale; *Klop v. Specht*, 11 Tex. Civ. App. 685, 33 S. W. 714, where representation was as to matter of opinion.

Relief in equity in case of fraud.

Cited in reference notes in 57 A. D. 530, on liability for false representations; 7 A. S. R. 216, on avoidance of contract by false representations; 56 A. D. 509, on avoidance of contract by intentional misrepresentations; 64 A. D. 667, as to when misrepresentations are basis for relief; 77 A. D. 144, on right of person guilty of negligence to relief from fraud.

Cited in note in 32 A. S. R. 384, on carelessness as bar to relief.

—For fraudulent representations as to quality.

Cited in *Condict v. Brown*, 21 Tex. 421, holding fraudulent misrepresentations as to quality of machinery in mill sold on which reliance was placed, a defense *pro tanto* in action on purchase-money note; *Dean v. Angle*, 1 Posey, Unrep. Cas. (Tex.) 186, upholding right of purchaser to have sale rescinded, where he was induced to purchase by vendor's fraudulent representations as to quality, situation, and value.

When equity will relieve for mistake in quantity of land conveyed.

Cited in *Wuest v. Moehrig*, 24 Tex. Civ. App. 124, 57 S. W. 864, holding that equity will relieve purchaser from paying for land he did not get, where quantity material inducement, and mistake as to quantity was mutual and material; *Willard v. Sanford*, 33 Tex. Civ. App. 594, 77 S. W. 290, holding that equity will grant relief in case of mutual mistake as to quantity of land sold, where deficiency great; *Hatch v. Da La Garza*, 7 Tex. 60, holding contract for sale of land in gross or by certain boundaries, not binding if vendor fraudulently represented that it contained twice its actual amount; *Speed v. Hollingsworth*, 54 Kan. 436, 38 Pac. 496, holding representations by vendor as to quantity of land and rentals thereof, matters peculiarly within his knowledge, and not mere expressions of opinion; *Jones v. Jones*, 2 Tex. App. Civ. Cas. (Willson) 17, holding that false representation as to tillable acreage will avoid rent contract.

Cited in reference note in 60 A. D. 219, on rights of vendee in case of deficiency in quantity of land sold.

Right to abatement in case of deficiency in quantity.

Cited in *Copeland v. Gorman*, 19 Tex. 253; *Franco-Texan Land Co. v. Simpson*, 1 Tex. Civ. App. 600, 20 S. W. 953; *Walling v. Kinnard*, 10 Tex. 508, 60 A. D. 216,—holding purchaser entitled to what vendor has with abatement for deficiency, where vendor made incorrect representation, though innocently, as to quantity; *Wheeler v. Boyd*, 69 Tex. 293, 6 S. W. 614, holding deficiency in quantity not ground for abatement of price, where sale was in gross, and vendor

pointed out the actual boundaries, and said nothing to deceive an ordinarily prudent person; *Wuest v. Moehrig*, 24 Tex. Civ. App. 124, 57 S. W. 864, refusing to allow reduction in price where nothing was said about number of acres.

Distinguished in *McIntyre v. De Long*, 71 Tex. 86, 8 S. W. 622, where defendant took under defective tax title.

Right to show fraud of vendor.

Cited in *Rhode v. Alley*, 27 Tex. 443, holding that purchaser under special warranty may show fraud in respect to title.

Estoppel by representations, etc.

Cited in note in 57 A. D. 452, on estoppel by representations, silence, etc.

51 AM. DEC. 722, SHELTON v. WADE, 4 TEX. 148.

Sufficiency of appeal bond.

Cited in *Jourdan v. Chandler*, 37 Tex. 55, holding district court clerk, incompetent surety; *Horstman v. Little*, 98 Tex. 342, 83 S. W. 679, holding that appeal bond in double sum fixed by clerk as probable amount of cost establishes right of appeal, which is not affected by costs amounting to more than clerk's estimate; *Dickenson v. McDermott*, 13 Tex. 248, holding that injunction should not be dissolved for failure of the judge to fix the amount of the bond, where the bond given was for a sufficient amount; *Scrantom v. Bell*, 35 Tex. 413, holding that appeal will not be dismissed on motion of appellants, seventeen years after it was taken, on ground that original bond was for insufficient amount, where a sufficient additional bond had been given.

Distinguished in *Laturner v. State*, 9 Tex. 451, holding bond insufficient to entitle person convicted of crime to appeal, where law requires a recognizance.

Permitting amendment of or filing of new bond.

Cited in *Martin v. Hartwell*, 1 Tex. App. Civ. Cas. (White & W.) 243, holding giving of new appeal bond, allowable only to cure defects for insufficiency in amount, or to permit addition of another surety.

Distinguished in *King v. Hopkins*, 42 Tex. 48, holding that new appeal bond cannot be given on motion to dismiss, where original bond was fatally defective in omitting provision for prosecuting appeal with effect and performing judgment of appellate court; *Hail v. New Shoreham*, 18 R. I. 405, 28 Atl. 344, denying right to permit filing of new bond *nunc pro tunc* after expiration of time limited for filing bond, to take place of radically defective one; *Hollis v. Border*, 10 Tex. 277, refusing to allow amendment of appeal bond on motion to dismiss appeal, where it incorrectly describes the judgment; *Holloran v. Texas & N. O. R. Co.* 40 Tex. 465, holding that appeal will be dismissed where appellant failed to file bond for costs.

—Adding new surety or increasing amount.

Cited in *Berry v. Martin*, 6 Tex. 264, allowing addition of surety on certiorari bond; *McClelland Bros. v. Allison*, 34 Kan. 155, 8 Pac. 239, upholding power of court, on motion to dismiss appeal for insufficiency of surety on bond, to allow filing of amended bond; *Davis v. Estes*, 4 Tex. Civ. App. 207, 23 S. W. 411, holding that defects in appeal bond as to amount or number of sureties may be cured by filing new bond.

Construction of statutes granting right of appeal.

Cited in *Brown v. Southwest R. Co.* 10 Pa. Dist. R. 693, 25 Pa. Co. Ct. 343, 32 Pittsb. L. J. N. S. 93; *Dane v. Daniel*, 28 Wash. 155, 68 Pac. 446,—holding that statutes granting right of appeal will be liberally construed; *Eppstein v.*

Holmes, 64 Tex. 560, holding party considering himself aggrieved entitled to appeal as matter of right.

Necessity of principal signing bond.

Cited in *Bridges v. Cundiff*, 45 Tex. 437; *San Roman v. Watson*, 54 Tex. 254; *J. & G. N. R. Co. v. Grant*, 1 Tex. App. Civ. Cas. (White & W.) 430; *Trial v. Lepori*, 1 Tex. App. Civ. Cas. (White & W.) 738; *McKellar v. Peck*, 39 Tex. 381,—holding that appellant need not sign appeal bond; *Florida Orange Hedge Fence Co. v. Branham*, 27 Fla. 526, 8 So. 841, holding that all plaintiffs in error need not join in execution of bond; *St. Louis Brewing Asso. v. Hayes*, 38 C. C. A. 449, 97 Fed. 859, holding sureties not relieved from liability by principal's failure to sign.

51 AM. DEC. 724, CROZIER v. KIRKER, 4 TEX. 252.

Right of party to testify.

Cited in *Evans v. Hardgrove*, 11 Tex. 210, holding testimony of party properly rejected where other person knew same facts.

Acceptance of bill of exchange.

Cited in reference notes in 83 A. D. 794, on necessity for acceptance of bills of exchange; 92 A. D. 578, on right of person other than person upon whom bill of exchange drawn to accept it.

Instructions upon the evidence.

Cited in reference notes in 59 A. D. 331, on refusal of misleading instructions; 67 A. D. 664, on instructions upon weight of evidence; 68 A. D. 510, on effect of judge's expression of opinion on facts; 58 A. D. 617, on instruction being erroneous which assumes fact to be proved; 66 A. D. 602, on erroneousness of instructions assuming that fact is proved; 65 A. D. 372, on error in charge to jury assuming facts to be proved where evidence is conflicting; 71 A. D. 348, on impropriety in instructing jury of expressing or intimating opinion as to what has or has not been proved in trial; 60 A. D. 698, on impropriety of instructions removing material testimony from consideration of jury.

Cited in note in 77 A. D. 501, on right of court in charging jury to express opinions as to what has been proved.

Estoppel to deny liability as partner.

Cited in *Moore v. Harper*, 42 W. Va. 39, 24 S. E. 633, holding defendants estopped by representations to deny partnership liability.

Cited in reference notes in 74 A. D. 63, on liability of one holding himself out as partner; 72 A. D. 324, on person being bound as partner by holding himself out at such; 75 A. D. 193, on persons being partners as to third persons, though not as between themselves.

Authority of partner to bind firm.

Cited in *Filter v. Meyer*, 16 Tex. Civ. App. 235, 41 S. W. 152, holding partnership liable for conversation by one member.

Cited in reference notes in 55 A. D. 514, on power to bind copartner; 99 A. D. 521, on power of partner to bind copartners by contract; 54 A. D. 513; 99 A. D. 256,—on power of partner to bind copartners by note in firm name; 70 A. D. 145, on partner's power to bind firm by negotiable instrument in firm name.

51 AM. DEC. 728, FITZHUGH v. CUSTER, 4 TEX. 391.

Jurisdiction of equity to prevent multiplicity of suits.

Cited in reference notes in 84 A. D. 97; 11 A. S. R. 355,—on equitable inter-

ference to prevent multiplicity of suits; 65 A. D. 247, as to when equity assumes jurisdiction to prevent multiplicity of suits.

Nature of mandamus.

Cited in *Austin v. Cahill*, 99 Tex. 172, 88 S. W. 542, holding mandamus, common-law remedy, having no connection with equitable jurisdiction.

When mandamus will lie.

Cited in *Arberry v. Beavers*, 6 Tex. 457, 55 A. D. 791, holding that mandamus will not lie to compel the chief justice of the county to receive and estimate certain election returns which he had rejected.

Cited in note in 31 L.R.A. 353, on sufficiency of title to office to support mandamus to compel surrender of office.

Sufficiency of answer in mandamus proceeding.

Cited in *Sanston v. Mercer*, 68 Tex. 488, 2 A. S. R. 505, 5 S. W. 62, holding that a general denial in mandamus proceeding will be treated as a nullity; *Watkins v. Kirchaim*, 10 Tex. 375, holding that answer to petition for mandamus need not be sworn to, where it refers to sufficient matter of record in respondent's office to justify him in his refusal to act.

Cited in note in 89 A. D. 742, on pleadings in mandamus.

When writ of mandamus returnable.

Cited in *Hitchcock v. Galveston*, 4 Woods, 308, 48 Fed. 640, holding that writ of mandamus may be made returnable in the same term.

Conclusiveness of judgment.

Cited in reference note in 62 A. D. 550, on right to attack collaterally judgment of court of competent jurisdiction.

Cited in notes in 53 A. D. 337, on conclusiveness of judgment upon parties and privies; 11 E. R. C. 16, on estoppel by matter of record.

Necessity of court having jurisdiction.

Cited in *Griffin v. Brown*, 1 Tex. App. Civ. Cas. (White & W.) 618, holding that waiver or consent will not confer jurisdiction, where the court does not possess it; *Risley v. Indianapolis, B. & W. R. Co.* Willson Super. Ct. (Ind.) 572, holding all subsequent proceedings void, where it is clearly shown that at any stage of proceedings jurisdiction of court was lost; *Ex parte Towles*, 48 Tex. 413, holding that statute giving county court jurisdiction of contested election cases gives no appeal.

51 AM. DEC. 735, LYNCH v. BAXTER, 4 TEX. 431.

Nature of judicial sale.

Cited in note in 3 L.R.A. 440, on implied warranty in judicial sale.

— Of administrator's sale.

Cited in *Maul v. Hellman*, 39 Neb. 322, 58 N. W. 112; *Noland v. Barrett*, 122 Mo. 181, 43 A. S. R. 572, 26 S. W. 692,—holding administrator's sale of land a judicial sale.

Cited in reference notes in 70 A. D. 647, on administrator's sale being judicial sale; 43 A. S. R. 580, as to whether sales by executors or administrators are judicial sales.

Applicability of rule of caveat emptor to judicial sales.

Cited in reference notes in 83 A. D. 230, on *caveat emptor* as rule at judicial sale; 57 A. D. 602, on application of rule of *caveat emptor* to execution sales.

Cited in notes in 6 L.R.A. 74, on rule of *caveat emptor*; 26 A. R. 38, on *caveat emptor* applying to sheriff's sales.

— To administrator's sale.

Cited in Norton v. Taylor, 35 Neb. 466, 37 A. S. R. 441, 18 L.R.A. 88, 53 N. W. 481, holding that doctrine of *caveat emptor* applies to all judicial sales; Norton v. Nebraska Loan & T. Co. 35 Neb. 466, 37 A. S. R. 441, 18 L.R.A. 88, 53 N. W. 481; Westfall v. Dungan, 14 Ohio St. 276; Walton v. Reager, 20 Tex. 103; Ward v. Williams, 45 Tex. 617; Williams v. McDonald, 13 Tex. 322,—holding rule of *caveat emptor* applicable to sale by administrator under order of court; Altgelt v. Mernitz, 37 Tex. Civ. App. 397, 83 S. W. 891, holding that rule of *caveat emptor* applies to administrator's sale, when made with judicial authority, as it does in all judicial sales; Aiken v. Horn, 2 Tex. Civ. App. Cas. (Willson) 19, as to whether doctrine of *caveat emptor* applies to sale of land by administrator; Thompson v. Munger, 15 Tex. 523, 65 A. D. 176, holding that *caveat emptor* applies and no warranty exists; George v. Watson, 19 Tex. 354, holding that purchaser need not look beyond decree of court; Club Land and Cattle Co. v. Dallas County, 26 Tex. Civ. App. 449, 64 S. W. 872, holding it error to give judgment against estate on unauthorized warranties.

Power of executor or administrator to bind estate.

Cited in Dallas County v. Club Land & Cattle Co. 95 Tex. 200, 66 S. W. 294 (affirming 26 Tex. Civ. App. 449, 64 S. W. 872), holding that administrator cannot bind estate by covenant of warranty in deed.

Cited in reference note in 70 A. D. 647, on executor's power to bind decedent's estate by warranty deed.

Cited in notes in 78 A. S. R. 193, on power of executors to sell personal assets; 52 A. S. R. 121, on estate's liability at law for executor's and administrator's contracts.

Distinguished in Boltwood v. Miller, 112 Mich. 657, 71 N. W. 506, holding administrator empowered to warrant soundness of personal property belonging to estate when making private sale.

Admissibility of transcript of record.

Cited in reference note in 63 A. D. 62, on admissibility of transcripts of records.

What record should contain.

Cited in reference note in 67 A. D. 642, on necessity for record containing each paper filed in its proper place and date.

Right of estate to derive benefit from administrator's fraud.

Distinguished in Able v. Chandler, 12 Tex. 88, 62 A. D. 518, holding that estate cannot derive any unjust or unconscientious advantage from unauthorized fraudulent conduct of executor.

Applicability of statute of frauds to sale of decedent's lands.

Cited in Halleck v. Guy, 9 Cal. 181, 70 A. D. 643, holding sale under probate court, not subject to statute of frauds; Whittemore v. Cope, 11 Utah, 344, 40 Pac. 256, holding minor heirs estopped to disaffirm parol partition of land by retaining after attaining their majority, the parts allotted to them, and subsequently selling same, without asserting claim to other portions.

Cited in reference notes in 10 A. S. R. 748, on parol partition; 53 A. D. 486; 93 A. D. 443,—on validity of parol partition; 66 A. D. 588, as to when parol partition of lands is valid.

Cited in note in 92 A. D. 122, on validity of parol partitions notwithstanding statute of frauds.

What necessary to give jurisdiction to probate court.

Cited in *Finch v. Edmonson*, 9 Tex. 504, holding petition for an order to sell, necessary to give probate court jurisdiction; *Miller v. Miller*, 10 Tex. 319, holding that petition of executor gave court no jurisdiction to order sale.

Cited in reference note in 53 A. D. 446, on jurisdiction of probate court.

Jurisdiction over estates of decedents.

Cited in *Weems v. Masterson*, 80 Tex. 45, 15 S. W. 590; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550,—holding that county court has jurisdiction over estates of deceased persons; *Harrison v. Oberthier*, 40 Tex. 385, holding that district court may revise proceedings of county court relating to estates.

Collateral attack on judgment.

Cited in *Toliver v. Hubbell*, 6 Tex. 166, holding judgment of probate court, not subject to collateral attack; *Daney v. Stricklinge*, 15 Tex. 557, 65 A. D. 179, holding decree of probate court confirming administrator's sale, conclusive on collateral attack against minors, in absence of fraud or want of jurisdiction; *Murchison v. White*, 54 Tex. 78, holding jurisdiction of probate court in matter of administration under proceeding apparently regular, not subject to collateral attack; *Smith v. State*, 5 Tex. 578, holding order of district court striking name of attorney from roll, not subject to collateral attack.

Cited in reference notes in 58 A. D. 609, as to whether judgment is subject to collateral attack; 76 A. D. 428, on right to attack collaterally judgment of court of general jurisdiction; 62 A. D. 549, on right to attack collaterally judgment of court of competent jurisdiction; 63 A. D. 83; 68 A. D. 101,—on impeaching judgments of probate courts; 67 A. D. 740, on collateral questioning of judgment of probate court; 58 A. D. 503, on right to attack judgment of probate court collaterally; 57 A. D. 364, on right to collaterally attack judgment of probate court for error or defect therein; 58 A. D. 133, on right to question collaterally judgment of probate court upon matters not within its jurisdiction; 72 A. D. 121, as to when judgment of probate court ordering distribution may be collaterally attacked.

Conclusiveness of judgment.

Cited in *Poor v. Boyce*, 12 Tex. 440, holding order for sale of decedent's estate on petition of administrator, conclusive in absence of fraud; *Porter v. Sweeney*, 61 Tex. 213, holding that all interested in the estate are deemed parties and bound by decree; *Martin v. Robinson*, 67 Tex. 368, 3 S. W. 550, holding erroneous conclusion of probate court, voidable only; *Neill v. Tarin*, 9 Tex. 256, holding former judgment a bar to subsequent suit between same parties in regard to same matters.

Cited in reference notes in 57 A. D. 529, on conclusiveness of judgment; 57 A. D. 168, on conclusiveness of proceedings of probate court; 65 A. D. 341, on conclusiveness of decisions and orders of probate courts within their jurisdiction.

Cited in notes in 53 A. D. 337, on conclusiveness of judgment upon parties and privies; 60 A. D. 353, on what persons are bound by decrees and orders granting, revoking, and refusing probate of wills.

Effect of irregularities on validity of judgment.

Cited in *Guilford v. Love*, 49 Tex. 715, presuming regularity of probate judgment; *Giddings v. Steele*, 28 Tex. 732, 91 A. D. 336, holding that mere regu-

larities do not affect legality of sale; *Hudson v. Jurnigan*, 39 Tex. 579, holding that statutes authorizing executor's sale should be liberally construed in favor of irregular sale.

Irregularities or defects in judicial sales.

Cited in reference notes in 78 A. D. 246, on effect of irregularities in judicial sales; 42 A. S. R. 470, on defense by vendee against action for purchase money; 67 A. S. R. 145, on remedies of vendee for defect in title; 67 A. D. 698, on protection of innocent purchaser at unnecessary or irregular administrator's sale.

Cited in notes in 67 A. D. 283, on suits on promissory notes given for purchase of land; 70 A. D. 340, on vendee's right to relief on ground of defect of title; 21 L.R.A. 46, on objection to completing purchase at execution or judicial sale on account of irregularity of proceedings.

—Necessity of restoration of possession to defense of defective title.

Cited in *Dunn v. Mills*, 70 Kan. 656, 79 Pac. 146, 3 A. & E. Ann. Cas. 363, holding rescission and restoration, necessary to defense by vendee of land to action for purchase price, in absence of fraud or insolvency of vendor; *Spies v. Butts*, 59 W. Va. 385, 53 S. E. 897, holding that vendee of land cannot hold possession while declining to pay purchase price on account of defect in title.

Cited in reference notes in 58 A. D. 260, on estoppel of vendee in possession under executory contract to deny vendor's title; 65 A. D. 608, as to whether vendee in possession is relieved from payment of purchase price on failure of title.

51 AM. DEC. 746, NEILL v. KEESE, 5 TEX. 23.

Parol evidence as to writing.

Cited in *Hughes v. Delaney*, 44 Tex. 529, holding parol admissible in equity to correct mistakes in written instruments.

—To establish trust.

Cited in *Chicago, B. & Q. R. Co. v. First Nat. Bank*, 58 Neb. 548, 78 N. W. 1064, holding parol admissible to establish resulting trust; *McCoy v. Crawford*, 9 Tex. 353, applying principle in case of purchase at judicial sale; *Vandever v. Freeman*, 20 Tex. 333, 70 A. D. 391, holding parol evidence inadmissible to prove nonpayment by grantee; *McAlister v. Farley*, 39 Tex. 552, holding parol admissible to prove use of community fund to purchase; *Hodges v. Johnson*, 15 Tex. 570; *Miller v. Thatcher*, 9 Tex. 482, 60 A. D. 172,—applying principle holding uncorroborated testimony insufficient to establish a trust in land; *Grace v. Hanks*, 57 Tex. 14, holding that uncorroborated testimony will not create a trust in land; *Donaghe v. Tams*, 81 Va. 132, holding that trust may be established by parol if clear and unquestionable.

Cited in reference notes in 63 A. D. 423, on right to prove resulting trust by parol; 63 A. D. 474, on establishment of resulting trust by parol evidence.

Creation of resulting trusts.

Cited in reference notes in 51 A. D. 694; 56 A. D. 688; 65 A. D. 786; 46 A. S. R. 513; 90 A. S. R. 480; 92 A. S. R. 636, 775,—on resulting trusts; 59 A. D. 92, on what is a resulting trust; 56 A. D. 688; 4 A. S. R. 634; 29 A. S. R. 328; 31 A. S. R. 914; 33 A. S. R. 215; 39 A. S. R. 686; 56 A. S. R. 843,—as to when resulting trust arises; 36 A. S. R. 749, as to how resulting trusts are created; 3 A. S. R. 510, on existence and effect of resulting trust; 25 A. S. R. 291, on conveyance without consideration creating trust for grantor; 25 A. S. R. 291, on resulting trust where purpose for which trust was created fails;

53 A. D. 509; 63 A. D. 424; 80 A. D. 206,—on resulting trusts, where purchase price paid by one and title taken in name of another; 57 A. D. 206, on resulting trust where land purchased with money of two or more persons is taken by agreement in name of one of them.

— **Necessity of certainty of interest in land to establish trust pro tanto.**

Annotation cited in *Currence v. Ward*, 43 W. Va. 367, 27 S. E. 329, holding certainty as to interest in land, necessary to establish trust *pro tanto*.

Presumption of advancement.

Cited in reference note in 79 A. S. R. 213, on presumption of advancement to wife.

Parol evidence to rebut presumption of trust or advancement.

Cited in *Walston v. Smith*, 70 Vt. 19, 39 Atl. 252, holding parol evidence admissible to rebut presumption of advancement or gift.

Annotation cited in *Deck v. Tabler*, 41 W. Va. 332, 56 A. S. R. 837, 23 S. E. 721, holding that presumption of resulting trust where consideration is paid by person other than one named as grantee may be rebutted by evidence or circumstances.

Availability of equitable title.

Cited in *Easterling v. Blythe*, 7 Tex. 210, 56 A. D. 45, holding it immaterial in trespass to try title, whether plaintiff's title is an equitable or a legal one; *New York & T. Land Co. v. Hyland*, 8 Tex. Civ. App. 601, 28 S. W. 206; *Miller v. Alexander*, 8 Tex. 36,—holding that ejectment may be maintained on equitable title; *Hanrick v. Gurley*, 93 Tex. 458, 54 S. W. 347, holding that in an action to try title an equitable interest may be pleaded; *Williams v. Turner*, 50 Tex. 137, holding that married woman furnishing funds may sue for breach of warranty, though deed was made to her husband; *Wright v. Thompson*, 14 Tex. 558, holding equitable title of vendee, not in default, available as defense in ejectment by vendor.

Cited in reference notes in 67 A. S. R. 237, on importance of legal title in ejectment; 56 A. D. 48, on equitable title to sustain action for recovery of land; 21 A. S. R. 611, on defense to action of ejectment; 27 A. S. R. 372, on equitable defenses in ejectment; 59 A. D. 331; 73 A. D. 599,—on equitable title as defense to action in ejectment.

Right to relief either at law or in equity.

Cited in *Croft v. Peck*, 64 Tex. 627, holding that plaintiff may recover when he shows himself entitled to relief either at law or in equity.

Cited in reference note in 56 A. D. 355, on administration of law and equity by same forum in Texas.

Grant of equitable relief in legal action.

Cited in reference note in 34 A. S. R. 302, on granting equitable relief in legal action.

Place for sale by administrator.

Cited in *Peters v. Caton*, 6 Tex. 554, denying right of administrator to expose slaves for sale at place other than that fixed by statute, in absence of provision therefor in order of sale; *Jemison v. Gaston*, 21 Tex. 266, holding sale by administrator at residence of deceased provided for by order made on petition of administrator directing sale "according to law," where such petition asked for sale at such residence.

Construction of statutes.

Cited in *Lane v. Missouri County*, 6 Mont. 473, 13 Pac. 136, holding that the court should in construing a statute endeavor to ascertain the purpose of the legislature.

Cited in note in 1 L.R.A. 363, on construing together statutes not repugnant.

— Different statutes passed by same legislature.

Cited in *Flatan v. State*, 56 Tex. 93 (dissenting opinion), on construction of statutes relating to same matters when passed at same session of legislature.

Cited in reference notes in 85 A. D. 670, on construing statutes *in pari materia* together; 57 A. D. 364, on construing together different sections of same statute; 68 A. D. 618, on construing together contemporaneous statutes and statutes *in pari materia*.

Distinguished in *Laughter v. Seela*, 59 Tex. 177; *Houston & T. C. R. Co. v. Ford*, 53 Tex. 364,—holding that acts passed at same session will be more liberally construed than if passed at different sessions.

Implied repeal of statutes.

Cited in *Hanrick v. Hanrick*, 54 Tex. 101, holding repeal by implication not favored; *Brown v. Chancellor*, 61 Tex. 437, holding that affirmative statute does not repeal affirmative statute; *Selman v. Wolfe*, 27 Tex. 68, holding that private act will not repeal a public act by implication; *Ragazine v. State*, 47 Tex. Crim. Rep. 46, 84 S. W. 832, holding that last statute enacted will control, where there is absolute and irreconcilable conflict or repugnancy between two statutes.

Cited in reference notes in 73 A. D. 380; 74 A. D. 317; 82 A. D. 167,—on repeal of statute by implication; 12 A. S. R. 695, on implied repeal of statute; 60 A. D. 223, on what constitutes repeal of statutes; 58 A. D. 102, on repeals by implication not being favored.

— By statute passed by same legislature.

Cited in *Brattleboro Town School Dist. v. School Dist. No. 2*, 72 Vt. 451, 48 Atl. 697, holding presumption that legislature did not intend that acts passed at same session should repeal one another; *Flatan v. State*, 56 Tex. 93, holding that statutes passed at same session of legislature will if possible be construed so as not to conflict; *Cain v. State*, 20 Tex. 355, holding that statute will not impliedly repeal other act passed at same session, unless there is an unreconcilable repugnancy between them.

Admissibility of evidence constituting link in necessary proof.

Cited in *Bouvet v. Woodward*, 2 Posey Unrep. Cas. (Tex.) 449, holding a deed one link toward the proof of conveyance by an attorney in fact.

51 AM. DEC. 760, HOLLIS v. FRANCOIS, 5 TEX. 195.**Validity of married woman's contracts.**

Cited in *King v. State*, 42 Tex. Crim. Rep. 108, 96 A. S. R. 792, 57 S. W. 840 (dissenting opinion), on liability of married women on contracts made by them; *Noel v. Clark*, 25 Tex. Civ. App. 136, 60 S. W. 356, holding married woman not liable on note executed jointly with husband for purchase price of land.

Cited in reference notes in 55 A. D. 611; 65 A. D. 432,—on invalidity of contracts of married women; 67 A. D. 579, on personal liability of married women on their contracts; 2 A. S. R. 321, on note of married woman; 80 A. D. 567, on validity of bond of *feme covert* at common law.

— Power over separate estates generally.

Cited in *Callahan v. Patterson*, 4 Tex. 61, 51 A. R. 712 (dissenting opinion), on power of married women over their separate estates; *Jones v. Crosthwaite*, 17 Iowa, 393, holding that wife's estate must be conveyed by terms of instrument creating it; *Rhodes v. Gibbs*, 39 Tex. 432, holding that wife can convey jointly with husband by deed duly acknowledged; *Dow v. Gould & C. Silver Min. Co.* 31 Cal. 629, holding that husband must join with wife in conveying her separate estate; *Angier v. Coward*, 79 Tex. 551, 15 S. W. 698, denying wife's right to retract after duly executing and acknowledging title bond for her separate property; *Jones v. Crosthwaite*, 17 Iowa, 393, holding executory contract by married woman to purchase property, not a contract in relation to her separate property.

Cited in reference notes in 85 A. D. 144, on separate property of wife as affected by American statutes; 65 A. D. 432, on power of married woman over her separate property; 85 A. D. 144, on power of married women in Texas over their separate estates; 10 A. S. R. 289, on right of married women to hold and dispose of separate property; 82 A. D. 128, on power of wife to alienate her separate estate; 71 A. D. 116, on power of *feme covert* to alienate or charge separate estate; 85 A. D. 144, on rule in equity as to wife's power to dispose of or charge her separate estate; 63 A. D. 558, on wife's power over separate estate, and its liability for her debts.

Cited in note in 53 A. D. 399, on control of married woman over her separate estate.

— Power to mortgage separate estate generally.

Cited in *Sampson v. Williamson*, 6 Tex. 102, 55 A. D. 762, upholding right of married woman to mortgage her separate estate; *Butler v. Robertson*, 11 Tex. 142, upholding right of married woman to bind her separate estate for its preservation; *Roy v. Bremond*, 22 Tex. 626, applying principle that the disposition must be voluntary and free from fraud and coercion; *Roy v. Bremond*, 26 Tex. 626, holding that, to bind the wife's separate estate, the acknowledgment must be pleaded; *Sampson v. Williamson*, 6 Tex. 102, 55 A. D. 762, applying principle that the power to alienate includes power to mortgage.

Cited in reference notes in 80 A. D. 441, on validity of mortgage of married woman; 71 A. D. 198, on wife's power to mortgage her separate property.

— Power to encumber estate for husband's debts.

Cited in *Rhodes v. Gibbs*, 39 Tex. 432; *Woffard v. Unger*, 55 Tex. 480; *Hall v. Dotson*, 55 Tex. 520; *Jordan v. Peak*, 38 Tex. 429,—holding that husband and wife may encumber homestead by trust deed to secure payment of debt due from husband; *Shelby v. Burtis*, 18 Tex. 644, upholding wife's power to mortgage her separate property as security for her husband's debt; *Roy v. Bremond*, 22 Tex. 626, holding that disposition of wife's estate for debt of husband will be closely scrutinized; *Jones v. Crosthwaite*, 17 Iowa, 399, holding that wife's estate cannot be charged in law on a note for husband's debts; *Shelby v. Burtis*, 18 Tex. 644, holding mortgage of separate estate by married woman, not void for undue influence, where an appeal was simply made to her sympathies to relieve her husband's property from temporary difficulties; *Hadden v. Larned*, 87 Ga. 634, 13 S. E. 806, holding deed of gift from wife to husband, presumptively valid as to third person loaning money to husband on faith of it.

Cited in reference notes in 55 A. D. 771, on mortgage of wife's separate estate to secure husband's debts; 87 A. D. 450, on power of wife to mortgage her separate

rate property to secure husband's debt; 33 A. S. R. 515, on validity of wife's mortgage of separate property to secure husband's debts.

Distinguished in *Magee v. White*, 23 Tex. 180, holding separate property of wife, not chargeable for husband's debts.

Necessity of acknowledgment to dispose of wife's separate estate.

Cited in *Wilkinson v. Rowland*, 3 Tex. App. Civ. Cas. (Willson) 30; *Ballard v. Carmichael*, 83 Tex. 355, 18 S. W. 734,—holding no acknowledgment necessary in the transfer of personalty belonging to separate estate.

Liability of wife's separate estate generally.

Cited in *Cruger v. McCracken*, 87 Tex. 584, 30 S. W. 537, holding wife's separate estate not liable on an appeal bond.

Cited in reference note in 58 A. D. 124, on separate property of *feme covert* being answerable for debts contracted for its benefit.

Husband's power over wife's separate estate.

Cited in *Texas & P. R. Co. v. Durrett*, 57 Tex. 48, holding that husband cannot sell personalty belonging to wife's estate.

51 AM. DEC. 769, HOWARD v. NORTH, 5 TEX. 290.

What constitutes fraud.

Distinguished in *Cross v. Evarts*, 28 Tex. 523, holding a refusal to comply with void promise not fraudulent.

Validity and effect of judgment against married woman.

Cited in notes in 55 A. D. 600, 601, on validity of judgments against married women; 11 L.R.A. 585, on effect of personal judgment against married woman.

Collateral attack on judgment.

Cited in *Nichols v. Dibrell*, 61 Tex. 539, holding judgment in suit involving title to large tract of land, conclusive against children of unsuccessful party setting up homestead rights in a portion of such land.

—Against married woman.

Cited in *Norton v. Meader*, 4 Sawy. 603, Fed. Cas. No. 10,351, holding that personal judgment cannot be rendered against a married woman; *Henson v. Sackville*, 2 Tex. Civ. App. 411, 21 S. W. 187, holding personal judgment against married woman, good on a collateral attack; *Carson v. Taylor*, 19 Tex. Civ. App. 177, 47 S. W. 395, holding that judgment against married woman cannot be inquired into collaterally; *Smith v. Borden*, 17 R. I. 220, 33 A. S. R. 867, 11 L.R.A. 585, 21 Atl. 351, holding judgment against married woman impleaded without her husband, voidable only, and valid until reversed; *McCurdy v. Baughman*, 43 Ohio St. 78, 1 N. E. 93, holding judgment by default against married woman, voidable, and will not be set aside except for fraud; *Taylor v. Harris*, 21 Tex. 438, holding plea of coverture to a scire facias to revive a judgment insufficient; *Ayers v. Parrish*, 15 Tex. Civ. App. 541, 40 S. W. 434, holding foreclosure sale under mortgage mistakenly including part of homestead, conclusive on both husband and wife in favor of mortgagee purchasing in absence of fraud on his part.

Effect of deed to married woman.

Cited in note in 57 A. D. 196, on effect of purchase by and deed to married woman.

Liability of community property for debts.

Cited in note in 19 L.R.A. 235, on liability of community property for debts.

Liability of separate estate of married woman.

Cited in *Linn v. Willis*, 1 Posey Unrep. Cas. (Tex.) 158, holding it error to charge wife's separate estate where no liability was created; *Taylor v. Stephens*, 17 Tex. Civ. App. 36, 42 S. W. 1048, holding levy on separate property of wife, proper under judgment against husband and wife in favor of their cotenants wrongfully ousted, although the judgment contains no specific direction therefor.

Cited in reference notes in 72 A. D. 577, as to when wife's property is subject to execution for husband's debts; 60 A. S. R. 331, on liability of wife's separate estate for husband's debts; 64 A. D. 587, on separate estate of wife as subject to execution sale for husband's debts; 57 A. D. 162, on liability of wife's property to execution or attachment for husband's debts; 76 A. D. 492, on right to dispose of wife's separate estate in payment of husband's debts; 63 A. D. 558, on wife's power over separate estate, and its liability for her debts.

Distinguished in *Taylor v. Stephens*, 17 Tex. Civ. App. 36, 42 S. W. 1048, holding that execution on judgment for tort against husband and wife in favor of cotenant may be levied on separate estate of wife, although judgment does not specifically award execution against such estate.

Husband's rights over wife's property.

Cited in reference note in 57 A. D. 162, on right of husband over wife's property.

Liability for antenuptial debts of wife.

Cited in *Nash v. George*, 6 Tex. 234, holding husband not liable for debts of wife contracted before marriage; *Taylor v. Murphy*, 50 Tex. 291, holding that antenuptial indebtedness of wife attaches to the community property.

Cited in note in 60 A. D. 264, on pleading and practice in actions to recover wife's antenuptial debts.

Distinguished in *Taylor v. Murphy*, 50 Tex. 291, holding community property liable to execution for debts of wife contracted before marriage.

Necessity of separate bill of exceptions.

Cited in *Keeton v. State*, 10 Tex. App. 686, holding that exceptions to evidence may be placed in the statement of facts.

Time for objections.

Cited in *Gildart v. Grumbles*, 22 Tex. 15, holding that, unless objection is made at proper time and of record, it will not avail.

Sufficiency of levy and return.

Cited in *Miller v. Alexander*, 13 Tex. 497, 65 A. D. 73, holding return sufficient if signed officially, irrespective of the levy; *Fitch v. Boyer*, 51 Tex. 336, holding indorsement on levy immaterial when property is clearly described in deed.

Cited in reference notes in 70 A. D. 779, on return to levy of writ of attachment; 65 A. D. 78, on necessity of signing levy where return is duly signed.

Irregularities in execution sale and their effect.

Cited in *Criswell v. Ragsdale*, 18 Tex. 443, holding that execution must be authorized by, and conform to, the judgment; *Crabtree v. Whiteselle*, 65 Tex. 111; *Donnebaum v. Tinsley*, 54 Tex. 362,—holding failure to call upon judgment debtor to point out property, mere irregularity; *Oppenheimer v. Reed*, 11 Tex. Civ. App. 367, 32 S. W. 325, holding selling lots separately, and not together as ordered, a mere irregularity; *Holmes v. Buckner*, 67 Tex. 107, 2 S. W. 452, holding that defective execution on a valid power does not make sale subject to collateral attack; *Moody v. Moeller*, 72 Tex. 635, 13 A. S. R. 839, 10 S. W. 727, holding

that acquiescence of judgment debtor imparts no validity to sale; *Brown v. Christie*, 27 Tex. 73, 84 A. D. 607, holding that void sale subsequently confirmed by court passes title.

Cited in reference notes in 55 A. D. 565, on effect of absence of notice of execution sale; 57 A. D. 265, on effect of sheriff's failure to give notice of execution sale; 56 A. D. 436; 66 A. D. 290,—on effect of defect in notice of execution sale; 56 A. D. 436, on effect of irregularities and omissions by sheriff as invalidating sale; 1 A. S. R. 706, on validity of sheriff's sale to bona fide purchaser notwithstanding irregularity in notice of sale.

Cited in note in 58 A. D. 149, on effect of sale on invalid execution issued on valid judgment.

Distinguished in *Harle v. Langdon*, 60 Tex. 555, holding fact that purchaser at execution sale did not get good title because of previous conveyance to one not made a party, not ground for vacating satisfaction of the judgment; *Luter v. Rose*, 16 Tex. 52, holding sale of less land than is levied on, not void where statute does not require appraisalment.

— On title of purchaser.

Cited in *Miller v. Alexander*, 13 Tex. 497, 65 A. D. 73, holding purchaser not bound by irregularities of sheriff; *Sadler v. Anderson*, 17 Tex. 246, holding that failure to advertise sale under execution does not affect title of bona fide purchaser; *Coffee v. Silvan*, 15 Tex. 354, 65 A. D. 169; *Hancock v. Metz*, 15 Tex. 205,—holding title of purchaser at sheriff's sale, not affected by irregularities in proceedings prior to the sale in which he did not participate; *Morris v. Hastings*, 70 Tex. 26, 8 A. S. R. 570, 7 S. W. 649, holding that want of notice will not vitiate title in absence of fraud by purchaser; *Moore v. Johnson*, 12 Tex. Civ. App. 694, 34 S. W. 771, holding that failure to advertise execution sale will not defeat title of purchaser; *Peters v. Caton*, 6 Tex. 554, holding that modification of order of sale except by order of court will render sale void; *Horan v. Wahrenberger*, 9 Tex. 313, 58 A. D. 145, holding that no title passes where judgment creditor is the purchaser under void sale; *Jones v. Taylor*, 7 Tex. 240, 56 A. D. 48, holding that decree authorizing conveyance by administrator must be produced in evidence, regardless of recitals in deed; *Wooters v. Arledge*, 54 Tex. 395, holding that sale of an undesignated part of large tract is void for indefiniteness; and does not pass title.

Law governing power of official to act at judicial sale.

Cited in note in 33 L.R.A. 93, on power of official to act at execution and judicial sale of real estate as determined by place of performance.

Presumption of regularity at judicial sale.

Cited in reference note in 69 A. D. 362, on presumption that execution sale is regular; 76 A. D. 148, on presumptions being in favor of regularity of sheriff's acts in selling property under execution; 89 A. D. 550, on presumption of regularity of sheriff's sale; 40 A. S. R. 910, on presumption of regularity of officer's acts in making judicial sale; 40 A. S. R. 828, on presumption in favor of validity of execution sale.

Place of sale under execution.

Cited in *Sinclair v. Stanley*, 64 Tex. 67, holding sale void, if held at other than courthouse door of the county; *Boone v. Miller*, 86 Tex. 74, 23 S. W. 574, holding sale under trust deed void unless terms of trust as to place of sale are complied with; *Anniston Pipe Works v. Williams*, 106 Ala. 324, 54 A. S. R. 51, 18 So. 111, holding that, if there are two courthouses, a sale at either is good;

Grace v. Garnett, 38 Tex. 156, holding sale void, unless carried out at time and place prescribed by law.

Cited in reference notes in 59 A. D. 418, on time, place, and adjournment of sheriff's sale; 76 A. D. 148, on sheriff's necessity to sell at time and place prescribed by statute; 94 A. D. 444, on validity of sale by sheriff at time or place other than that prescribed by statute.

Sufficiency and effect of recitals in deed to land sold at judicial sale.

Cited in Sadler v. Anderson, 17 Tex. 246, holding that bill of sale need not contain a recital of the execution; Leland v. Wilson, 34 Tex. 79, holding that recital in deed cannot affect a stranger whose land is attempted to be sold; Johnson v. McKinnon, 54 Fla. 221, 13 L.R.A.(N.S.) 874, 45 So. 23, holding recital in sheriff's deed, that sale was made by virtue of execution issued out of circuit court, sufficient to show that officer had authority to sell; Sydnor v. Roberts, 13 Tex. 598, 65 A. D. 84, to point that there is marked distinction between that which confers power to do certain act, and rules regulating mode of its exercise; Wright v. Doherty, 50 Tex. 34, holding recital in guardian's deed, no evidence of his appointment.

Cited in reference notes in 56 A. D. 435, on necessity and effect of recitals in sheriff's deed; 63 A. D. 361, on effect of misrecital of judgment in sheriff's deed.

Sufficiency of description in deed.

Cited in reference notes in 74 A. S. R. 334, on validity of sheriff's deed; 76 A. D. 57, on validity of comptroller's deed; 69 A. D. 411, as to what uncertainty of description renders deed void; 65 A. D. 341, on mistake or repugnancy in description of land in deed and parol evidence to identify land granted; 69 A. D. 751, on validity of conveyance of land in which description is uncertain.

Protection of purchaser at judicial sale.

Cited in Laughter v. Seela, 59 Tex. 177, on protection of purchaser at execution sale on a judgment which has become dormant.

Cited in reference notes in 77 A. D. 564, on rights of purchasers at void judicial sales; 91 A. D. 378, on rights of purchasers under void execution sales; 54 A. D. 296, on what irregularities affect rights of purchaser at execution sale.

Cited in note in 30 A. D. 177, 182, on rights of purchasers who by reason of void sales have paid off claims on real estate.

— Right to reimbursement on setting aside sale.

Cited in Terry v. Cutler, 4 Tex. Civ. App. 571, 23 S. W. 539, holding that party seeking to avoid void foreclosure sale must pay amount that is charge upon land; Andrews v. Richardson, 21 Tex. 287; Morton v. Welborn, 21 Tex. 772; Terry v. Cutler, 4 Tex. Civ. App. 571, 23 S. W. 539; Bailey v. White, 13 Tex. 114,—holding purchaser at invalid execution sale, entitled to reimbursement; Stephenson v. Marsalis, 11 Tex. Civ. App. 162, 33 S. W. 383; Stone v. Crawford, 1 Posey Unrep. Cas. (Tex.) 605; Mayes v. Blanton, 67 Tex. 245, 3 S. W. 40,—holding purchaser entitled to reimbursement of money applied to estate; Walker v. Lawler, 45 Tex. 532, holding purchaser without notice, entitled to reimbursement by owner seeking to recover; Burns v. Ledbetter, 54 Tex. 374, holding purchaser entitled to reimbursement, when money paid was applied to judgment; Burns v. Ledbetter, 56 Tex. 282, holding principle applicable where attorney for judgment plaintiff is purchaser; Davis v. Gaines, 104 U. S. 386, 26 L. ed. 757; Valle v. Fleming, 29 Mo. 152, 77 A. D. 557; Blodgett v. Hitt, 29 Wis. 169; Dutcher v. Hobby, 86 Ga. 198, 22 A. S. R. 444, 10 L.R.A. 472, 12 S. E. 356,—holding that purchaser at foreclosure sale may be subrogated to Am. Dec. Vol. VII.—63.

rights of mortgagee; *Flaniken v. Neal*, 67 Tex. 629, 4 S. W. 212; *Arlington State Bank v. Paulsen*, 57 Neb. 717, 78 N. W. 303,—holding purchaser entitled to reimbursement under doctrine of subrogation; *French v. Grenet*, 57 Tex. 273, holding purchaser subrogated to judgment creditor, and entitled to reimbursement before eviction; *McCormick v. Edwards*, 69 Tex. 106, 6 S. W. 32, holding that a void tax deed involves no equity that subrogates the purchaser; *Thouvenin v. Rodrigues*, 24 Tex. 468, on right of purchaser at execution sale to be reimbursed amount of purchase price on setting aside the sale; *Johnson v. Caldwell*, 38 Tex. 217, on necessity of reimbursing innocent purchaser for amount expended to satisfy valid judgment on setting aside sale under execution thereunder; *Campbell v. Townsend*, 26 Tex. 511, on necessity of making reparation to purchaser at execution sale for satisfaction of judgment on which execution was issued before dispossessing him; *McLean v. Martin*, 45 Mo. 393, holding purchaser entitled to be reimbursed, where consideration for which money was paid fails; *Elam v. Donald*, 58 Tex. 316; *Brown v. Lane*, 19 Tex. 203,—holding purchaser entitled to reimbursement of purchase money if there is no fraud on his part; *Teas v. McDonald*, 13 Tex. 349, 65 A. D. 65, holding that equity will not restore property except on repayment of purchase money; *Graves v. Hickman*, 59 Tex. 381, holding that owner must tender purchase money; *Galveston, H. & S. A. R. Co. v. Blakeney*, 73 Tex. 180, 11 S. W. 174, holding that purchase money must be proffered by judgment debtor; *Galveston, H. & S. A. R. Co. v. Blakeney*, 73 Tex. 180, 11 S. W. 174, holding that purchase money must be refunded in suit to recover lands acquired in condemnation proceedings; *Folts v. Ferguson*, 77 Tex. 301, 13 S. W. 1037, holding that property sold with authority of minors can be recovered on repayment of purchase money; *Cline v. Upton*, 59 Tex. 27, holding purchaser of homestead at execution sale, entitled to amount paid by him with interest on setting aside the sale; *Halsey v. Jones*, 86 Tex. 488, 25 S. W. 696, holding that purchase money with interest must be repaid before recovery of land permitted; *McGee v. Wallis*, 57 Miss. 638, 34 A. R. 484, holding heirs not permitted to maintain ejectment until reimbursement of purchase price; *Weaver v. Norwood*, 59 Miss. 665, holding that equity will enforce a claim for reimbursement by bona fide purchaser; *Dutcher v. Hobby*, 86 Ga. 198, 22 A. S. R. 444, 10 L.R.A. 472, 12 S. E. 356, holding purchaser of property sold under void foreclosure as property of mortgagor, entitled to rights of mortgagee, where he has applied purchase money to payment of mortgage and sale has been set aside; *Bailey v. White*, 13 Tex. 114, holding that purchaser at sale on invalid execution on valid judgment will not be compelled to restore property, in absence of fraud, until money paid to satisfaction of judgment is returned.

Cited in reference notes in 77 A. D. 564, on right of innocent purchaser at void judicial sale to reimbursement; 66 A. D. 344, on right of purchaser at execution sale to subrogation to creditor's rights; 2 A. S. R. 330, on right of purchaser at invalid judicial sale to subrogation to recover purchase price.

Cited in notes in 21 L.R.A. 50, on reimbursement of purchaser at void execution sale; 69 L.R.A. 41, 42, on reimbursement of purchaser on annulling judicial or execution sale; 21 L.R.A. 48, on subrogation of purchaser on void execution sale.

Distinguished in *Davison v. Robertson*, 67 Mo. 208, holding that in suit to try title between two purchasers at execution sales reimbursement need not be made.

Jurisdiction of equity to prevent multiplicity of suits.

Cited in reference notes in 84 A. D. 97, on equitable interference to prevent multiplicity of suits; 65 A. D. 247, as to when equity assumes jurisdiction to prevent multiplicity of suits.



